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COMMENT

Bankruptcy v. Environmental Obligations: Clash of the Titans

I. INTRODUCTION

A. *The Neverending Story*

Once upon a time, in a faraway kingdom, several ambitious subjects banded together to produce widgets. The dedicated group hired the very best workers, and soon word of the marvelous widgets spread throughout the land. Before many revolutions of the moon, the demand for, and thus production of, widgets increased twofold. But alas, so did the production of vile by-products. So busy were the workers in satisfying the citizens' voracious demand for widgets that the poisonous waste was merely collected and deposited in an earthen pit.

All was well until one day when, alerted by the noxious odor emanating from the widget plant's grounds, the kingdom's environmental custodian happened upon the ghastly (and now glowing) pit. The widget manufacturer was immediately ordered to find a more suitable method of disposing of the waste, one in keeping with the kingdom's laws regulating such matters. When the group discovered that such compliance would virtually deplete its coffers of gold pieces, and that the kingdom itself would undertake the clean-up if it did not, the group sought shelter in the lenient debtor protection mechanism known as bankruptcy.

And thus the kingdom faced a dilemma: should the group be able to evade its environmental obligations while continuing to manufacture widgets under the protective umbrella of bankruptcy? Or to phrase the query in what is perhaps more appropriate terms, should the kingdom now advance the public policy embodied in its environmental regulations or promote the private relief afforded by bankruptcy?

B. *Scope of Paper*

Such is the tale that unfolds today far more frequently and with more complexity than one might imagine.¹ The search for a solution begins with identification of specific conflicts between bankruptcy and environmental hazardous waste regulations. More specifically, the provisions of the Bankruptcy Code² relating to abandonment, discharge, priority of claims, and the automatic stay have to be examined in light of their effect on environmental obligations as set forth in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).³ In addition, the effect of bankruptcy on state law environmental obligations needs to be assessed.

This paper will offer possible solutions to the problem of reconciling the competing policies embodied in CERCLA and the Bankruptcy Code. Because the conflict cannot be resolved as long as environmental obligations are mutable inside bankruptcy, complete relief is likely to ultimately require legislative action.

II. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT

CERCLA establishes a complicated scheme⁴ that enables the federal government to respond promptly and effectively to the pervasive problems inherent in hazardous waste disposal.⁵ Ultimately, CERCLA promotes the "private allocation of responsibility"⁶ for costs incurred in

1. The Environmental Protection Agency (EPA) has estimated that during the next 50 years voluntary bankruptcy petitions will be filed by 23-30% of the owners or operators of waste disposal facilities. U.S. General Accounting Office, *Hazardous Waste, Environmental Safeguards Jeopardized When Facilities Cease Operating* 18 (1986), cited in Note, *Police and Regulatory Power v. Pecuniary Interest: The Bankrupt Hazardous Waste Site Owner Faces the Music*, 30 *Nat. Resources J.* 423 (1990).

2. 11 U.S.C. §§ 101 et seq. (1988). The 1978 Bankruptcy Reform Act created the Bankruptcy Code. The Act was amended by Act of July 27, 1982, Pub. L. No. 97-222, 96 Stat. 235 (1982); the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984); the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986); the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (1988); and the Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (1990).

3. 42 U.S.C. §§ 9601-9657 (1982), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

4. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 *Bus. Law* 923, 952 (1990) [hereinafter Barr].

5. See H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17-18, reprinted in 1980 U.S. Code Cong. & Admin. News 6119-20.

6. Barr, *supra* note 4, at 1001.

responding to threatened or actual releases, spills, or discharges of hazardous substances⁷ at existing or abandoned sites by laying liability at the feet of a broadly defined "potentially responsible party" (PRP).⁸

CERCLA is the first comprehensive⁹ and self-executing federal statute to address the past as well as the future release of hazardous substances. To effectuate the broad statutory mandate, CERCLA vests the President (and thus the EPA) with extensive power.¹⁰ The EPA has a continuing duty to identify sites¹¹ releasing hazardous substances. The sites, ranked in order of priority, comprise the National Priorities List (NPL).¹²

Essentially, CERCLA provides three courses of action:

1. The government can undertake clean-up actions consisting of removal¹³ and remedial¹⁴ measures whenever there is a release

7. 42 U.S.C. § 9601(14) (1988) defines "hazardous substance" by reference to substances designated hazardous or toxic under provisions of the Clean Water Act (33 U.S.C. §§ 1321(b)(2)(A), 1317(a)); characteristic or listed hazardous wastes under the Solid Waste Disposal Act (42 U.S.C. §§ 6921 et seq.); hazardous air pollutants under the Clean Air Act (42 U.S.C. § 7412); any imminently hazardous chemical substance upon which the EPA acted under the Toxic Substances Control Act (15 U.S.C. § 2606); and, finally, any other element, substance, etc. designated under CERCLA (42 U.S.C. § 9602). CERCLA exempts petroleum, natural gas, and synthetic gas.

8. 42 U.S.C. § 9607(a) (1988) imposes liability on present owners and operators, those who were owners and operators at the time the disposal occurred, generators (including those who "arranged for" disposal, treatment, or transportation to disposal or treatment), and transporters. See also T.P. Long Chem. Co., 45 Bankr. 278, 283 (Bankr. N.D. Ohio 1985) (the debtor and the debtor's estate may incur liability under CERCLA).

9. See J. Arbuckle, M. Brown, N. Bryson, W. Frick, R. Hall, J. Miller, M. Miller, T. Sullivan, T. Vanderver & L. Wegman, *Environmental Law Handbook* 109 (8th ed. 1985). Also, a substance may be deemed hazardous under CERCLA despite the fact that the substance is not considered hazardous by the Resource Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C. §§ 6921 et seq. (1988)).

10. Such power is obviously essential to implement "appropriate environmental response action to protect public health and the environment from the dangers posed by [hazardous waste] sites." H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17 reprinted in *U.S. Code Cong. & Admin. News* 6119.

11. The procedure is undertaken pursuant to the National Contingency Plan (42 U.S.C. § 9605 (1988)).

12. 42 U.S.C. § 9605(a)(8)(B) (1988). Currently, the NPL contains over 1,200 sites. EPA National Priorities List for Uncontrolled Hazardous Waste Sites, 40 C.F.R. § 300 (1991). Additionally, while the NPL addresses only sites presenting problems of long-term or chronic release of hazardous substances, the EPA may also order and/or undertake itself the clean-up of sites presenting an "imminent or substantial endangerment" regardless of whether these sites appear on the NPL.

13. 42 U.S.C. § 9601(23) (West 1983 & Supp. 1991) defines removal in pertinent part as "the cleanup or removal of released hazardous substances from the environment . . . as may be necessary . . . in the event of the threat of release of hazardous substances into the environment (and as may be) necessary to monitor, assess, and evaluate the

or threatened release of a hazardous substance or pollutant which may present "an imminent and substantial danger to the public health or welfare."¹⁵ Where response is consistent with the National Contingency Plan, costs are absorbed by the Hazardous Substances Superfund.¹⁶

2. The EPA may also order abatement actions (and thus conserve its own resources) where an imminent and substantial endangerment to the public health or welfare or to the environment exists.¹⁷ Additionally, the EPA can assess penalties for non-compliance.¹⁸

3. Where the government or a private party has expended funds for cleanup, a cost recovery action may be brought against the PRP.¹⁹ Recoverable costs include necessary response costs incurred by the government or by nongovernmental parties consistent with the NCP, damages to natural resources and the costs of assessing such damages, and health assessment costs authorized under CERCLA.²⁰ To secure all costs and damages for which the PRP may be liable, the statute grants the federal government a lien on all property belonging to the PRP that is subject to or affected by the removal or remedial action.²¹

release or threat of release . . . or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage."

14. 42 U.S.C. § 9601(24) (1988) defines remedial actions as "those actions consistent with permanent remedy taken instead of or in addition to removal actions."

See also S. Wolf, *Pollution Law Handbook* 229 (1988) wherein the author states, "The essential difference between removal and remedial actions is that removal is directed at immediate and necessary clean-up operations, while remedial actions are concerned with more extensive and permanent efforts to rehabilitate the environment and repair the damage caused by the release of hazardous substances."

15. 42 U.S.C. § 9604 (1988).

16. 42 U.S.C. § 9631 (1982), repealed by Act of Oct. 17, 1986, Pub. L. No. 99-499, § 517(c)(1), 100 Stat. 1774 (1986) (previously known as the Hazardous Substance Response Trust Fund). See also the reauthorization of Superfund at Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

The Superfund is financed by a tax on petroleum and chemicals, federal appropriations, interest, and reimbursements for government clean-up costs.

17. 42 U.S.C. § 9606(a) (1988).

18. 42 U.S.C. § 9606(b)(1) (1988). Superfund penalties averaged \$7,295 during 1989. EPA's National Penalty Report for 1989, cited in Lavelle, *Enforcement and the EPA*, Nat'l L.J., Sept. 24, 1990, at 49.

19. 42 U.S.C. § 9607(a) (1988).

20. 42 U.S.C.A. § 9611(a) (West 1983 & Supp. 1991).

21. 42 U.S.C. § 9607(1) (1988). The lien attaches when costs are incurred by the United States or when notice is given to the PRP, whichever occurs later, and continues until the obligation is satisfied or the statute of limitations has run on the action.

CERCLA liability is often termed "excessive",²² presumably for its imposition of joint and several liability²³ without regard to negligence,²⁴ and subsequent provision of only limited defenses.²⁵ Moreover, CERCLA has a retroactive application.²⁶ CERCLA's expansive liability has in fact reached third parties in the past,²⁷ including parent corporations,²⁸ shareholders,²⁹ corporate successors,³⁰ and lenders.³¹

In summation, CERCLA provides an integrated scheme for the clean-up of hazardous waste and for the imposition of costs on a statutorily defined responsible party. CERCLA's assessment of strict liability on a joint and several basis, its expansive definition of PRP, its criteria for financial responsibility,³² and the flexibility it grants the government to, as needed, either conduct the clean-up itself or order the PRP to do so, help assure that a "deep-pocket" will ultimately be reached.

III. BANKRUPTCY

The bankruptcy process may be best justified on the basis of its power to stave off the circling flock of creditors who would otherwise

22. See, e.g., Lavelle, *Setting Sights on Superfund*, Nat'l L.J., Feb. 18, 1991, at 36.

23. See, e.g., *O'Neil v. Picillo*, 883 F.2d 176 (1st Cir. 1989), cert. denied, 110 S. Ct. 1115 (1990), adopting the Restatement (Second) of Torts approach in holding that damages should be apportioned only in the rare case where the defendant demonstrates that the harm is divisible.

24. Although 42 U.S.C. § 9607 (1988) does not provide for strict liability in express terms, the courts have consistently imposed CERCLA liability without a showing of negligence. See, e.g., *U.S. v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir.), cert. denied, 490 U.S. 1160, 109 S. Ct. 3156 (1988).

25. 42 U.S.C. § 9607(b) (1988) carves out limited defenses applicable to situations caused solely by an act of God, an act of war, or an act or omission of a third party who is not an employee or agent and does not have a contractual relationship with the defendants either directly or indirectly.

26. See, e.g., *U.S. v. Northeastern Pharm. & Chem., Inc.*, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848, 108 S. Ct. 146 (1987); *U.S. v. Rohm and Haas Company, Inc.*, 669 F. Supp. 672 (D.N.J. 1987).

27. For a thorough discussion of cases in this area, see Comment, *The Environmental Due Diligence Defense and Contractual Protection Devices*, 49 La. L. Rev. 1405 (1989).

28. For an excellent discussion of this subject, see Barr, *supra* note 4, at 981-82. But see *Joslyn Manuf. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991) wherein the court refused to pierce the corporate veil to impose liability under CERCLA.

29. See, e.g., *U.S. v. Mirabile*, 751 F. Supp. 372 (E.D. Pa. 1985).

30. See, e.g., *Smith Land Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), cert. denied, 488 U.S. 1029, 109 S. Ct. 837 (1989).

31. See, e.g., *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 111 S. Ct. 752 (1991); *U.S. v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

32. 42 U.S.C. § 9608(b) (1988).

feast merrily on the debtor's carcass, with the swiftest among them realizing the choicest cuts.³³ Thus, rather than a counterproductive free-for-all where each creditor pursues his own self-interest to snatch whatever assets the debtor has remaining,³⁴ the Bankruptcy Code establishes procedural mechanisms³⁵ to maximize the debtor's assets. The objectives of bankruptcy are twofold: 1) to provide the debtor with a fresh start financially,³⁶ and 2) to provide the creditor with a mechanism for the orderly distribution of the debtor's estate,³⁷ either by liquidation³⁸ or pursuant to a plan of reorganization.³⁹

Bankruptcy may be initiated by the debtor's⁴⁰ filing of a voluntary petition,⁴¹ or the creditor's⁴² commencing, under certain conditions, an involuntary action against the debtor.⁴³ The filing of the petition creates certain rights and obligations. In a voluntary case, it serves as the order for relief⁴⁴ and the benchmark for determining when a claim arose for

33. Essentially, bankruptcy "encourag[es] creditors and others with rights to the debtor's assets to act as the sole owner of the assets would act." D. Baird & T. Jackson, *Cases, Problems, and Materials on Bankruptcy* 40 (1990) [hereinafter Baird].

34. Bankruptcy scholars refer to this phenomenon as the problem of the common pool. An illustration given is that of a small pond, owned by no one person but instead by a group of individuals, and brimming with fish. Although it would be in the group's interest to set per-member quotas in an attempt to insure that fish will remain plentiful in the future, each individual's self-interest will prevail and each will catch as many fish as he can. See, e.g., Baird, *supra* note 33, at 39. In environmental law, an analogous situation is presented by the "commons."

35. Generally, bankruptcy law is procedural. Substantive matters are regulated by state law as long as the objectives of bankruptcy are not frustrated. See, e.g., *Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914 (1979) ("Property interests [in bankruptcy] are created and defined by state law.').

36. See H.R. Rep. No. 595, 95th Cong., 2d Sess. 174, reprinted in 1978 U.S. Code Cong. & Admin. News, 5963, 6135.

37. But see Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 Mich. L. Rev. 2097, 2098 [hereinafter Bowers] wherein the author states, "[W]e do know that bankruptcy is not working as a creditor's remedy."

38. Liquidation is a synonym for Chapter 7 bankruptcy. See 11 U.S.C. §§ 701-766 (1988).

39. The reorganization provisions are also known as Chapter 11 filings. See 11 U.S.C.A. §§ 1101-1174 (West 1983 & Supp. 1991).

40. 11 U.S.C.A. § 101(13) (West Supp. 1991): "'[D]ebtor' means person or municipality concerning which a case under this title has been commenced." In turn, § 101(41) defines "person" as including individuals, partnerships, and corporations.

41. 11 U.S.C. § 301 (1988). There is no prerequisite of insolvency for the filing of a voluntary bankruptcy petition.

42. 11 U.S.C.A. § 101(10) (West Supp. 1991) defines creditor in pertinent part as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor."

43. See 11 U.S.C. § 303 (1988) for the substantive and procedural requirements that must be satisfied before an order for relief will be ordered under an involuntary petition.

44. 11 U.S.C. § 301 (1988).

purposes of priority of payment.⁴⁵ Additionally, upon the filing of the petition the automatic stay⁴⁶ takes effect, and all efforts to commence or continue judicial or administrative actions,⁴⁷ to enforce a prepetition judgment against the debtor or his property,⁴⁸ to create, perfect, or enforce a lien,⁴⁹ or to attempt by any other actions to collect the debt, are prohibited.⁵⁰

The trustee is the representative of the estate.⁵¹ As a fiduciary, the trustee is charged with collecting the assets of the estate⁵² in a manner that will maximize the return to unsecured creditors. To effectuate this purpose, the Bankruptcy Code grants the trustee the capacity to invalidate liens⁵³ as well as preferential⁵⁴ or fraudulent⁵⁵ transfers. The trustee may also use, sell, or lease estate property⁵⁶ and may abandon property that is burdensome or of inconsequential value.⁵⁷

The bankruptcy trustee pays claims⁵⁸ according to the priority scheme set forth in the Bankruptcy Code. Generally, secured claims⁵⁹ are granted

45. See, e.g., 11 U.S.C. §§ 502 (1988) (allowance of claims), 503 (1988) (administrative expenses), and 507 (1988) (priorities).

46. 11 U.S.C.A. § 362 (West 1983 & Supp. 1991).

47. 11 U.S.C.A. § 362(a)(1) (West Supp. 1991).

48. 11 U.S.C. § 362(a)(2) (1988).

49. 11 U.S.C. § 362(a)(5) (1988).

50. Other actions forbidden by § 362 are acts to obtain possession of the property; to collect, assess, or recover a claim against the debtor; to set off any debt; or to commence or continue any proceeding concerning the debtor before the United States Tax Court. 11 U.S.C.A. §§ 362(a)(3), (6), (7), (8) (West 1983 & Supp. 1991). Willful violations of the stay entitle the debtor to actual damages including costs, attorneys' fees, and punitive damages. See 11 U.S.C.A. § 362(h) (West Supp. 1991).

51. 11 U.S.C. § 323(a) (1988). The Chapter 7 trustee is selected from a panel of private trustees. In a typical Chapter 11 case, the "debtor in possession" serves in place of the trustee.

52. The estate is broadly defined to encompass all legal or equitable interests of the debtor in property at the commencement of the case. See 11 U.S.C. § 541(a) (1988) for a complete listing of the interests comprising the estate.

53. 11 U.S.C. §§ 544, 545 (1988).

54. 11 U.S.C. § 547 (1988).

55. 11 U.S.C.A. § 548 (West 1983 & Supp. 1991).

56. 11 U.S.C. § 363 (1988).

57. 11 U.S.C. § 554 (1988).

58. Section 101(5) defines a claim in expansive terms as:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

11 U.S.C.A. § 101(5) (West Supp. 1991).

59. Claims are secured only up to the value of the collateral. 11 U.S.C. § 506 (1988).

first priority, followed by administrative claims,⁶⁰ special expenses and claims as set forth in section 507, unsecured claims,⁶¹ fines, penalties, and forfeitures,⁶² and payment of legal interest.⁶³ Finally, in the unlikely event any assets remain, the debtor is the recipient of these.⁶⁴

At the conclusion of a Chapter 7 bankruptcy, the individual debtor is normally granted a discharge.⁶⁵ In a Chapter 11 reorganization, the confirmation of the plan under section 1141 discharges the debt other than as provided in the plan.⁶⁶

Because of the protective procedural mechanisms of the Bankruptcy Code, the process provides a haven for the debtor from menacing creditors. But the filing of the petition may disrupt business, lower the value of the debtor's business operation, and make it difficult for the debtor to collect on accounts receivable.⁶⁷ In fact, the creditors themselves may benefit from their debtor's bankruptcy by achieving some control over the debtor and competing creditors.

IV. BANKRUPTCY V. ENVIRONMENTAL OBLIGATIONS

The bankruptcy process endeavors to grant the debtor a fresh financial start and to assure competing creditors a fair and orderly administration of the estate. In contrast, environmental regulations in general, and CERCLA in particular, seek to protect the public safety and the environment despite the selfish interests of the debtor and his creditors.

Most importantly, the Bankruptcy Code does not inquire *why* a person or entity seeks bankruptcy relief.⁶⁸ Consequently, bankruptcy makes no distinction between the obligation to shoulder financial responsibility for clean-up costs and any other financial obligation.⁶⁹ The tension between the public policies embodied in environmental obli-

60. 11 U.S.C. § 503 (1988).

61. 11 U.S.C. § 726(a)(2), (3) (1988).

62. 11 U.S.C. § 726(a)(4) (1988).

63. 11 U.S.C. § 726(a)(5) (1988).

64. 11 U.S.C. § 726(a)(6) (1988).

65. 11 U.S.C. § 727 (1988). There are no provisions under Chapter 7 for the discharge of a corporation. Such a provision is deemed unnecessary because: 1) corporate shareholders have no personal liability, and 2) state dissolution procedures are available.

66. For the requirements necessary to receive a discharge upon confirmation of the plan, see 11 U.S.C. § 1141 (1988).

67. Baird, *supra* note 33, at 65.

68. Van Patten & Puetz, *Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy*, 35 S.D.L. Rev. 220, 222 (1990) [hereinafter Van Patten].

69. *Id.*

gations and the private relief offered by bankruptcy thus becomes obvious.⁷⁰

The foregoing summary admittedly oversimplifies the discord between bankruptcy and environmental obligations. However, the following sections will further define the scope of the problem by examining the conflict as it relates to the trustee's power of abandonment, the automatic stay, the administrative expense priority, and the discharge provision. Ultimately, compliance with environmental regulations must take precedence over the protection presently offered by the Bankruptcy Code. Hence, to the extent possible, there must be no distinction between environmental obligations of those "potentially responsible parties" who are bankrupt and those who are not.

A. *Abandonment*

1. *The Conflict*

Bankruptcy Code section 554(a) permits the trustee or the debtor in possession to abandon property that is "burdensome" or of "inconsequential value."⁷¹ Undoubtedly, weighty environmental obligations render property, pending remediation and response actions, both burdensome and of inconsequential value. Yet if the trustee is permitted to abandon property before complying with clean-up obligations, the burden of clean-up falls upon the government unless joint and several liability enables pursuit of a solvent PRP. Additionally, abandonment eliminates the trustee's incentive to implement even relatively inexpensive measures such as fencing or sealing of barrels that might otherwise mitigate harms. Surely, such a result cannot be justified by the principally procedural mechanism of bankruptcy.

On the other hand, denial of abandonment requires the trustee to expend estate funds on the maintenance of essentially worthless property. This result may frustrate the "fresh start" policy of bankruptcy and impair the trustee's role of *maximizing* assets for the general unsecured creditors' benefit. It may be, however, that the narrow interests of the debtor and creditors should remain inferior to the greater concern of protecting the public health and safety. The court has thus struggled

70. The conflict between environmental obligations and bankruptcy is inherent in their respective sources; the former emanates from regulatory and police power and the latter from property law.

71. "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a) (1988). The abandonment is made to any party with possessory interest in the property abandoned.

to place limits on the trustee's seemingly broad statutory power of abandonment.

2. *The Jurisprudence*

The earliest indication of the Supreme Court's stance on the scope of the trustee's power to abandon property pursuant to the Bankruptcy Code appeared in dictum in *Ohio v. Kovacs*.⁷² The Court assumed without discussion that in a Chapter 7 bankruptcy where property is worth less than the cost of cleanup, the trustee may evade clean-up obligations imposed pursuant to state environmental laws by abandoning the property to its prior owner.⁷³

Shortly after *Kovacs* was rendered, the Supreme Court squarely faced the abandonment issue in *Midatlantic National Bank v. New Jersey Department of Environmental Protection*.⁷⁴ The Court ruled that the trustee's "absolute" power to abandon property admittedly of inconsequential value and subject to a state court order of clean-up,⁷⁵ was circumscribed by the countervailing need to protect the public health and welfare.⁷⁶ Said the Court,

The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety [A] trustee may not abandon property in contravention of a state statute or regulation that is *reasonably designed to protect the public health or safety from identified hazards*.⁷⁷

72. 469 U.S. 274, 105 S. Ct. 705 (1985). In *Kovacs*, the state of Ohio had effectuated a prepetition seizure of the hazardous waste site subsequent to the failure of the Chem-Dyne Corp. and Kovacs, its CEO, to comply with a state court judgment to remediate hazardous conditions. Kovacs then filed for bankruptcy protection and sought discharge of the obligation pursuant to § 554(a). The discharge was permitted.

73. *Id.* at 284 n.12, 105 S. Ct. at 710 n.12. The Court opined that if bankruptcy had been filed prior to the appointment of a receiver, the trustee would determine if the property was of value to the estate. "If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." *Id.*

74. 474 U.S. 494, 106 S. Ct. 755 (1986).

75. *Id.* at 497, 106 S. Ct. at 757. The debtor (Quanta Resources Corporation) processed waste at two facilities, one in New York and the other in New Jersey. The former site contained over 70,000 gallons of PCB-contaminated oil in leaking containers, while the latter contained more than 400,000 gallons of the PCB-laced oil. Thus, Quanta was in violation of the environmental laws of New York and New Jersey. Quanta sought to abandon both sites.

76. *Id.* at 501, 106 S. Ct. at 759. ("[A] trustee could not exercise his abandonment power in violation of certain state and federal laws.")

77. *Id.* at 507, 106 S. Ct. at 762 (footnotes omitted) (emphasis added).

The five to four decision emphasized that the equitable principles underlying the judicially created restrictions on abandonment, including the subordination of bankruptcy to state laws intended to protect public health and welfare, were codified in section 554.⁷⁸ The Court then tempered its holding in three ways. First, the Court pretermitted the question of "whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself."⁷⁹ The remaining limitations on the trustee's section 554 abandonment power, although relegated to a footnote,⁸⁰ are the most compelling. Second, the Court asserted that the exception to the abandonment power vested in the trustee by section 554 does not apply to a "speculative or indeterminate *future violation*."⁸¹ Third, it found that the power to abandon is "not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from *imminent and identifiable harm*."⁸²

After *Midatlantic*, the courts considered whether a threat to the public health and safety is necessary to circumscribe the trustee's power to abandon property or whether a "mere" violation of an environmental law *designed* to protect the public from "imminent and identifiable

78. *Id.* at 501, 106 S. Ct. at 759. The court buttressed its argument that 11 U.S.C. § 554(a) (1988) codified the common law restrictions on abandonment by: 1) examining the legislative history of CERCLA, 2) examining another provision of the Bankruptcy Code where non-bankruptcy law is pertinent, i.e. 11 U.S.C.A. § 362(a) (1983 & West Supp. 1991) (the automatic stay) and 3) referring to 28 U.S.C. § 959(b) (1988). The latter, which orders the trustee or debtor in possession "to manage and operate the property in his possession . . . according to the requirements of the valid laws of the State," indicates Congressional intent that the Bankruptcy Code not preempt all state and local laws concerning property.

But see Justice Rehnquist's dissent positing that the explicit language of 11 U.S.C. § 554(a) (1988) indicates that the trustee's power to abandon is limited *only by consideration of the property's value to the estate*. *Midatlantic*, 474 U.S. at 509; 106 S. Ct. at 763 (Rehnquist, J., dissenting) (emphasis added).

79. *Midatlantic National Bank v. New Jersey*, 474 U.S. 494, 507, 106 S. Ct. 755, 762 (1986). In *re Peerless Plating, Co.*, 70 Bankr. 943 (Bankr. W.D. Mich. 1987) held that although denial of abandonment would force depletion of the debtor's estate in complying with CERCLA, depletion of funds is not a condition so onerous as to interfere with the bankruptcy adjudication.

80. *Midatlantic*, 474 U.S. at 507 n.9, 106 S. Ct. at 762 n.9.

81. *Id.*, 106 S.Ct. at 762 n.9.

82. *Id.*, 106 S. Ct. at 762 n.9 (emphasis added). See *In re FCX, Inc.*, 96 Bankr. 49, 55 (Bankr. E.D.N.C. 1989), wherein the court stated that "imminent danger" encompasses a situation where, although the environmental threat is not fully manifested, "the danger is immediate in the sense that there is a *present* and real possibility of public exposure to . . . deadly substances if they are not removed." (emphasis in original) This case also lends support to the proposition that the court, although giving some deference to EPA and state environmental agency findings, will itself determine if there is an immediate threat to public health and safety.

harm" is enough to trigger restrictions. Under the first standard, if imminent and identifiable harm is not present, abandonment may be allowed despite noncompliance with CERCLA and state environmental regulations. But where, under the second standard, the abandonment power is deemed limited by violation of a law designed to prevent imminent and identifiable harm, full compliance with that law would be required prior to abandonment. *Midatlantic's* rationale applies to state and federal environmental regulations, including CERCLA,⁸³ and has generally been interpreted as requiring a threat to the public health and welfare⁸⁴ before limitations on abandonment power will be imposed, rather than the stricter standard of requiring full compliance with all environmental laws prior to abandonment.⁸⁵

This pro-bankruptcy approach (for want of a better term) predominates and is perhaps best illustrated by *In re Oklahoma Refining Co.*⁸⁶ In this case, the trustee expended \$275,000 in complying with environmental regulations.⁸⁷ The total clean-up was projected to cost \$2.5 million and require 30 years of monitoring. Ultimately, the value of the land would not exceed \$100,000.⁸⁸ Noting that the trustee's sole lack of compliance was the failure to submit a closure plan, and that there was no "immediate and menacing harm to public health and safety,"⁸⁹ the court concluded it must only "take state environmental laws and regulations into consideration" in determining whether to permit abandonment.⁹⁰ The approach adopted seems to be one of "reasonableness."⁹¹

To require strict compliance with State environmental laws under the facts of this case could create a bankruptcy case in perpetuity

83. *In re FCX*, 96 Bankr. at 54. See also *In re Peerless Plating Co.*, 70 Bankr. 943 (Bankr. W.D. Mich. 1987) (abandonment denied where the release of cyanide gas violated CERCLA and presented an immediate harm to the public).

84. *In re FCX*, 96 Bankr. at 54.

85. For a minority view holding that abandonment is not permitted unless there is full compliance with environmental law unless such compliance is so onerous as to interfere with the adjudication of the bankruptcy process, see *In re Peerless Plating Co.*, 70 Bankr. 943 (Bankr. W.D. Mich. 1987) (criticized in *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988)). In *Peerless* the court opined that the depletion of the estate due to compliance with CERCLA was not onerous under *Midatlantic*.

86. 63 Bankr. 562 (Bankr. W.D. Okla. 1986). For a discussion of the case, see Note, *Abandonment of Hazardous Waste Sites in Bankruptcy*, 13 U. Dayton L. Rev. 511 (1988) [hereinafter *Abandonment*].

87. *Oklahoma Refining Co.*, 63 Bankr. at 564. The trustee, with the consent of the secured creditors, utilized cash collateral for this purpose.

88. *Id.* at 564.

89. *Id.* For criticism of this point, see *Abandonment*, *supra* note 86, at 517-19.

90. *Oklahoma Refining Co.*, 63 Bankr. at 565.

91. A similar standard was enunciated in *In re Franklin Signal Corp.*, 65 Bankr. 268, 272 (Bankr. D. Minn. 1986).

and fetter the estate to a situation without resolve. This trustee, with consent of the secured creditors, has done what is reasonable under the circumstances. To pre-empt the administration of this estate would derogate the spirit and purpose of the bankruptcy laws requiring prompt and effectual administration within a limited time period.⁹²

From the above quotation, one may surmise that one of the factors the court will consider in future analyses is whether or not the trustee has unencumbered assets with which to comply with the state and/or federal regulations. Among the factors enunciated in *In re Franklin Signal Corp.*⁹³ to be considered in determining the conditions under which the abandonment may be allowed are the amount and type of funds available for cleanup.⁹⁴ In *Franklin Signal*, the Fourth Circuit allowed the trustee to abandon fourteen drums of toxic chemicals, despite noncompliance with state environmental laws, where no "imminent and identifiable harm" to the public was presented and where the estate possessed limited unencumbered funds.⁹⁵ Moreover, at least one court has bluntly stated that "the trustee cannot be ordered to comply with a cleanup obligation that he does not have the financial resources to satisfy."⁹⁶

92. *In re Oklahoma Refining Co.*, 63 Bankr. 562, 565 (Bankr. W.D. Okla. 1986) (citations omitted).

93. *Franklin Signal*, 65 Bankr. at 268.

94. The factors enunciated by the court were: 1) the imminence of danger to the public health and safety, 2) the extent of probable harm, 3) the amount and type of hazardous waste, 4) the cost to bring the property into compliance with environmental laws, and 5) the amount and type of funds available for cleanup. *Franklin Signal*, 65 Bankr. at 272.

95. See also *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988) and *In re FCX, Inc.*, 96 Bankr. 49 (Bankr. E.D.C. 1989). In *FCX*, five tons of buried pesticides presented an "immediate" threat under *Midatlantic*, and abandonment would not be allowed unless the trustee set aside \$250,000 to pay for cleanup undertaken pursuant to state and CERCLA regulations. The court indicated a different result might be merited where the trustee has unencumbered funds at his disposal.

96. *In re Microfab*, 105 Bankr. 161, 169 (Bankr. D. Mass. 1989). In *Microfab* the court concluded that even if the trustees expended all the estate's assets on compliance, the cleanup would still be underfunded. Further, there was no assurance that the trustee would thereby "significantly improve the condition of the Site." Abandonment was permitted.

See also *In re Better-Brite Plating, Inc.*, 105 Bankr. 912 (Bankr. E.D. Wis. 1989) (where the unencumbered assets were "far short" of the estimated cost of clean-up and there was no evidence of imminent harm to the public, abandonment was allowed); and *In re A & T Trailer Park, Inc.*, 53 Bankr. 144, 147 (Bankr. D. Wyo. 1985) ("[I]n a no-asset case . . . the question is not whether the trustee must expend the assets of the estate on compliance with the environmental laws before abandoning the property. Rather, because the estate has no assets, the question becomes whether or not the trustee may be required to bring the property into compliance *at his own expense*. In this court's view, the trustee may not . . .") (emphasis in original).

3. Conclusion

By its literal terms, section 554(a) speaks only of the abandonment of *property* of the estate, not of the abandonment of liabilities such as those imposed by CERCLA.⁹⁷ In fact, abandonment of property will not relieve the owner of liability under CERCLA any more than sale to a third party would.⁹⁸ However, to the extent compliance with environmental laws requires maintenance of the property, fencing, sealing of barrels, and other security measures, the trustee may seek to escape such liability and conserve funds by abandonment.⁹⁹ One wonders by what rationale property that cannot be abandoned outside bankruptcy may be abandoned inside bankruptcy.

If the property cannot be abandoned when there is an imminent danger to the public, and if the estate has no unencumbered assets, who will pay for compliance? *Midatlantic* does not answer that question. Thus, the query may be more aptly phrased as one of priority. Granting an administrative expense priority for costs of compliance would absolve the trustee of personal liability,¹⁰⁰ encourage the trustee to cooperate with the environmental agencies,¹⁰¹ and protect the public from harm. However, this feat would be accomplished at the expense of the general unsecured creditors.

A decision must be made: is the "fresh start" policy of bankruptcy to be subordinated to the concern for the health of humans and the environment embodied in environmental regulations? Presently, the answer appears to depend on the court, the characterization of harm, and the presence or lack thereof of unencumbered assets. At the very least, however, abandonment should not be allowed unless the trustee assures the protection of the public by preventive measures such as installation of security fencing, completion of drainage and diking repairs, sealing of deteriorating tanks, and removal of explosive agents.¹⁰² At most, the environmental obligations should not be protected by the procedural mechanisms of bankruptcy.

Because there is no balance sheet insolvency requirement for a voluntary bankruptcy under either Chapter 7 or Chapter 11, the debtor's motives in filing a petition (including the desire to escape environmental obligations) may result in an abuse of the bankruptcy process. Ulti-

97. See generally Baird, *supra* note 33, at 591.

98. 42 U.S.C. § 9607 (1988). If abandonment is made to the debtor in a Chapter 7 bankruptcy, he will seek discharge of his personal obligations pursuant to Bankruptcy Code § 727(a) (11 U.S.C. § 727(a) (1988)).

99. Baird, *supra* note 33, at 592.

100. Van Patten, *supra* note 68, at 249.

101. *Id.*

102. *Midatlantic National Bank v. New Jersey*, 474 U.S. 494, 499 n.3, 106 S. Ct. 755, 758 n.3 (1986).

mately, the "fresh start" policy of bankruptcy carries too high a price for the public. Thus, section 554(a) should be amended to prevent this occurrence. Rather than the issue turning on the characterization of the harm as imminent and identifiable, the focus would then be on *compliance* with environmental obligations imposed pursuant to CERCLA and state regulations. Viewed in this light, the procedural mechanism of bankruptcy could exist in harmony with the substantive requirements imposed by environmental statutes outside bankruptcy.

The suggested addition to section 554(a) is italicized:

After notice and a hearing, the trustee may abandon any property of the estate that is burdensome or that is of inconsequential value and benefit to the estate, *provided however that no abandonment be permitted unless there is substantial compliance with 42 U.S.C. sections 9606 and 9607 [CERCLA] and applicable state environmental regulations enacted to protect the public health and safety.*

The term "substantial compliance" will allow the court to determine if the violation is a technical one which would not merit the subordination of the bankruptcy process. Furthermore, the limiting language "enacted to protect the public health and welfare" prevents a state legislature from concealing purely pecuniary measures in environmental statutes.

In tandem with the above provision limiting the trustee's abandonment power where there is no "substantial compliance," CERCLA section 101(20)(A), defining the "owner or operator", must be amended to exclude the trustee expressly. Only if the trustee is absolved of personal liability can cooperation with federal and state environmental agencies be assured.¹⁰³

B. *The Automatic Stay*

1. *The Basic Problem*

The automatic stay provision of the Bankruptcy Code¹⁰⁴ is an immediate and automatic consequence of the filing of the bankruptcy petition. In fact, it is this immediacy that prompts many debtors to seek the protection of bankruptcy.¹⁰⁵ "The automatic stay is one of

103. See Van Patten, *supra* note 68, at 249. The authors state, "[If it would help] to have someone charged with responsibility for the cleanup so that maximum cooperation with state or federal agencies is fostered, then it would make sense to absolve the trustee from personal liability as an owner/operator during the period of appointment."

104. 11 U.S.C.A. § 362 (1983 & West Supp. 1991).

105. Smillie, *When Worlds Collide: The Effect of the Bankruptcy Stay on Environmental Cleanup Litigation*, 8 *Temp. Envtl. L. & Tech. J.* 77, 80 (1989).

the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property."¹⁰⁶

As long as the stay is in effect,¹⁰⁷ the debtor is insulated from virtually every collection action, foreclosure attempt, or form of harassment by any entity.¹⁰⁸ Any willful violation of the stay provisions subjects the offender to actual damages, costs, attorneys' fees, and punitive damages.¹⁰⁹

The Bankruptcy Code provides several exceptions to the automatic stay. Pertinent provisions for purposes of this paper are: 1) the exception permitting the enforcement of actions within a governmental unit's police or regulatory powers,¹¹⁰ and 2) "the exception to the exception," prohibiting the enforcement of money judgments but allowing the enforcement of all other judgments in an action by a governmental unit to enforce the unit's regulatory or police power.¹¹¹

The rationale for prohibiting the enforcement of money judgments, even within the context of a governmental unit's enforcement of its police or regulatory powers, is the unfair advantage that the government would otherwise obtain over other creditors in regard to the distribution of the debtor's assets.¹¹² The legislative history is instructive on this

106. H.R. Rep. No. 595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6296.

107. The stay remains in effect until the property is no longer the property of the estate, the case is closed or dismissed, or the court grants relief upon the showing of cause, including a demonstration of the lack of adequate protection (see *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 108 S. Ct. 626 (1988)), or, with respect to specific property, upon the debtor's demonstration that the debtor lacks equity in the property and the property is not necessary for an effective Chapter 11 reorganization. 11 U.S.C.A. § 362(c), (d) (1983 & West Supp. 1991).

108. 11 U.S.C.A. § 101(5) (West Supp. 1991) defines entity to include persons, estates, trusts, governmental units, and United States trustees.

109. 11 U.S.C.A. § 362(h) (West Supp. 1991). See also *In re Chateaugay Corp.*, 112 Bankr. 526, 530 (Bankr. S.D. N.Y. 1990), rev'd on other grounds, 920 F.2d 183 (2d Cir. 1990) (a willful violation requires only knowledge of the bankruptcy filing and a *general intent* to take actions which have the effect of violating the automatic stay).

110. 11 U.S.C. § 362(b)(4) (1988) excepts from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."

111. 11 U.S.C. § 362(b)(5) (1988) is phrased in the affirmative: the filing of a petition does not operate as a stay "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."

112. See H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6299 ("Since the assets of the debtor are in the possession

point: "This section is intended to be given a narrow construction in order to permit governmental units to pursue action to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in the property of the debtor or property of the estate."¹¹³

The automatic stay gives rise to several issues in defining the applicability of the stay in environmental enforcement actions: 1) does an action by the governmental unit under state environmental laws and/or CERCLA fall within the police and regulatory exception, and 2) if so, under what circumstances, if any, would such an action be deemed an action to enforce a money judgment (and thus be prohibited)?¹¹⁴

The jurisprudence has attempted to fill in the gap created by the imprecise statutory language. If an action is deemed one to enforce a money judgment,¹¹⁵ the court will not reach the question of whether or not the action would otherwise be embraced by the police/regulatory power exception to the automatic stay.¹¹⁶

If the initial question concerning a money judgment is answered in the negative, the issue then turns on the characterization of the government's action. When the state or the EPA seeks to enforce environmental regulations by way of injunction, to assess liability, or to recover response costs, the action is either a permissible enforcement of police and regulatory powers or an impermissible furtherance of pecuniary interest.

2. *Judicial Interpretation*

a. *Distinguishing the Money Judgment: Past Injury v. Future Harm*

Shortly after the enactment of the Bankruptcy Reform Act of 1978, one commentator opined that the application of the automatic stay in defense of environmental infractions would protect the debtor from the

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.").

113. H.R. Rep. No. 595, 98th Cong., 2d Sess., at 340, reprinted in U.S. Code Cong. & Admin. News 5963, 6296.

114. Neither 11 U.S.C. § 362(b)(4) (1988) nor 11 U.S.C. § 362(b)(5) (1988) is clarified by definitional terms.

115. See *Penn Terra Ltd. v. Dept. of Env'tl. Resources*, 733 F.2d 267, 275 (3d Cir. 1984), where the court was reluctant to accept the label assigned by the governmental unit and determined for itself if the purpose of the action was really to "achieve . . . what a money judgment was traditionally intended to accomplish and no more."

116. Clearly, a mere entry of a money judgment in favor of a governmental unit does not violate the automatic stay. *Penn Terra*, 733 F.2d at 275.

initiation or continuation of enforcement actions.¹¹⁷ The enthusiasm was short-lived.

The first case to confront the conflict between the automatic stay provision and performance of environmental obligations came in the context of an action to enforce a state environmental statute.¹¹⁸ In *Penn Terra Ltd. v. Department of Environmental Resources*,¹¹⁹ the debtor corporation had entered a prepetition consent agreement with the state Department of Environmental Resources (DER).¹²⁰ When the debtor failed to comply and subsequently filed for bankruptcy under Chapter 7, the DER sought to obtain an injunction in state court to enforce the consent decree.

The Third Circuit reversed the bankruptcy court¹²¹ and held that the state court mandatory injunction directing the debtor to *perform* mining reclamation work was not an enforcement of a money judgment and therefore was not stayed by the initiation of bankruptcy. The court distinguished the action before it (an injunction to prevent future harm) from an action seeking compensation for past acts.¹²² The court opined, "[I]t is unlikely that any action which seeks to prevent culpable conduct *in futuro* will, in normal course, manifest itself as an action for a money judgment, or one to enforce a money judgment."¹²³

The test for distinguishing a money judgment, said the court, is to look to the nature of the injuries which the challenged remedy is intended to redress and to discern whether the plaintiff seeks compensation for past harm or the prevention of future hazards.¹²⁴ Since the payment of money would not satisfy the state court injunctive order to backfill, complete erosion plans, seal mine openings, and so forth, the *Penn Terra* court characterized the action as one clearly intended to prevent future harm.¹²⁵

Interestingly, the debtor in *Penn Terra* was involved in liquidation proceedings rather than reorganization. Because the debtor would not

117. J. Dimento, *Environmental Law and American Business* 158 (1986) ("[U]se of the Bankruptcy Reform Act can operate to block the effective implementation of a mandatory injunction obtained in environmental actions.").

118. The state cases are instructive on this issue; the cases construing the automatic stay in reference to CERCLA are sparse.

119. 733 F.2d 267 (3d Cir. 1984).

120. The debtors had agreed to a schedule for compliance with clean-up obligations. *Id.* at 269.

121. The bankruptcy court was apparently persuaded by the fact that the debtor had filed under Chapter 7 and that the mandatory injunction required the expenditure of funds. *Penn Terra*, 733 F.2d at 277.

122. *Id.*

123. *Id.*

124. *Penn Terra Ltd. v. Dept. of Env'tl. Resources*, 733 F.2d 267, 278 (3d Cir. 1984).

125. *Id.*

be operating in the future, the dispute must *not* have been one to force compliance with environmental regulations addressing *ongoing* or *future* operations.¹²⁶ Indeed, although the court states that the distinction is one between past acts and future harms, the outcome of the decision is that the debtor was required to take action to undo *past harms*.¹²⁷ Thus, it is likely that the court's distinction between past acts and future harms will be of little significance when the debtor will cease operations.¹²⁸

Shortly after *Penn Terra*, the Supreme Court in *Kovacs* was presented with the issue of whether an obligation to cleanup a site pursuant to a state court ordered injunction was a "debt" subject to discharge.¹²⁹ In answering that question in the affirmative, the Court cited *Penn Terra* with approval, but distinguished the instant case on the basis that the debtor had been dispossessed of his property upon the appointment of a state court receiver prior to the filing of the bankruptcy petition. The Supreme Court ruled that the state court injunction had in effect been converted into an obligation to pay money.¹³⁰

At first blush the Supreme Court decision seems to imply a pro-debtor position with implications for the automatic stay, but the holding is actually a very narrow one. Since the debtor had been dispossessed in *Kovacs*, the only performance the state could seek from the debtor was the *payment* of money. The Supreme Court stressed, "The automatic stay provision does not apply to suits to enforce the regulatory statutes of the state, but the enforcement of such a judgment by seeking money from the Bankrupt . . . is another matter."¹³¹

Thus, in *Kovacs* the state sought the payment of money, rather than performance; by contrast, in *Penn Terra* the remedy sought was performance rather than payment. Admittedly, because performance by way of clean-up cannot be accomplished without the expenditure of funds, one may argue the distinction is one without a difference. Nevertheless, the courts have consistently held that the mere fact that

126. Baird, *supra* note 33, at 575.

127. *Id.*

128. See Van Patten, *supra* note 68, at 233, wherein the author states that the cases should perhaps turn on whether the debtor is ceasing operations or reorganizing and continuing operations. But see *In re Lenz Oil Serv., Inc.*, 65 Bankr. 292, 297 (Bankr. N.D. Ill. 1986) (following *Penn Terra*). Despite the fact that the debtor had filed a Chapter 7 petition and had ceased operations, the court held that a state court pre-petition cleanup order was not subject to stay. "[T]he main purpose of the relief sought," said the court, "was prospective: only if the old wastes were cleaned up and new waste deposits prevented could the potential future harm be prevented."

129. *Ohio v. Kovacs*, 469 U.S. 274, 105 S. Ct. 705 (1985).

130. *Id.* at 283, 105 S. Ct. at 710.

131. *Id.* at 283 n.11, 105 S. Ct. at 710 n.11.

the debtor must expend funds to comply with an injunction does not transform the action into one to enforce a money judgment.¹³²

b. Regulatory Interest or Pecuniary Interest?

Once a court determines that an action is not one to enforce a money judgment, one hurdle remains before the action can proceed: is the action to be enforced a valid exercise of the government's police or regulatory power under section 362(b)(4)? The police and regulatory power exception to the automatic stay does not grant the government plenary power to enforce environmental regulations. Rather, the legislative history¹³³ and jurisprudence indicate that the exception is applicable only where the government seeks to protect the public and the environment from harm.

However, it is not necessary for the government to show imminent and identifiable harm or urgent public necessity to override the automatic stay provision.¹³⁴ Nor may a debtor successfully argue that the police and regulatory exception applies only to a governmental unit enforcing *its own* laws.¹³⁵ Certainly, laws intending to rectify environmental harm are within the ambit of the exception.¹³⁶ Moreover, CER-

132. See, e.g., *Penn Terra Ltd. v. Dept. of Env'tl. Resources* 733 F.2d 267, 278 (3d Cir. 1984) ("[A]most everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity."). See also *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175 (5th Cir. 1986), cert. denied, 483 U.S. 1005, 107 S. Ct. 3228 (1987) (Despite the fact that the debtor would have to spend funds to comply with an order to submit a permitting application and closure plans pursuant to the Resource Conservation and Recovery Act (RCRA), the action was not one to enforce a money judgment and thus was not subject to the automatic stay.).

133. "[W]here a government unit is suing a debtor to prevent or stop violation of fraud, environmental protection . . . or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay." S. Rep. No. 95-989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838; H.R. No. 95-595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. Code Cong. & Admin. News 6299, cited in *Penn Terra*, 733 F.2d at 272.

134. *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1184 (5th Cir. 1986), cert. denied, 483 U.S. 1005, 107 S. Ct. 3228 (1987). Cf. *Midatlantic National Bank v. New Jersey*, 474 U.S. 494, 106 S. Ct. 755 (1986). (imminent harm required to override abandonment power under Bankruptcy Code § 554(a), 11 U.S.C. § 554(a) (1988)).

135. See, e.g., *People of Illinois v. Elec. Util.*, 41 Bankr. 874, 876 (Bankr. N.D. Ill. 1984) ("The legislative history (of § 362(b)(4)) draws no distinction between a state suing under state law and one suing under federal law." The court held that the state could thus sue to enforce the Toxic Substances Control Act without violating the automatic stay.).

136. See, e.g., *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988) (action to fix liability under CERCLA was a valid exercise of the government's police and regulatory power); *Penn Terra Ltd. v. Dept. of Env'tl. Resources*, 733 F.2d 267, 274 (3d Cir. 1984)

CLA has achieved virtually per se status as a regulatory measure.¹³⁷

In *United States v. Nicolet*,¹³⁸ the Third Circuit allowed an action assessing liability under CERCLA section 107 to proceed against the debtor, despite the fact that the judgment, if rendered, could not be enforced because of the bar raised by Bankruptcy Code section 362(b)(5). Nicolet had filed a petition under Chapter 11 shortly after the EPA initiated suit pursuant to CERCLA to recover more than \$1 million in costs already expended and to obtain reimbursement for the future costs incurred in cleanup of an asbestos site. Nicolet argued unsuccessfully that the action was a prohibited one which allowed the government to pursue its pecuniary interest. Despite the fact that the site no longer posed a threat to the public, the action to assess liability was deemed a valid exercise of regulatory power and was excepted from the automatic stay.

Under the *Penn Terra* past act-future harm dichotomy, the action should have been barred; clearly the remedy sought was compensation for past acts, at least insofar as recovery for funds already expended was concerned. The court, however, announced a sweeping conclusion that the legislative history of section 362,¹³⁹ along with CERCLA's regulatory and deterrence functions,¹⁴⁰ reveal that CERCLA actions up to and including the entry of a money judgment are not pecuniary in nature. CERCLA actions are thus encompassed within the police or regulatory exception to the automatic stay.¹⁴¹

*United States v. Mattiace*¹⁴² presented facts similar to those in *Nicolet*. After the EPA expended \$1 million to clean-up the company's waste site pursuant to CERCLA, the company filed for reorganization under Chapter 11. All parties agreed that injunctive relief and imposition of fines were clearly permitted by section 362(b)(4).¹⁴³ The court made short work of the debtor's argument that the action to recover response costs previously incurred as well as punitive damages was not a valid exercise of regulatory power, but rather an impermissible pursuit of pecuniary interest.

The court stated:

("No more obvious exercise of the State's power to protect the health, safety, and welfare of the public (than the DER's injunction) can be imagined."); *United States v. Mattiace Indus. Inc.*, 73 Bankr. 816, 819 (Bankr. E.D. N.Y. 1987) ("CERCLA . . . was clearly enacted to protect the health, safety, and welfare of the public.").

137. *Mattiace*, 73 Bankr. at 819.

138. 857 F.2d at 202.

139. *Id.* at 207.

140. *Id.* at 209, citing H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17, reprinted in 1980 U.S. Code Cong. & Admin. News 6119.

141. *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988).

142. 73 Bankr. 816 (Bankr. E.D. N.Y. 1987).

143. *Id.* at 818.

[G]overnment actions under CERCLA, whether for injunctive relief or for recovery costs, damages, and penalties, are brought pursuant to a statute that was clearly enacted to protect the health, safety, and welfare of the public Even where the United States seeks punitive damages or reimbursement of Superfund cleanup costs in addition to or in lieu of injunctive relief, . . . *the deterrence function of the relief sought* will render the action one to protect the public health, safety, and welfare (and therefore within the section 362(b)(4) exception).¹⁴⁴

After *Mattiace* and *Nicolet*, it would appear that actions under CERCLA sections 104, 106, and 107 fall within the 362(b)(4) exception. It is likely that the rationale of these two cases will be followed and will prevent the automatic stay from being used as a shield by otherwise solvent corporations seeking to escape environmental obligations. As long as the government does not attempt to enforce any judgment regarding the fixing of liability against the debtor, the court will not inquire into whether the action falls within the exception to the exception of 362(b)(5). This result may subordinate private relief to public policy, but such is the nature of cost allocation; those who reap the benefits from the debtor's operations should bear the risks.

3. Conclusion

The automatic stay provision generally protects both the debtor and the creditor; the former is protected through the provision of "breathing room" and the latter through the assurance that the debtor's assets will not be parceled out based on the results of an inequitable race. However, its application to environmental obligations is not easily resolved.

The jurisprudence indicates that the automatic stay is virtually useless in the face of CERCLA actions to enforce clean-up mandates or to assess liability. CERCLA has been deemed regulatory in nature, regardless of whether the action in question is one to enforce an injunction, assess liability, or assess fines. The regulatory nature, coupled with the deterrence function, renders every act up to and including the entry of a money judgment, the provision of injunctive relief,¹⁴⁵ the imposition of fines and penalties, or the initiation of an action to assess liability for reimbursement of clean-up funds expended by the government on behalf of the debtor¹⁴⁶ within section 362(b)(4) and outside of section 362(b)(5). However, it is also clear that the EPA

144. *Id.* at 819 (citations omitted) (emphasis added).

145. 42 U.S.C. § 9606 (1988).

146. 42 U.S.C. §§ 9604, 9607 (1988).

may not enforce any judgment awarded in its favor without returning to the bankruptcy court and requesting further relief from the automatic stay.

Enforcement of state environmental laws when bankruptcy is a factor fares similarly. Here, the court will perform a two step analysis to determine first if the action is one to enforce a money judgment, and if it is not, whether the action is a permissible exercise of regulatory power or a prohibited pursuit of pecuniary interest.

The action will not be deemed a money judgment if the debtor has not been dispossessed of his property and if only injunctive relief is sought. If the analysis proceeds to the second issue, the court focuses on the primary purpose of the action. Some courts apply the "pecuniary interest test" when assessing whether the matter is related to the protection of the state's pecuniary interest or to matters of public policy, while other courts focus on whether the proceeding adjudicates private rights or public policy.¹⁴⁷

An examination of the legislative purposes underlying sections 362(b)(4) and (5) reveals that the provisions were intended to allow the government access to the courts to enforce environmental laws and regulations despite the existence of a bankruptcy proceeding.¹⁴⁸ As a result of *Penn Terra*, in a Chapter 7 liquidation where an injunctive action proceeds, the government has what is in essence a first claim to the remaining funds. Thus, when the pie is divided among the debtor's prepetition creditors, they will find themselves farther down the "serving" line than they would otherwise be.

But, if laws should work inside bankruptcy as they do outside bankruptcy, the government is in essence "bootstrapping" itself into a position in bankruptcy that it would not enjoy outside bankruptcy. Outside bankruptcy, the federal government's lien on the property under CERCLA section 107(1) is inferior to any previously perfected security interests under state law. In bankruptcy, the government gets first claim to the funds. If this discrepancy is objectionable, it is less so than the debtor's ability to evade environmental obligations imposed outside

147. See *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988), wherein the court discusses the two approaches and states that under either, where the state seeks to collect a debt or compensation for reclamation work it has already performed, the action is stayed. However, the action under consideration—one to fix civil liability and damages for violation of a state environmental law—was not stayed.

148. *Donovan v. TMC Indus. Ltd.*, 20 Bankr. 997 (Bankr. N.D. Ga. 1982) (government was permitted to enforce minimum wage provision of the Fair Labor Standards Act despite the debtor's bankruptcy; the court said 11 U.S.C. § 362(b)(4) (1988) was "intended to give the government a super-priority, not a priority to proceeds from the estate, but a priority in terms of having access to any court to enforce laws which promote public health and welfare.").

bankruptcy by invoking procedural protections such as the automatic stay inside bankruptcy.

Again, the issue boils down to policy. From the government's viewpoint, if environmental actions are stayed, the public health and the environment may be jeopardized while the government waits for the stay to be lifted or terminated. The delay in assessing liability and in enforcing an injunction might diminish the likelihood of recovery. Furthermore, delay may require the EPA to dip into Superfund with more frequency, thereby taxing an already dwindling resource. Additionally, the delay may lead the government to attempt to act before the PRP declares bankruptcy. Once again, earlier intervention¹⁴⁹ may mean a further depletion of Superfund.

From the debtor's and his creditor's points of view, if environmental actions are stayed, assets can be channeled into business operations, and the Chapter 11 debtor's prospect of successful reorganization is improved. Otherwise, the debtor may be forced to spend his remaining funds on compliance with a CERCLA section 106 abatement action or in defending himself against a section 107 cost recovery action.

Conversely, permitting an environmental enforcement exception to the automatic stay makes it more likely that the cost of clean-up will be borne by the responsible party or at least by those who benefitted from the debtor's operations, rather than by the public. Since a choice must be made, it is the public's interest that should prevail over the competing creditors' interests.

A preferable way to view this dilemma reconciles the competing values of environmental obligations and bankruptcy protections: the debtor should be held to the same obligations in bankruptcy vis-a-vis environmental regulations as he would be outside bankruptcy. If the debtor cannot operate his business outside bankruptcy without compliance with state and federal environmental laws, neither should he be able to do so in bankruptcy,¹⁵⁰ whether the proceeding is in Chapter 7 or Chapter 11. Bankruptcy was conceived as a procedural mechanism and was "not designed to change the value of substantive rights."¹⁵¹ If one agrees that bankruptcy is procedural rather than substantive, and that one must look outside bankruptcy to determine substantive rights and duties, there is then no real conflict between bankruptcy's private relief and the public policy of environmental regulation. Moreover, this approach incorporates the philosophy of cost-internalization:

149. 42 U.S.C. § 9604 (1988).

150. See Van Patten, *supra* note 68, at 233 ("Debtors ought not to be able to preserve their own economic viability through continuing noncompliance with state and federal environmental laws.") (footnote omitted).

151. Baird, *supra* note 33, at 574.

those who benefit should bear the costs. If made aware that bankruptcy will not provide the desired shelter, corporate America may better plan to meet its environmental obligations through cooperation with state and federal officials, the restructuring of pricing systems so as to pass on costs, the purchase of insurance, or the initiation of environmental management programs.

Although the most recent pronouncements from the circuits deem CERCLA regulatory in nature and thus outside the automatic stay, the Supreme Court has not ruled definitively on the issue. Thus, an amendment to section 362(b) is needed to assure consistency in results, and to build into the procedural protection of bankruptcy a recognition of the substantive requirements of environmental regulations. The bankruptcy judge will then be forced to look outside the confines of bankruptcy law when dealing with substantive matters.

The suggested language of the amendment is as follows: an action by a governmental unit pursuant to 42 U.S.C. sections 9604, 9606, or 9607 [CERCLA], or by a state under similar environmental regulations, up to and including the entry of a money judgment [is not subject to the automatic stay provision].

If the statute is amended, abatement actions and clean-ups can proceed, and the issue of whether or not compliance requires the expenditure of funds will not arise. However, where the action is under CERCLA section 104 and the government then seeks reimbursement, the amended provision would still not allow the enforcement of the judgment without returning to the bankruptcy court. Instead, the issue concerns the priority of payment.

C. Administrative Expense Priority

1. An Explanation

The third area where environmental obligations and bankruptcy policy potentially clash exists in the Bankruptcy Code's scheme for the prioritization of creditors' claims. Whether the obligation is deemed prepetition, and thus paid pursuant to classification as a general unsecured claim, or whether it is considered postpetition and thus entitled to administrative expense priority, is obviously a crucial issue.¹⁵² The priority scheme not only determines who is entitled to a slice of the

¹⁵² See, e.g., D. Cowans, *Bankruptcy Law and Practice* § 12.23, at 551 (1989) [hereinafter, Cowans].

pie¹⁵³ but also into how many slices the pie will be cut and in which order the pieces will be distributed.¹⁵⁴

Secured claimants are entitled to first priority status up to the value of the collateral securing their claim.¹⁵⁵ Next come the administrative expense priorities as set forth in section 503; section 503(b)(1)(A) provides for the actual necessary costs and expenses of preserving the estate. Finally, the remaining claims are satisfied.¹⁵⁶

Only after each layer of administrative expenses is *satisfied in full* do assets trickle down to the general unsecured creditor. It is easy to grasp the impact of designating a multimillion dollar environmental claim as an administrative expense.¹⁵⁷

What expenditures qualify as "actual necessary costs and expenses of preserving the estate" such that the claimant is accorded administrative expense priority? Clearly, expenditures such as guard services, insurance, bookkeeping, deliveries, rent, and license fees constitute administrative expenses.¹⁵⁸ The rationale is that these expenses arise in a transaction with the debtor in possession and, most importantly, are beneficial to the debtor in possession in the operation of the business.¹⁵⁹ Employing the preceding rationale, a majority of courts have designated claims for clean-up costs as necessary and actual to the preservation of the estate and therefore administrative expenses.

2. *The Jurisprudence*

The cases generally fall into one of two categories. The minority view denies administrative priority and perceives clean-up obligations as based on prepetition conduct, compensatory in nature, and without benefit to the estate.¹⁶⁰ The majority approach grants administrative

153. See *supra* note 58 for the broad definition of "claim." The debtor may not defeat a creditor by simply alleging that the debtor's extent of liability is unknown.

154. An administrative expense priority must be provided for in the plan, must be paid on the effective date of the plan, and is nondischargeable. 11 U.S.C. § 1129(a)(9)(A) (1988).

155. 11 U.S.C. §§ 506(a), 506(d) (1988). A creditor also is deemed secured to the extent of the amount of setoff.

156. The remaining claims are paid according to the order established by 11 U.S.C. § 507 (1988). Thus, after the satisfaction of secured claims and administrative expenses, the order of priority is as follows: involuntary case gap claims, specified wages, employee benefit contributions, grain farmers' and fishermen's claims, consumer deposits or lay-aways, and taxes.

157. The issue is important in a Chapter 7 proceeding in case there are any encumbered assets, and in a Chapter 11 proceeding because operations are ongoing.

158. Cowans, *supra* note 152, at 557.

159. See Cowans, *supra* note 152, at 557 and the cases discussed therein.

160. See, e.g., *In re Dant & Russell*, 853 F.2d 700 (9th Cir. 1988); *So. Ry. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985).

expense priority on the rationale that since compliance with environmental laws is a prerequisite to abandonment, the costs expended in achieving compliance and in ultimately assuring the public health are a necessary cost of preserving the estate.¹⁶¹

The minority view has been notably represented. In *In re Dant & Russell, Inc.*,¹⁶² the Ninth Circuit held that the lessor of a contaminated site was not entitled to an administrative expense priority for the prepetition and postpetition costs it expended on behalf of the lessee/debtor¹⁶³ in compliance with state environmental laws and CERCLA. The lessor had spent \$250,000 to mitigate the dangerous conditions on the site pursuant to an agreement with the EPA. Because the debtor's assets were \$3 million and the estimated costs of clean-up were \$10 to 30 million, the court noted that granting administrative priority would "wipe out the claims of all nonpreferred creditors."¹⁶⁴ The court reluctantly held that where costs are expended with no corresponding benefit to the estate, and where damages occur during the prepetition period, the claim is merely compensatory in nature and is not entitled to administrative expense priority.¹⁶⁵

Although (the lessor/owner) asserts that public policy considerations entitle its claim for cleanup costs to administrative expense priority, we acknowledge that Congress alone fixes priorities [U]ntil the (state) legislature enacts such protective provision or until Congress amends sections 503 and 507 to give priority to claims for cleanup costs, we are without authority to create such a priority.¹⁶⁶

The Sixth Circuit rendered a contrary holding in the often cited *In re Wall Tube & Metal Production Co.*¹⁶⁷ In this case, the state of Tennessee was granted administrative expense priority in a Chapter 7 liquidation proceeding for both prepetition inspection and testing expenditures incurred pursuant to a state environmental statute and recovery of response costs pursuant to CERCLA section 107.¹⁶⁸ In so

161. See, e.g., *In re Wall Tube & Metal Prod. Inc.*, 831 F.2d 118 (6th Cir. 1987); *In re Peerless Plating Co.*, 70 Bankr. 943 (Bankr. W.D. Mich. 1987); *In re Stevens*, 68 Bankr. 774 (Bankr. D. Me. 1987); *In re Pierce Coal and Constr., Inc.*, 65 Bankr. 521 (N.D. W. Va. 1986); *In re T.P. Long Chem. Inc.*, 45 Bankr. 278 (N.D. Ohio 1985).

162. 853 F.2d 700 (9th Cir. 1988).

163. The lessor/owner argued that it was entitled to an administrative expense priority because it was jointly liable under § 101(21) of CERCLA.

164. *Dant*, 853 F.2d at 703.

165. *Id.* at 709. Cf. *In re Stevens*, 68 Bankr. 774 (Bankr. D. Me. 1987), wherein the court held that the benefit to the *creditor* was the abatement of danger to the public.

166. *Dant*, 853 F.2d at 709. The Third Circuit reached a similar conclusion in *So. Ry. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985).

167. 831 F.2d 118 (6th Cir. 1987).

168. 42 U.S.C. § 9607 (1988).

deciding, the Sixth Circuit reversed the Bankruptcy Court¹⁶⁹ and held that since the existence at the site of an imminent and identifiable harm to the public would have prevented abandonment by the trustee,¹⁷⁰ the cost of abating the harm was entitled to administrative priority.¹⁷¹

[I]f the Wall Tube trustee could not have abandoned the estate in contravention of the State's environmental law, neither then should he have *maintained or possessed* the estate in continuous violation of that same law. Otherwise, the result avoided in *Midatlantic* would (and in this case did) remain an ongoing potentially disastrous health hazard without remedy from those at fault. The only difference here is that the danger arose because of the trustee's and the debtor's failure to correct the violation, not because of the trustee's abandonment power as in *Midatlantic*. We find that difference unpersuasive¹⁷²

The minority view looks to the date of the conduct causing the harm as the crucial event, while the majority view focuses on the date the costs were incurred, regardless of when the damage occurred.¹⁷³ The issue also turns on the reading given to *Midatlantic*. The minority reads the case narrowly¹⁷⁴ while the majority reads broadly the limit that *Midatlantic* places on the trustee vis-a-vis abandonment.¹⁷⁵ Certainly, it is the latter view which is beneficial to the government; since the cleanup order itself may provoke the filing of the petition, the expenditures will be deemed postpetition.

The more recent cases generally allow administrative expense priority for the actual costs of clean-up which are necessary to prevent future

169. *In re Wall Tube and Metal Products Co.*, 56 Bankr. 918 (Bankr. E.D. Tenn. 1986).

170. *Wall Tube & Metal*, 831 F.2d at 122. For this proposition, the court cited and discussed *Midatlantic National Bank v. New Jersey*, 474 U.S. 494, 106 S. Ct. 755 (1986).

171. The court also cited 28 U.S.C. § 959(b) (1988), which provides that the "trustee . . . including a debtor in possession, shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated."

172. *In re Wall Tube & Metal Prod. Co.*, 831 F.2d 118, 122 (6th Cir. 1987) (emphasis in original).

173. See generally Massin, *Recent Developments in Bankruptcy and the Cleanup of Hazardous Waste*, 19 *Env'tl. L. Rep.* 10427 (1987).

174. See, e.g., *In re Dant & Russell*, 853 F.2d 700 (9th Cir. 1988) and *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988), both holding that the limit placed on the trustee's abandonment powers under *Midatlantic* is narrow. Both cases cited in *In re FCX, Inc.*, 96 Bankr. 49 (Bankr. E.D. N.C. 1989).

175. See, e.g., *Wall Tube & Metal*, 831 F.2d at 118; *FCX*, 96 Bankr. at 49; *In re Stevens*, 68 Bankr. 774 (Bankr. D. Me. 1987); *In re Peerless Plating Co.*, 70 Bankr. 943 (Bankr. W.D. Mich. 1987).

harm.¹⁷⁶ Thus, administrative expense priority has been granted to a purchaser (a PRP) for past and future response costs undertaken pursuant to CERCLA;¹⁷⁷ to the state where such action was necessary to protect the public from "imminent and identifiable danger;"¹⁷⁸ and to the state for postpetition clean-up costs and civil penalties assessed for prepetition activity.¹⁷⁹

The courts, however, have not allowed all costs expended on clean-up to enjoy such priority. Rather, the administrative expense has been limited to clean-up costs that were necessary to abate the immediate threat to the public.¹⁸⁰

In view of the foregoing, the issue should perhaps be phrased as one of characterization. "The outcome turns on whether the court characterizes the threat as an imminent or immediate threat to the public health and safety a characterization that depends entirely on the views of the court in the particular jurisdiction."¹⁸¹

3. Conclusion

One rationale for the administrative expense provision is that the costs expended in keeping the debtor in operation are incurred in the collective interest of the general unsecured creditors. After all, if the debtor remains operational, the size of the pie may increase, ultimately benefitting the unsecured creditors.¹⁸² Furthermore, if the debtor must comply with environmental regulations outside bankruptcy to remain

176. Cf. *Reading Co. v. Brown*, 391 U.S. 471, 88 S. Ct. 1759 (1968). In *Reading*, the tort victim's claim arose during the bankruptcy proceeding and was thus entitled to administrative expense priority. If the claim had arisen prepetition, he would have been a mere general unsecured creditor. If the event had occurred after the completion of the proceeding, he would have been entitled to payment in full.

177. *In re Hemingway Transport Inc.*, 73 Bankr. 494 (Bankr. D. Mass. 1987) (Although the waste was dumped prepetition, the cause of action under CERCLA arose postpetition when the property was conveyed to the purchaser or when the purchaser expended funds for clean-up.)

178. *In re Stevens*, 68 Bankr. 774 (Bankr. D. Me. 1987).

179. *In re Chateaugay*, 112 Bankr. 513 (Bankr. S.D. N.Y. 1990).

180. See, e.g., *In re FCX, Inc.*, 96 Bankr. 49 (Bankr. E.D. N.C. 1989) (North Carolina and the EPA were accorded priority status for funds expended in abating the immediate threat to the public from five tons of buried pesticides.). The courts have imposed one further requirement: the funds must be expended, at least in part, prior to the application for administration expense priority. *United States v. Price*, 577 F. Supp. 1103 (D. N.J. 1983).

181. Note, *International Environmental Bankruptcy*, 23 Vand. J. Transnat'l L. 345, 362 (1990).

182. See Baird, *supra* note 33, at 698. But see *In re Vernon Sand & Gravel, Inc.*, 93 Bankr. 580, 583 (Bankr. N.D. Ohio 1988) in which the court held that the effect of granting an administrative expense priority for reclamation work on the debtor's business operations was "irrelevant" in deciding whether the priority status was proper.

in operation, compliance should not be altered by the mere filing of the bankruptcy petition. The costs should be borne both inside and outside bankruptcy by those who benefit from the operation of the business.

If one views compliance with environmental obligations as a cost of doing business, one would agree that such obligations ought to receive an administrative expense priority. Likewise, if one believes that the purpose of bankruptcy is to assure fairness among similarly situated creditors, one would also agree that environmental obligations that arise prepetition should not be granted an administrative expense, in spite of the fact that costs of compliance are not incurred until postpetition. Once again an impasse is reached, and a policy decision must be made. And again, the Bankruptcy Code must give way to the public's safety, at least where the clean-up is undertaken to abate an imminent and identifiable harm.¹⁸³

Another more subtle rationale exists for granting clean-up costs an administrative expense priority: before clean-up, the contaminated property has a negative value; after clean-up, the original value is restored at the government's expense. Furthermore, since property cannot be abandoned where there is a violation of an environmental law designed to protect the public health and safety, it cannot be possessed or maintained in violation of those laws. Utilizing this approach, the courts have been willing to subordinate the bankruptcy policy of treating similarly situated parties alike to assure that the responsible party, rather than the public, bears the cost of environmental wrongdoing.

The resulting impairment of the Bankruptcy Code's priority scheme extracts some measure of costs. Postpetition creditors, who supply goods and services to the Chapter 11 debtor and are thus entitled to share pro rata if administrative expenses exceed available funds, may be less eager to provide the services the debtor in possession requires to stay in business.¹⁸⁴ In an extreme case, the reorganization may fail, forcing conversion to Chapter 7 proceedings. Despite such ominous possibilities, noncompliance with environmental obligations is far more alarming.

The impetus for legislative reconciliation is apparent. The amended version of Bankruptcy Code section 503 would add the following italicized words to the present list of administrative expenses: "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions rendered after commencement of the estate,

183. See also *In re Stevens*, 68 Bankr. 774, 783 (Bankr. D. Me. 1987), citing *Pierce Coal and Constr. Inc.*, 65 Bankr. 521, 531 (Bankr. N.D. W. Va. 1986) ("[I]n some circumstances the priorities of the Bankruptcy Code must give way to laws designed to protect the public health and safety.").

184. See *Abandonment*, *supra* note 86, at 523.

and reasonable costs expended in compliance with 42 U.S.C. sections 9606 and 9607 [CERCLA] and applicable state environmental regulations. Because the circuits are not in agreement regarding resolution of this issue, the amendment would assure uniform treatment. Additionally, the bankruptcy court would be required to look beyond the Bankruptcy Code to determine substantive rights and duties.

Although the provision would elevate the government's cost recovery action to priority status at the expense of general unsecured creditors, it may be justified in that, at least in a Chapter 11 reorganization, those who benefit from the continued operation of the debtor are the ones who should bear the costs and risk of operations.¹⁸⁵ Although CERCLA is intended to remediate past harms, until the violator/debtor has complied with its mandate, a "continuing offense" occurs, and the risk appropriately falls upon the creditors.

The government is granted a lien for *prepetition* judgments under CERCLA section 107.¹⁸⁶ Presently, the lien is of little practical significance in bankruptcy because it is inferior to all security interests previously perfected under state law. To remedy the situation, CERCLA section 107(1) must be amended to provide a "superlien" for the costs of removal or remedial actions which takes priority over even previously perfected state liens.¹⁸⁷ Several states have already enacted similar provisions.¹⁸⁸ Because the superlien would "pass through" bankruptcy,¹⁸⁹ the government would be first in line when the "pie" that is the debtor's estate is sliced and served. If the amount of the superlien is limited to the amount which the clean-up benefits the property, rather than to the full cost of expenditures, the trustee is no worse off than he is without the superlien. Since the trustee could not abandon the property without compliance with the environmental obligations, and since no one would purchase property having a negative value, the estate which lacks unencumbered assets to finance the clean-up would be at an impasse. If the government expends its own funds and then seeks reimbursement, the property enjoys a positive value and may be sold by the trustee. The trustee *and* the general unsecured creditors are no

185. This is not a novel approach. In *Reading Co. v. Brown*, 391 U.S. 471, 88 S. Ct. 1759 (1968), Justice Harlan opined that the claim of a postpetition tort victim was a cost of keeping the debtor's business operational. He stated, "Existing creditors are, to be sure, in a dilemma not of their own making, but there is no obvious reason why they should be allowed to attempt to escape that dilemma at the risk of posing it on others [tort victims] equally innocent."

186. 42 U.S.C. § 9607 (1988).

187. A bill which would have created such a superlien status was defeated in 1983. See H.R. 2767, 98th Cong., 1st Sess. (1983).

188. See Eppling, *Environmental Liens in Bankruptcy*, 44 *Bus. Law.* 85 (1988).

189. 11 U.S.C. § 506(d)(2) (1988).

worse off, and the government's position is improved to the extent it has benefitted the property.

Since all actions to perfect liens are stayed under section 362 upon filing of the petition, the superlien will only be relevant where it is perfected *prior* to the filing. Moreover, the superlien would not be applicable unless the government conducted the cleanup itself, rather than ordering the violator to do so. Although the superlien would go a long way toward solving the conflict between bankruptcy and environmental obligations, it is not a panacea. The measures discussed in the various sections of this paper are designed to work together collectively.

D. Discharge¹⁹⁰

1. Overview

The discharge provisions' "fresh start" policy is the siren that lures many debtors into filing for bankruptcy.¹⁹¹ The provisions differ depending on whether the debtor has filed under Chapter 7 or 11.

In a Chapter 7 case, obligations of the individual debtor are discharged pursuant to Bankruptcy Code section 727(a).¹⁹² Environmental debts resulting from willful or malicious injury or imposed through fines remain nondischargeable under Bankruptcy Code section 523.¹⁹³ In a Chapter 11 case, the discharge provision, perhaps more aptly termed a restructuring provision, is in section 1141(a). Unless the plan provides otherwise, the debt is discharged. For purposes of this paper, a claim¹⁹⁴ is discharged under Chapter 7 to the extent it arose before the filing of the petition¹⁹⁵ and under Chapter 11 if it arose before the

190. Discharge is to be distinguished from abandonment. The former affects personal obligations whereas the latter addresses obligations that run with the property.

191. See Baird, *supra* note 33, at 749, wherein the author states, "The ability of individuals to discharge existing debts probably also explains why there are so many bankruptcy cases each year."

192. Corporate debtors are not granted a discharge in a Chapter 7 case as their interests are deemed adequately protected by state liquidation procedures. See *supra* note 65 and accompanying text.

193. 11 U.S.C. § 523(a)(6) (1988): discharge is denied "for willful and malicious injury by the debtor to another entity or to the property of another entity"; 11 U.S.C. § 523(a)(7) (1988): discharge is denied "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

194. See *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705 (1985), defining an obligation to comply with a state court injunction as a pecuniary interest, i.e. a "claim." Hence, it was dischargeable in bankruptcy. See *supra* note 58 for the definition of claim.

195. Postpetition debts may qualify as administrative expenses. For discussion see *supra* section IV, subsection C.

confirmation of the plan. This discharge affects all creditors except those with secured status, whether or not a proof of claim is filed.¹⁹⁶

2. *Pecuniary v. Nonpecuniary Obligation*

As with the automatic stay provision, the case law interpreting the meaning of the term "discharge" as it relates to environmental obligations focuses on whether or not the claim is characterized as a money judgment.¹⁹⁷ Since *Kovacs*¹⁹⁸ has been discussed at length previously in this paper,¹⁹⁹ mention of it here is abbreviated. The significance of *Kovacs* was the Court's finding that the appointment of a receiver necessarily limited the Chapter 7 individual debtor's obligation under a state court ordered injunction ordering clean-up to the payment of money. Since the obligation was a prepetition "claim," it was dischargeable in bankruptcy.

Further illumination on this subject is found in *United States v. Whizco*²⁰⁰ where the Sixth Circuit distinguished the receivership issue in *Kovacs* and ignored the *Penn Terra* distinction between cost recovery and injunction relief. The individual debtor and several mine companies for which he served in an executive capacity were in violation of the Surface Mining Control and Reclamation Act (SMCRA).²⁰¹ The federal government ordered reclamation to abate damage at one of the sites. The individual debtor then filed for bankruptcy under Chapter 7, and subsequently the district court held that the injunction was a debt dischargeable in bankruptcy.

The Sixth Circuit found that only part of the obligation was subject to discharge. To the extent that the debtor could comply with the injunction *only* by the payment of money, the obligation was a claim dischargeable in bankruptcy.²⁰² But to the extent the debtor could comply without spending money, the injunction did not give rise to a right to

196. 11 U.S.C. § 501 (1988).

197. See, e.g., *In re Commonwealth Oil Refining, Inc.*, 805 F.2d 1175 (5th Cir. 1986), cert. denied, 483 U.S. 1005, 107 S. Ct. 3228 (1987). (The Chapter 11 debtor's obligation to submit a "part B" application under RCRA and to submit a plan of closure was nonpecuniary and thus *not* subject to the automatic stay.)

198. *Kovacs*, 469 U.S. at 274, 105 S. Ct. at 705.

199. See *supra* sections IV, subsections A and B.

200. 841 F.2d 147 (6th Cir. 1988).

201. 30 U.S.C. §§ 1201-1328 (1982). The reasoning of the case concerning the applicability of the discharge provision to injunctive relief should also apply in cases construing hazardous waste laws. Massin, *Recent Developments in Bankruptcy and the Cleanup of Hazardous Waste*, 19 *Envtl. L. Rep.* 10427, 10429 (1987).

202. *Whizco*, 841 F.2d at 150.

payments and therefore was not dischargeable.²⁰³ "To the extent [the debtor] can act personally, he is not discharged."²⁰⁴

The court was unable to reconcile the conflicting policies of bankruptcy law and environmental obligations and reluctantly chose to favor the former.²⁰⁵ In reaching this result,²⁰⁶ the court distinguished a monetary from a nonmonetary obligation, but ignored the *Penn Terra* distinction between past acts and future harm. If the *Penn Terra* dichotomy had been utilized in *Whizco*, the court may have characterized the obligation to reclaim the land as one to prevent future harm. If so, the obligation would be nonpecuniary, and consequently nondischargeable, despite the fact that it would require the expenditure of funds.²⁰⁷

The *Penn Terra* dichotomy, although suffering from its own imperfections,²⁰⁸ is preferable to the *Whizco* monetary-nonmonetary distinction. It is easily agreed that a debtor must comply with environmental laws so long as it remains in business.²⁰⁹ One could argue that an abatement order, obviously directed to future operations, is not a claim for purposes of the Bankruptcy Code and is thus not subject to discharge.²¹⁰

203. *Id.* at 151.

204. *Id.* The court indicated that if the debtor obtained equipment in the future and reengaged in mining operations, the obligation would be held nondischargeable to the extent he could comply with the injunction without spending money.

Notably, however, at the time of the decision the debtor was 63 years old, owned only limited exempt property, and his only income was Social Security. Compliance was practically "impossible." Note, *United States v. Whizco*, 20 *Env'tl. L. Rep.* 207, 222 (1990).

205. *United States v. Whizco*, 841 F.2d 147, 151 n.5 (6th Cir. 1988). "We are not unmindful of the policy problems of allowing a mine operator to discharge his obligation to reclaim his mine. However, policy decisions are the responsibility of Congress, which could easily modify the Bankruptcy Code so that the debtor may not discharge his obligations to reclaim the environment."

206. For a similar result, see *In re Robinson*, 46 *Bankr.* 136 (*Bankr. M.D. Fla.* 1985), *rev'd* on other grounds, *United States v. Robinson*, 55 *Bankr.* 355 (*Bankr. M.D. Fla.* 1985) (because a remedial order to restore the marshlands would require an expenditure of money, the debt was pecuniary and therefore dischargeable).

207. See generally, Zabaraukas, *Bankruptcy Law: Toxic Bankruptcy and Life After Kovacs and Midatlantic*, 1987 *Ann. Surv. Am. L.*, 749, 763 (1988). The author presents a persuasive argument that *Whizco* led to a "strategy of delay." Since injunctions are not subject to the automatic stay (by virtue of *Penn Terra*) where the judgment is entered against the Chapter 11 debtor *during* the bankruptcy case, compliance would be necessary. However, says the author, under *Whizco*, if the judgment is not entered until *after* confirmation of the plan, the injunctive relief would require the expenditure of post-discharge funds. Consequently, it would be considered a claim which was discharged.

208. See *infra* section IV, subsection B.

209. Baird, *supra* note 33, at 769.

210. *Id.* at 771.

3. *Prepetition v. Postpetition Claims*

Whether a claim is characterized as prepetition, and thus subject to discharge, or postpetition, and thus subject to an administrative expense priority, is a simple matter where the creditor is an accident victim or business person who voluntarily or involuntarily dealt with the debtor. Much more difficult is the task of pinpointing *when* the obligation under CERCLA or state environmental laws arises for purposes of determining dischargeability in bankruptcy.

The most recent pronouncement on this subject came in the context of a declaratory judgment action. The court in *In re Chateaugay Corp.*²¹¹ established a clear cut rule: unless a prepetition event, described as a release or threatened release of hazardous waste, occurs *prior* to the filing of the petition, any subsequent liability under CERCLA would not be dischargeable in bankruptcy.²¹² Further, if the release or threatened release did occur prior to bankruptcy, the government would not prevail on any argument that the claim was not "ripe" and therefore not dischargeable in bankruptcy unless the EPA took actual action prepetition.²¹³ The key then, under *Chateaugay*, is not the date the EPA acts, but rather the date the release or threatened release occurs.²¹⁴

4. *Conclusion*

To be dischargeable in bankruptcy, the obligation must be deemed pecuniary *and* prepetition. To be deemed nondischargeable, the debt must be *either* nonpecuniary *or* postpetition. After *Whizco*, the debtor may have an incentive to delay the enforcement action. Since the court decided the issue of dischargeability on the basis of pecuniary versus nonpecuniary performance, rather than looking to the *Penn Terra* dichotomy of past act versus future harm, any order entered after the conclusion of the bankruptcy will be deemed discharged to the extent it requires the expenditure of postpetition funds.

A second difficulty in discharge concerns classifying the claim as prepetition or postpetition. The courts have held that the claim is deemed to arise prepetition whenever the release or threatened release occurred prior to bankruptcy, regardless of when the EPA attempted to enforce its duty under CERCLA. If the release is discovered postpetition, but occurred prepetition, the obligation may be dischargeable to the extent

211. 112 Bankr. 513 (Bankr. S.D. N.Y. 1990).

212. *Id.* at 521.

213. *Id.* at 522.

214. The court did acknowledge, however, that injunctive relief which carries with it no right of payment for clean-up or other remedial costs does not fall within the Bankruptcy Code and is not dischargeable. Conversely, governmental clean-up followed by an assessment of costs is subject to discharge. *Id.* at 523.

it is deemed pecuniary under *Whizco*. Early enforcement actions will become crucial.

With the foregoing in mind, the wisest course for the EPA may be to order abatement under CERCLA section 106. As long as the obligation is considered nonmonetary, it is nondischargeable. Even so, the court will look to substance over form and is likely to find a dischargeable monetary obligation where the debtor, as in *Whizco*, cannot fulfill the obligation personally, either because he lacks unencumbered assets or because a receiver has been appointed under state law.

Finally, if environmental obligations are to remain immutable inside of bankruptcy, legislative action is needed.²¹⁵ Exemption of environmental obligations from discharge would eliminate the inequities caused when firms utilize funds that could be earmarked for environmental compliance for internal matters.²¹⁶ Prohibiting discharge in a Chapter 7 case and requiring the inclusion and prompt payment of environmental obligations in a Chapter 11 plan would prompt potential debtors to reconsider their strategy. If bankruptcy will not provide an escape from liability, and since creditors may incur joint and several liability under CERCLA, the no-discharge provision will a) eliminate any pecuniary advantage in bankruptcy, and b) cause creditors to monitor debtors' compliance.²¹⁷ Admittedly, the no-discharge policy would preclude debtors from escaping liability. Whether or not one views this result as desirable again depends on one's views regarding the proper role of bankruptcy. Present legislative exceptions for dischargeability of the debts of an individual debtor reflect societal policy that certain debts, including certain taxes, frauds, alimony, willful and malicious injuries, and fines and penalties²¹⁸ should remain immutable in bankruptcy. Societal views concerning environmental obligations have changed since the enactment of the Bankruptcy Code in 1978. Perhaps now is the appropriate time to urge legislative action.

V. RESOLVING THE CONFLICT: A CONCLUSION

Although the judiciary has struggled mightily to resolve the conflict between the policies embodied in the Bankruptcy Code, CERCLA, and

215. "Whether the obligations involved are subject to discharge should not depend on who is in control of the debtor's property or whether the site poses a present and ongoing threat to public health and safety. Clearly defined statutes should resolve conflicts so that all interested parties can predict the outcome prior to a bankruptcy proceeding." Note, *supra* note 204, at 227.

See also *United States v. Whizco*, 841 F.2d 147, 151 n.5. (Congress could easily exempt environmental obligations from discharge.)

216. See generally Note, *supra* note 204, at 225.

217. *Id.*

218. See generally 11 U.S.C. § 523(a) (1988).

state environmental statutes, the results have been less than satisfactory. If one agrees bankruptcy's *primary* role is procedural and that all substantive rights in bankruptcy should be governed by the applicable federal and state regulations operative outside bankruptcy, a solution is clearly needed.

Thus far, what reconciliation has occurred has been at the price of impairment of one of the competing interests. Moreover, in some cases "reconciliation" has resulted in the frustration of *both* the policies of the Bankruptcy Code and those of CERCLA, inconsistent rulings, and a resultant decline in ability of the parties (the debtor and the EPA) to develop effective strategies for the future.

The power to provide a solution lies with Congress. Only by amendments to the Bankruptcy Code, and to a lesser degree, CERCLA, can this problem be resolved. Amendments to the Bankruptcy Code should prohibit abandonment of property unless there is substantial compliance with environmental regulations. An amendment to the automatic stay would render that provision inapplicable to all actions undertaken pursuant to CERCLA and state environmental statutes up to and including the entry of a money judgment. Reasonable costs expended in compliance with CERCLA and state obligations would receive an administrative expense priority. Finally, environmental obligations should be deemed nondischargeable. In tandem with these amendments, CERCLA must be amended to grant the government a superlien for the amount by which the clean-up has benefitted the property.

During the interim, the judiciary has tools available to construe existing statutory provisions to best effectuate the public policy embodied in CERCLA and state environmental laws. First, the bankruptcy judge should utilize his power of dismissal of the petition under Bankruptcy Code section 305²¹⁹ where the government can show that the bankruptcy process is being abused. Because a Chapter 7 case may be dismissed under section 707(2) "only after notice and hearing and only for cause,"²²⁰ the parties may have the opportunity and the incentive to reach amicable resolution of environmental obligations outside bankruptcy. The same result may be obtained in a Chapter 11 case under 1112(b).²²¹ A second avenue available to the bankruptcy judge is Bank-

219. 11 U.S.C. § 305(a)(1) (1988) states that after notice and a hearing, the judge may dismiss the case, or suspend all proceedings, if "the interests of the creditors and the debtor would be better served by such dismissal or suspension."

220. 11 U.S.C. § 707(a) (1988). The section then sets forth an illustrative list. See *In re Commercial Oil Serv. Inc.*, 58 Bankr. 311 (Bankr. N.D. Ohio 1986), where the court refused to dismiss the voluntary Chapter 7 case.

221. 11 U.S.C. § 1112(b) (1988) provides, in pertinent part, that the court may dismiss a case if it is "in the best interest of creditors and the estate, for cause." An illustrative list follows.

ruptcy Code section 105.²²² Whether or not the bankruptcy stay provision is amended as suggested, the bankruptcy court will continue to have the power to stay environmental obligations in exceptional circumstances. It is acknowledged that because CERCLA's objectives may not outweigh all interests in all cases, such flexibility is needed. Third, the court may invoke 28 U.S.C. section 959 to require the trustee, including a debtor in possession, to manage and operate property in his possession in compliance with state environmental laws.²²³ Finally, the bankruptcy court may subordinate a claim for purposes of distribution under the doctrine of equitable subordination contained in Bankruptcy Code section 510.²²⁴ The government's claim will benefit from the change in priority.

The conflict between environmental regulations and bankruptcy policy is essentially one over loss distribution. CERCLA assesses liability on PRPs regardless of their ability to pay and thus protects the public and Superfund. The Bankruptcy Code establishes an orderly prioritization schedule of payment that distinguishes creditors based only on the type, but not the content, of the claim. The issue then is not only who gets a piece of the pie, but how one determines the number and size of the slices. As long as bankruptcy offers a respite from environmental obligations, the conflict will remain unresolved. Legislative reconciliation, and in the interim judicial discretion, is needed to create some harmony out of what is at present a source of discord.

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222. "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (1988).

223. 28 U.S.C. § 959(b) (1988) provides, "[A] trustee . . . appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee . . . according to the valid laws of the State in which the property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." See also *Midatlantic National Bank v. New Jersey*, 474 U.S. 494, 106 S. Ct. 755 (1985).

224. 11 U.S.C. § 510(c)(1) (1988) states in pertinent part that after notice and a hearing, the court may "under principles of equitable subordination subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest."