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Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup

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NOTE

Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup

I.	INTRODUCTION	1037
II.	DEFINING THE PROBLEM	1041
	A. <i>Identifying the Context</i>	1041
	1. Automatic Stay	1042
	2. Dischargeability	1051
	3. Abandonment	1054
	4. Dismissal	1057
	5. Priorities	1059
	B. <i>Characterizing the Conflict</i>	1061
III.	PROPOSING A SOLUTION: A BALANCING APPROACH ...	1063
	A. <i>Qualitative Differences</i>	1065
	B. <i>Quantitative Differences</i>	1074
	C. <i>Good Faith</i>	1076
	D. <i>Application</i>	1081
IV.	CONCLUSION	1084

I. INTRODUCTION

In recent years, the critical risks of improper storage and disposal of hazardous and toxic substances have become frighteningly apparent,¹ and the regulation of hazardous waste disposal has be-

1. In December 1984 over 2000 people were killed in Bhopal, India when invisible methyl isocyanate gas escaped from a Union Carbide underground storage tank. The possibility of the runaway reaction that caused the tank's failure apparently had been reported to managers of a similar Union Carbide factory in West Virginia. See *Union Carbide Had Been Told of Leak Danger*, N.Y. Times, Jan. 25, 1985, at 1, col. 5.

come increasingly comprehensive and complex, on both the federal and state level. On the federal level, the Resource Conservation and Recovery Act (RCRA)² and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or the Superfund Act)³ together provide a comprehensive statutory and

In 1978 residents of the Love Canal area in New York suffered serious health problems as a result of chemical waste leaking into their basements from a nearby landfill. Hundreds of residents were evacuated and relocated at government expense, and the wastes were removed and deposited at another landfill. A recent Environmental Protection Agency (EPA) report found that the new landfill is now leaking, and wastes are migrating off-site, threatening a nearby residential neighborhood. See *EPA Draft Report Says Love Canal Wastes Dumped in Leaking Land Disposal Facility*, [Current Developments] 15 ENV'T REP. (BNA) No. 27, at 1149-50 (Nov. 2, 1984). See generally S. REP. No. 848, 96th Cong., 2d Sess., at 8-10 (describing details of Love Canal disaster).

The Tennessee Valley Authority is launching a major program aimed at educating the public about hazardous waste management. Tennessee produces 19 billion pounds of hazardous waste per year, which ranks the state among the top 10 producers in the nation. The *Tennessean*, Jan. 18, 1985, at B2, col. 2.

2. 42 U.S.C. §§ 6901-6987 (1982), amended by Pub. L. No. 98-616, 98 Stat. 3221 (1984). RCRA regulates the treatment, storage, and disposal of "hazardous waste," establishing a "cradle-to-grave" manifest system designed to keep track of hazardous wastes from their creation until their permanent disposal and even to monitor them thereafter. See RCRA §§ 3001-3007, 42 U.S.C. §§ 6921-6927 (1982). The 1984 RCRA amendments substantially broaden the scope of the statute and tighten the regulatory restraints. For instance, the elimination of the small generator exception will subject many more facilities to the regulations. RCRA § 3001(d), 98 Stat. at 3248-49. In addition, the amendments will cover a much larger field of substances because "hammer" provisions automatically assign a hazardous rating to substances that the EPA does not classify by a set deadline. RCRA §§ 3004(d), (e), (f)(3), (g)(6), 98 Stat. at 3227-31. Finally, new enforcement provisions allow more citizen suits, RCRA § 7003, 98 Stat. at 3271-72, and authorize administrative orders or suits to compel "corrective action" after a leak has occurred, RCRA § 3008(h), 98 Stat. at 3257-58. See *President Reagan Signs RCRA Amendments; EPA to Adopt Statutory Deadlines as Rules*, [Current Developments] 15 ENV'T REP. (BNA) No. 29, at 1243 (Nov. 16, 1984).

3. 42 U.S.C. §§ 9601-9657 (1982). CERCLA establishes the "Superfund" to finance cleanup of some sites and requires certain responsible parties to reimburse either the fund or the parties responsible for financing the cleanup. See generally *infra* notes 180-210 and accompanying text. CERCLA, which will expire on September 30, 1985, currently provides a fund of \$1.6 billion. The EPA estimates that the cost of cleaning up 1800 dump sites will be \$22.7 billion. See *Superfund Law, Clean Water Act, Due to Expire Sept. 30, Emerge as Top Environmental Priorities for 99th Congress*, [Current Developments] 15 ENV'T REP. (BNA) No. 37, at 1481 (Jan. 11, 1985) [hereinafter cited as *Superfund Law*]. The United States Congress considers CERCLA reauthorization a top priority. Former EPA Administrator William Ruckelshaus expects reauthorization in some form. *Ruckelshaus Says Law Revisions Depend on Better Relations with Interest Groups*, [Current Developments] 15 ENV'T REP. (BNA) No. 28, at 1228-29 (Nov. 9, 1984). Several reauthorization bills under consideration include proposals to increase funding, to increase industry taxes, and to impose a tax on waste disposal. See *Sikorski Offers Comprehensive CERCLA Bill; Waste Tax Bills Introduced in House, Senate*, [Current Developments] 15 ENV'T REP. (BNA) No. 50, at 2183 (Apr. 12, 1985).

The EPA notes that CERCLA probably would provide the main statutory response if a gas leak similar to the leak in Bhopal, India happened in the United States. Even with the

regulatory scheme designed to cleanup existing hazardous waste disposal sites and to prevent the growth of future dangerous sites.⁴ Other federal statutes address in a more general way the problem of toxic⁵ or hazardous substances in the air⁶ and water.⁷ In addition, both RCRA and CERCLA allow, encourage, and even demand state participation in establishing and enforcing hazardous waste regulations on a local level.⁸ On the state level, regulatory schemes are similar to the federal laws,⁹ or even more stringent.¹⁰

1984 Amendments, RCRA still does not cover air emissions from underground tanks. See *Task Force Studies Adequacy of Statutes to Prevent Accidents Similar to Bhopal Case*, [Current Developments] 15 ENV'T REP. (BNA) No. 38, at 1508 (Jan. 18, 1985). Congressional staff members expect that the horror and immediacy of the Bhopal incident will affect Congress' deliberations in reauthorizing CERCLA. See *Superfund Law*, *supra*.

4. CERCLA addresses the problem of cleaning up existing dump sites, focusing on the release of hazardous substances. *E.g.*, CERCLA § 104(a), 42 U.S.C. § 9604(a) (1982). The Act broadly defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." CERCLA § 1011(22), 42 U.S.C. § 9601(22) (1982). Hazardous substances include substances designated under other federal environmental statutes, including RCRA, as well as substances designated under CERCLA as those that "may present substantial danger to the public health or welfare or the environment." CERCLA §§ 102(a), 101(14), 42 U.S.C. §§ 9602(a), 9601(14) (1982). RCRA defines the substances subject to regulation more narrowly than CERCLA because RCRA applies only to "solid wastes" that qualify as hazardous under the regulations. RCRA §§ 104(5), 3001, 41 U.S.C. §§ 6903(5), 6921 (1982). The 1984 amendments to RCRA expand its scope by applying automatic deadlines for designating hazardous substances. See *supra* note 2.

The RCRA and CERCLA programs may be merging because the EPA intends to apply RCRA standards to the superfund program. Because a substantial number of sites accepting superfund wastes violate RCRA standards, the creation of new threats out of old ones endangers the effective functioning of the entire superfund program. See *Hedeman Scores Land Disposal Facility Owners, Warning They Jeopardize Superfund Credibility*, [Current Developments] 15 ENV'T REP. (BNA) No. 29, at 1244 (Nov. 16, 1984).

This Note uses the terms "hazardous waste" and "hazardous substances" to refer to substances that would qualify as hazardous under either CERCLA or RCRA.

5. The Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982), regulates the development, testing, and use of chemical substances. The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982), regulates pesticides and similar toxic substances.

6. *E.g.*, Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982).

7. *E.g.*, Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982), as amended by the Clean Water Act of 1977, 91 Stat. 1567 (1977); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-10 (1982).

8. See Florini, *Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?*, 6 HARV. ENVTL. L. REV. 307 (1982); *Special Report: Success of Georgia Environmental Program Shows States Can Be Fully in Charge of Federal Programs*, Ledbetter Says, [Current Developments] 15 ENV'T REP. (BNA) No. 30, at 1291 (Nov. 23, 1984). The level of state participation may not always be as high as desirable. See, *e.g.*, *EPA Says States Need 84 Percent Staff Boost Over Fiscal 1983 Levels for Cleanup Program*, [Current Developments] 15 ENV'T REP. (BNA) No. 34, at 1396 (Dec. 21, 1984).

9. See, *e.g.*, New Hampshire Hazardous Waste Management Act, N.H. REV. STAT. ANN. § 147-A (Supp. 1983).

10. See, *e.g.*, New Jersey Environmental Cleanup Responsibility Act, N.J. STAT. ANN.

With the increasingly comprehensive federal regulation of the hazardous waste disposal industry, the cost of safe and legal disposal has skyrocketed.¹¹ The huge costs have forced some companies out of business¹² and have prompted other companies to evade regulations by using illegal disposal methods.¹³ Often the companies go into bankruptcy. Conflicts then arise between the goals, policies, and provisions of the Federal Bankruptcy Code¹⁴ and the goals, policies, and provisions of state and federal hazardous waste laws.¹⁵

The purpose of this Note is to identify the basic conflicts between the Bankruptcy Code and hazardous waste laws and to propose a balancing approach to resolve these conflicts. Part II of this Note identifies points of conflict that have arisen in recent cases and characterizes the conflict as a clash between the economic interests under the Bankruptcy Code and public health and safety

§§ 13:1K-6 to -14 (West Supp. 1984-85). The New Jersey law requires industrial facilities to submit detailed plans for decontaminating equipment, buildings, and dump sites if a facility is to be closed, sold or transferred. See *Texaco Moves Sludge from Refinery to Comply with New Jersey Waste Cleanup Act*, [Current Developments] 15 ENV'T REP. (BNA) No. 37, at 1479 (Jan. 11, 1985).

11. See Rosenbaum, *Bankruptcy and Environmental Regulation: An Emerging Conflict*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10099, 10099 (1983). Cleanup of old sites is also incredibly expensive. The EPA recently approved the United States Army's plan to clean up the dumpsite at the Rocky Mountain Arsenal for \$357 million. *Army Proposes \$357 Million Plan for Rocky Mountain Arsenal Cleanup*, [Current Developments] 15 ENV'T REP. (BNA) No. 28, at 1231 (Nov. 9, 1984); see also *In re Charles George Land Reclamation Trust*, 30 Bankr. 918, 921 (Bankr. D. Mass. 1983) (cleanup cost estimated at \$5-10 million with a diagnostic study alone at \$2 million).

12. Rosenbaum, *supra* note 11, at 10099. Because many hazardous waste disposal companies are financially unstable anyway, the increased cost of compliance probably will lead to further bankruptcies. *Id.*

13. See *EPA Guidance Memorandum Regarding CERCLA Enforcement Against Bankrupt Parties*, at 4 (May 24, 1984) [hereinafter cited as *EPA Guidance for Bankruptcy*]. The increased cost of compliance for honest waste haulers and the large profit margins available to illegal dumpers may lead to the involvement of organized crime in the hazardous waste disposal industry. *Organized Crime and Hazardous Waste Disposal: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 5, 31-35 (1980) (Testimony of Harold Kaufman). Illegal dumpers may be even more prevalent under the new 1984 regulations because the costs of compliance will be much greater and many more businesses are covered.

14. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101 *et seq.* (1982), as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. This Note refers to the Bankruptcy Reform Act, as amended in 1984, as the Bankruptcy Code.

15. This Note concentrates on the goals and policies of CERCLA because it is designed to address directly the problem of cleaning up hazardous waste dumpsites. RCRA also directly addresses the problem of proper disposal. Certain types of hazardous waste may fit within the provisions of the Clean Water Act or the Clean Air Act. State laws may be similar to any of the federal acts.

concerns under CERCLA and RCRA. Part III proposes a "balancing of the equities" approach to resolve these conflicts. This approach considers three factors: qualitative interests, quantitative interests, and the good or bad faith of the parties. Part IV concludes that a balancing test is necessary to ensure the proper resolution of the competing concerns at issue and suggests that the courts should balance the equities according to Congress' expressed priorities.

II. DEFINING THE PROBLEM

A. *Identifying the Context*

Recent cases that have confronted the basic conflict¹⁶ between the Bankruptcy Code and hazardous waste disposal laws have ad-

16. Numerous factors may affect the nature of the conflict between hazardous waste laws and the Bankruptcy Code. See Aaron, *Bankruptcy Stays of Environmental Regulation: Harvest of Commercial Timber as an Introduction to a Clash of Policies*, 12 ENVTL. L. 1, 1-2 (1981). For example, the debtor may be responsible under RCRA or CERCLA as a past or present owner of the site, see RCRA § 3004, 42 U.S.C. § 6924 (1982); CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1982), a past or present generator of the hazardous waste, see RCRA § 3002, 42 U.S.C. § 6922 (1982); CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982), or a party who arranged for or accepted disposal at the site, see CERCLA § 107(a)(3)-(4), 42 U.S.C. § 9607(a)(3)-(4) (1982); e.g., *In re Charles George Land Reclamation Trust*, 30 Bankr. 918, 919 (Bankr. D. Mass. 1983). Alternatively or additionally, the debtor may be responsible for cleanup under analogous state laws. See, e.g., *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068, 4069 (U.S. Jan. 9, 1985) (violation of Ohio water pollution control law, OHIO REV. CODE ANN. § 6111 (Page 1977)); *In re Quanta Resources Corp.*, 739 F.2d 912, 913 (3d Cir. 1984), cert. granted sub nom. *O'Neill v. City of New York*, 53 U.S.L.W. 3584 (U.S. Feb. 19, 1985) (No. 84-805) (violation of N.Y. ENVTL. CONSERV. LAW §§ 27-0900 to -0923 (McKinney 1984)).

Furthermore, the parties may vary. The debtor may be an individual, a corporation, or an individual acting on behalf of a corporation. E.g., *Kovacs II*, 53 U.S.L.W. at 4069 (state suing Kovacs both as a corporate officer and as an individual); *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310 (D.N.H. 1982) (United States suing Johns-Manville as a corporation). The Bankruptcy Code treats individuals and corporations differently in some areas. For example, a bankruptcy court will discharge permanently the debts of an individual, but the court cannot discharge the debts of a corporation. See 11 U.S.C. § 727(a)(1) (1982). EPA policy is to pursue financially solvent individuals if the corporation becomes insolvent, especially when the action concerns an individual officer, or the court could pierce the corporate veil. *EPA Guidance for Bankruptcy*, supra note 13, at 30-34.

The party attempting to compel the debtor to clean up the site may be the state, see, e.g., *Kovacs II*, 53 U.S.L.W. 4068, the federal government, see, e.g., *Johns-Manville*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310, or private parties seeking to enforce federal statutes, see, e.g., *In re Revere Cooper and Brass, Inc.*, 29 Bankr. 584 (Bankr. S.D.N.Y.), aff'd, 32 Bankr. 725 (S.D.N.Y. 1983).

Finally, a debtor's petition may be voluntary or involuntary and may be a Chapter 7 liquidation proceeding or a Chapter 11 reorganization proceeding. Under Chapter 7, the court appoints a trustee to collect and liquidate the debtor's nonexempt assets and apply

dressed five principal issues. The first issue is whether the Bankruptcy Code's automatic stay provision applies to government proceedings that seek to compel a debtor to clean up a hazardous waste site.¹⁷ A second and related issue concerns whether a judgment requiring a debtor to clean up a hazardous waste site is a "claim" or "debt" that is dischargeable in bankruptcy.¹⁸ The third issue is whether the Bankruptcy Code allows a debtor to abandon a hazardous waste site when a state law would require cleanup.¹⁹ The fourth issue is whether threats posed by a defendant's hazardous waste disposal site may constitute sufficient cause for dismissal of the bankruptcy petition.²⁰ Finally, the fifth issue concerns the level of priority to assign government reimbursement claims for cleaning up a hazardous waste site.²¹ This section considers each of these issues in turn.

1. Automatic Stay

The most visible facet of the bankruptcy-hazardous waste conflict has been whether the automatic stay provision²² of the Bankruptcy Code applies to state or federal proceedings to compel a debtor to clean up a hazardous waste site. In general, under section 362(a) of the Bankruptcy Code, the filing of a petition in bankruptcy acts to automatically stay most legal proceedings against the debtor.²³ The purpose of the stay is both to give the debtor a "breathing spell" by granting immediate temporary relief from creditors' demands and to preserve the debtor's assets for orderly and equitable distribution under the Bankruptcy Code.²⁴ The automatic stay provision, however, is not absolute. If an interested

the proceeds in satisfaction of qualified creditor claims. *See* 11 U.S.C. §§ 701-766 (1982). Under Chapter 11, a debtor's assets are not liquidated; instead, the debtor's business continues under the management of a trustee or a "debtor-in-possession." The debtor and creditors propose a reorganization plan, which the court must approve. The court then establishes a schedule for future regular payments of all the debts. *See* 11 U.S.C. §§ 1101-1174 (1982).

17. *See infra* notes 22-82 and accompanying text.

18. *See infra* notes 83-103 and accompanying text.

19. *See infra* notes 104-25 and accompanying text.

20. *See infra* notes 126-33 and accompanying text.

21. *See infra* notes 134-54 and accompanying text.

22. 11 U.S.C. § 362 (1982).

23. *Id.* Section 362(a) lists 11 categories of stayed proceedings. These provisions cover basically any attempts to collect money from the debtor. *Id.*

24. *See Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 271 (3d Cir. 1984). *See generally* H.R. REP. No. 595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6296-97 (noting protection that stay gives debtor and creditor) [hereinafter cited as H.R. REP. No. 95-595].

party demonstrates sufficient cause, the bankruptcy court may provide relief from a stay and thereby allow a legal action to commence or continue.²⁵ In addition, section 362(b) provides eleven other exceptions to the automatic stay.²⁶

Subsections (b)(4) and (b)(5)²⁷ are the most relevant exceptions for cases concerning the removal of hazardous waste. Both of these exceptions apply when a governmental unit²⁸ acts to enforce its police or regulatory powers. Section (b)(4) allows the government to commence or continue legal proceedings.²⁹ Section (b)(5) permits the enforcement of judgments, other than money judgments, which the government has obtained.³⁰ Even if the filing of the debtor's petition does not automatically stay a particular action, a bankruptcy court may still use its general power to issue orders and injunctions to stay a proceeding.³¹

Two questions commonly arise concerning whether these exceptions apply in hazardous waste cases. First, does a governmental action to compel the debtor to clean up a dumpsite qualify as an action to enforce police or regulatory power? Because comply-

25. 11 U.S.C. § 362(d) (1982). The court may find "cause" for lifting a stay, for example, when the value of a creditor's security interest is depreciating, see H.R. REP. NO. 95-595, *supra* note 24, at 343; Aaron, *supra* note 16, at 5, when another forum is more appropriate and desirable, see Comment, *In re Johns-Manville Corp.: The Delicate Balance of Fairness Between Bankruptcy and Products Liability Law*, 3 J. LAW & COM. 365, 374 (1983) (noting concerns raised in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), regarding whether the state court should decide issues of state law), when the debtor does not file in "good faith," see, e.g., *In re Victory Constr. Co.*, 9 Bankr. 549, 558-60 (Bankr. C.D. Cal. 1981); see also Comment, *supra*, at 378, or when the stayed action does not concern the Bankruptcy Code's goal of preserving the assets of the estate, see H.R. REP. NO. 95-595, *supra* note 24, at 340-44; see also *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979) (noting under prior bankruptcy act that courts should not stay suits other than actions to collect debts because they would not interfere with administration of bankruptcy).

26. 11 U.S.C. § 362(b)(1)-(11) (1984).

27. *Id.* at § 362(b)(4)-(5).

28. The term governmental unit includes state, federal, and municipal governments and regulatory agencies, see, e.g., *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108, 1114 (6th Cir. 1981), but may not apply to private parties acting under statutory civil enforcement provisions, see *In re Revere Copper and Brass, Inc.*, 32 Bankr. 725, 727 (S.D.N.Y. 1983) (citizen environmental group bringing civil enforcement action under Clean Water Act not acting as "governmental unit"). This Note concentrates on entities that are clearly governmental units.

29. 11 U.S.C. § 362(b)(4) (1982).

30. *Id.* at § 362(b)(5).

31. *Id.* at § 105(a) (1982) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); see also Aaron, *supra* note 16, at 25 (advocating use of § 105(a) in environmental cases for specific restraints instead of depending on broad categories in § 362).

ing with cleanup orders is extremely expensive,³² courts may characterize the cleanup orders as "money judgments" and, therefore, refuse to except them. Second, may a court still stay a government action that does fit within the (b)(4) or (b)(5) exceptions?³³ Because the scope of these exceptions is unclear, courts have turned to the limited legislative history³⁴ of the Bankruptcy Code for clarification.³⁵

The legislative history of section (b)(4) specifically identifies actions to prevent or stop violation of environmental laws, including actions to fix damages for these violations, as instances of governmental actions to enforce police or regulatory powers.³⁶ The legislative history, however, also emphasizes that Congress intended that courts construe section (b)(4) narrowly. Congress intended to permit governmental units to pursue actions to protect the public health and safety and not to permit government action designed solely to protect the government's "pecuniary interests."³⁷ In ex-

32. See, e.g., *In re Charles George Land Reclamation Trust*, 30 Bankr. 918, 921 (Bankr. D. Mass. 1983) (estimating \$5-\$10 million); *Massive Excavation of Waste Planned as California Begins Cleanup at McColl Dump*, [File Binder] 15 ENV'T REP. (BNA) No. 26, at 1063 (Oct. 26, 1984) (\$21.5 million superfund allocation).

33. See 11 U.S.C. § 105 (1982); see, e.g., *In re Revere Copper and Brass, Inc.*, 29 Bankr. 584, 588 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (S.D.N.Y. 1983) (enjoining citizen environmental group action because gist of complaint went to prepetition conduct, rather than postpetition conduct subject to suit under 28 U.S.C. § 959(a) (1982)).

34. Because Congress passed the Bankruptcy Reform Act in a last minute flurry in 1978, the official legislative history is scanty and contrived. For instance, Representative Edwards and Senator DeConcini, as respective floor managers during the debates, made identical statements about the scope of the §§ 362(b)(4) and (b)(5) exceptions. 124 Cong. Rec. H11089, S17406 (daily ed. Sept. 28 and Oct. 6, 1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6444-45 (Rep. Edwards), 6513 (Sen. DeConcini). The Senate and House reports are also substantially identical. Compare S. REP. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5838 [hereinafter cited as S. REP. No., 95-989] with H.R. REP. No. 95-595, *supra* note 24, at 343. See Rosenbaum, *supra* note 11, at 10100.

35. E.g., *In re Kovacs* (Kovacs I), 681 F.2d 454, 456 (6th Cir. 1982); *United States v. Johns-Mansville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310, 20311 (D.N.H. 1982); see also *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 272 (3d Cir. 1984). See generally Aaron, *supra* note 16, at 2.

36. The legislative history states:

[T]hus, [under 11 U.S.C. § 362(b)(4) (1982),] where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. H. R. REP. No. 95-595, *supra* note 24, at 343; S. REP. No. 95-989, *supra* note 34, at 52 (emphasis added).

37. The (b)(4) exception "is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the

cluding the enforcement of money judgments from the (b)(5) exception, Congress was concerned that the governmental unit should not receive "preferential treatment to the detriment of all other creditors."³⁸ Although section 362(b)(5) does not allow actions to enforce money judgments, the legislative history indicates that the exception does allow courts to enter money judgments and to issue and enforce injunctions.³⁹ These few snippets of legislative history provide the only direct discussion of the intended scope of the (b)(4) and (b)(5) exceptions. Courts that have examined this legislative history have reached different results in attempting to resolve the bankruptcy-hazardous waste conflict.

In *In re Kovacs (Kovacs I)*⁴⁰ and *Ohio v. Kovacs (Kovacs II)*⁴¹ the State of Ohio sought to compel Kovacs, both as an individual and as corporate officer,⁴² to clean up the Chem-Dyne site in Hamilton, Ohio. The Chem-Dyne corporation was in the business of treating, recycling, storing, and disposing of industrial and chemical wastes. Improper operations allegedly caused the discharge of toxic and carcinogenic pesticides into Ohio waters in violation of

debtor or property of the estate." H. REP. NO. 95-595, *supra* note 24, at H11089 (remarks of Rep. Edwards); S. REP. NO. 95-989, *supra* note 34, at S17406 (remarks of Sen. DeConcini).

38. According to the legislative history,

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

H. REP. NO. 95-595, *supra* note 24, at 343; S. REP. NO. 95-989, *supra* note 34, at 52.

39. H. REP. NO. 95-595, *supra* note 24, at 343; S. REP. NO. 95-989, *supra* note 34, at 52. For example, the stay does not apply to proceedings to assess penalties for child labor law violations, but § 362(b)(5) prevents proceedings to actually recover the amount assessed. *E.g.*, *In re Tauscher*, 7 Bankr. 918, 920 (Bankr. E.D. Wis. 1981).

40. 681 F.2d 454 (6th Cir. 1982), *vacated and remanded*, 459 U.S. 1167 (1983).

41. 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985). The state first filed suit on September 29, 1976, case no. CV 76-09-0834, Butler County, Ohio, Court of Common Pleas. There followed an agreed order in July 1979, the appointment of a receiver in 1980, and, in September 1980, the first *Kovacs* lawsuit (*Kovacs I*), which applied the automatic stay under Chapter 7. In addition, in October 1980 the State of Ohio filed a separate action (*Kovacs II*) arguing that the judgment against Kovacs is not dischargeable in bankruptcy. *See* Brief for Petitioner at 4-7, Brief for Respondent at 1-5, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985). The Supreme Court decided the dischargeability issue in *Kovacs II*. *See infra* notes 86-103 and accompanying text. In the meantime, the United States Army Corps of Engineers had removed the wastes, and some of the other responsible parties had reimbursed the government. The Army Corps of Engineers, however, failed to remove all the toxic substances before some of them permeated the soil. 53 U.S.L.W. at 4069.

42. Kovacs was an officer in the Chem-Dyne corporation and other related corporations. The government named the other corporations as defendants. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 804 (S.D. Ohio 1983) (United States seeking reimbursements under CERCLA for cleanup).

state environmental laws.⁴³ In 1979, Kovacs signed a stipulation and judgment entry enjoining him from causing further water pollution and requiring him to remove all the wastes stored at the Chem-Dyne site.⁴⁴ Kovacs failed to comply⁴⁵ with this order, and in 1980 the state court appointed a receiver. The court order directed the receiver to arrange for cleanup of the Chem-Dyne site, gave the receiver the power to collect all the money that the defendant owned, and directed Kovacs to cooperate with the receiver to effect the cleanup. Cleanup proceeded under the receiver's direction. Kovacs then filed a Chapter 11 bankruptcy petition, which the court converted to a Chapter 7 liquidation. Subsequently, Ohio moved the state court to hold a hearing "to determine Kovacs' current employment status and income."⁴⁶ Kovacs then moved the bankruptcy court to apply the automatic stay to prevent the hearing.⁴⁷

The bankruptcy court determined that Ohio sought to gain information about Kovacs' income for purposes of obtaining a court order requiring Kovacs to apply part of his postpetition earnings to the receiver's cleanup efforts.⁴⁸ In view of this objective, the bankruptcy court held that the State's action was subject to the automatic stay, even though neither the prior stipulation and judgment entry nor the order appointing a receiver technically gave the state a "money judgment" under section 362(b)(5).⁴⁹ The bankruptcy court declared that "no difference [existed] in substance between

43. In the complaint, Ohio alleged that the defendants improperly had stored the carcinogenic pesticides endrin, dieldrin, and heptachlor and that the wastes were leaking into the Great Miami River, killing wildlife and fish, polluting the river, and destroying natural resources. Brief for the United States as Amicus Curiae Supporting Petitioner at 2-3, Brief for Petitioner at 4-5, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

44. In 1979, wastes stored at the Chem-Dyne site amounted to 850,000 gallons of liquid wastes and 4000 barrels of solid or semi-solid sludges. Brief for Petitioner at 4-5, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

45. The Ohio Court of Common Pleas, in appointing the receiver, noted that Kovacs and other defendants had operated in "flagrant disregard" of the stipulation and judgment entry. Brief for Petitioner at 6, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 5068 (U.S. Jan. 9, 1985). The United States Court of Appeals for the Sixth Circuit, however, characterized Kovacs' operation as "compliance . . . substantially behind schedule." *In re Kovacs*, 717 F.2d 984, 985 (6th Cir. 1983), *aff'd sub nom. Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 5068 (U.S. Jan. 9, 1985).

46. *Kovacs I*, 681 F.2d at 455.

47. *Id.*

48. *Id.* The Bankruptcy Court assumed that Kovacs' cleanup obligation was not dischargeable in bankruptcy, although that issue was not before the court. *Id.*; see *infra* notes 83-103 and accompanying text.

49. *Kovacs I*, 681 F.2d at 456.

efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him.'"⁵⁰

The United States Court of Appeals for the Sixth Circuit agreed with the bankruptcy court and held that the automatic stay prevented Ohio's action because the State sought "what in essence amounted to a money judgment."⁵¹ The court maintained that Congress intended the (b)(4) and (b)(5) exceptions to permit governmental units to enforce their police power through mandatory injunctions but not through the collection of money.⁵² The Sixth Circuit opinion thus implied that any injunction requiring the expenditure of funds is a "money judgment" under section 362(b)(5).⁵³

Although the United States Supreme Court vacated and remanded the judgment in *Kovacs I*,⁵⁴ the Supreme Court's holding in *Kovacs II*⁵⁵ accepts the Sixth Circuit's reasoning. In *Kovacs II* the Court decided that by appointing a receiver and dispossessing Kovacs, Ohio effectively had converted the cleanup order into an obligation to pay money.⁵⁶

In *United States v. Johns-Manville Sales Corp.*⁵⁷ the United States and the State of New Hampshire sought injunctions⁵⁸ to require the Johns-Manville corporation to take remedial steps to

50. *Id.* (citation reference omitted).

51. *Id.*

52. *Id.*

53. See *In re Penn Terra Ltd.*, 24 Bankr. 427 (Bankr. W.D. Pa. 1982), *rev'd sub nom.* *Penn Terra Ltd. v. Department of Envtl. Resources*, 733 F.2d 267, 277-78 (3d Cir. 1984) (characterizing the Sixth Circuit decision as holding that any injunction which requires money expenditure is a "money judgment"); *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310, 20311 (D.N.H. 1982) (applying similar reasoning to the (b)(4) exception).

54. 459 U.S. 1167 (1983). The Supreme Court granted certiorari in *Kovacs I*, but vacated the judgment and remanded for consideration of the question of mootness. *Id.* The mootness issue arose because the bankruptcy court had held that Kovacs' obligation was dischargeable, *In re Kovacs*, 29 Bankr. 816 (Bankr. S.D. Ohio 1982), *aff'd*, 717 F.2d 984 (6th Cir. 1983), *aff'd sub nom.* *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985), and because the appeal of that decision was pending in the Sixth Circuit at that time. On remand, the Sixth Circuit held that the Supreme Court's decision in *Kovacs II* rendered the automatic stay issue moot in *Kovacs I*, 755 F.2d 484 (6th Cir. 1985).

55. *Kovacs II*, 53 U.S.L.W. 4068.

56. *Id.* at 4071. For a discussion of the Supreme Court's holding in *Kovacs II*, see *infra* text accompanying notes 92-103.

57. 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310 (D.N.H. Nov. 15, 1982).

58. The United States brought this action under the imminent hazard provisions of CERCLA, 42 U.S.C. § 9606(a) (1983), and RCRA, 42 U.S.C. § 7003 (1983). New Hampshire based its cause of action on similar state laws and on the common law of nuisance. *Johns-Manville*, 13 ENVTL. L. REP. (ENVTL. L. INST.) at 20310.

abate the hazards caused by several asbestos dumpsites.⁵⁹ Johns-Manville, the world's largest manufacturer and supplier of asbestos and asbestos products,⁶⁰ already faced approximately 16,000 product liability claims and a "staggering number" of potential future claims from individuals whose injuries had not yet become apparent. These product liability claims prompted Johns-Manville to file for reorganization under Chapter 11.⁶¹ When Johns-Manville filed its Chapter 11 petition, the bankruptcy court issued a broad restraining order staying all litigation.⁶² New Hampshire and the United States argued that section 362(b)(4) excepted their actions from this stay.

The district court refused to allow the suit, holding that it had no jurisdiction to interfere with the bankruptcy court's control of the debtor's assets.⁶³ Three factors influenced the court's decision. First, the government failed to take any steps to clean up the sites or to pursue any other responsible parties.⁶⁴ Second, the court emphasized that Johns-Manville's bankruptcy was a result of the huge product liability claims of individuals already injured by the corporation's asbestos products.⁶⁵ Last, in following the reasoning in *Kovacs I*, the *Johns-Manville* court focused on the fact that the relief sought would require a substantial expenditure of funds from the debtor's estate.⁶⁶

The district court read the (b)(4) exception in conjunction with the (b)(5) exception, which would prevent enforcement of a

59. The plaintiffs also sought an injunction against the individual owners of the sites. Johns-Manville had generated the asbestos and had arranged for its disposal, but did not own the sites involved. The relief sought included an injunction requiring the individual defendants to note on their deeds the presence of the asbestos and to allow government inspection of the sites. The court indicated that the plaintiffs could have severed the suit and proceeded against the individual defendants without being restrained by the automatic stay. *Johns-Manville*, 13 ENVTL. L. REP. (ENVTL. L. INST.) at 20311.

60. When Johns-Manville filed its petition, it was a "Fortune 500" company and "a paradigm of success of corporate America." *In re Johns-Manville Corp.*, 36 Bankr. 727, 729 (Bankr. S.D.N.Y. 1984) (denying motions to dismiss petition).

61. *Id.*

62. *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) at 20310.

63. *Id.* at 20312.

64. *Id.* at 20311-12. The court stated that the governments' reasons for not proceeding to finance the cleanup were unclear, but noted that "the respective government plaintiffs [may] feel that the funds available to them are inadequate to provide the relief actually sought herein." *Id.* at 20310 n.7.

65. *Id.* at 20312.

66. *Id.* at 20311-12. The court also emphasized that the government could have cleaned up the site and then proceeded against the debtor for reimbursement. *Id.* at 20312.

“money judgment” if entered under (b)(4).⁶⁷ The court read the legislative history suggesting a narrow construction of the (b)(4) exception as merely restating the rule of law that a “plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money.”⁶⁸ Under this approach, the court characterized the government action as an action to obtain a money judgment or to recover money damages, rather than a regulatory action.⁶⁹ The court indicated that the (b)(4) exception applies only when the government seeks relief that does not require any expenditure of funds and thus does not conflict directly with the bankruptcy court’s control of the property.⁷⁰ The exception, therefore, did not apply to the government action in this case.

The Third Circuit has taken a different approach to injunctions requiring monetary expenditure. In *United States v. Price*⁷¹ the United States sought a preliminary injunction to compel the defendant to fund a diagnostic study to determine whether his dormant landfill was dangerous.⁷² The district court followed the reasoning in *Kovacs I* and *Johns-Manville* and found that an injunction would be inappropriate because it would amount to a money judgment.⁷³ The United States Court of Appeals for the

67. *Id.* at 20312.

68. 13 ENVTL. L. REP. (ENVTL. L. INST.) at 20311 (quoting *United States v. Price* (Price I), 523 F. Supp. 1055, 1067 (D.N.J. 1981), *aff’d on other grounds*, 688 F.2d 204 (3d Cir. 1982), which quotes *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979)). In dicta the court expressly repudiated the language in *Price I*. *United States v. Price* (Price II), 688 F.2d 204, 211 (3d Cir. 1982). One commentator criticized *Johns-Manville* for relying so heavily on *Kovacs I*, which was vacated and remanded, and *Price I*, which was affirmed on appeal only with express disavowal of the lower court’s reasoning. See Rosenbaum, *supra* note 11, at 10101; see also Brief for United States as Amicus Curiae, at 14 n.13, *Ohio v. Kovacs* (Kovacs II), 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

69. 13 ENVTL. L. REP. (ENVTL. L. INST.) at 20312.

70. 688 F.2d 204 (3d Cir. 1982). The court’s holding is basically jurisdictional. The court notes that the parties still may apply to the bankruptcy court for relief from the stay. *Id.* The 1984 Bankruptcy Amendments reduce the all-inclusive nature of the bankruptcy court’s jurisdiction under the 1978 Code.

71. *Price I*, 523 F. Supp. 1055, *aff’d*, *Price II*, 688 F.2d 204 (3d Cir. 1982).

72. Huge amounts of extremely toxic wastes from Price’s landfill in Pleasantville, New Jersey leaked out, contaminating local wells and threatening the city water supply. Price had been disposing of highly toxic chemicals by pouring waste into the dump or by burying drums of toxic waste under other refuse. The leaking chemicals were carcinogenic, mutagenic, and teratogenic, posing a grave danger to public health. The United States, therefore, sought an injunction under RCRA’s imminent danger provision, 42 U.S.C. § 7003 (1983). *Price I*, 523 F. Supp. at 1058-68.

73. *Price I*, 523 F. Supp. at 1067. *Kovacs I*, *Johns-Manville*, and *Price I* rely on *Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979). The plaintiff in *Jaffee* sued the United States Government for intentionally exposing him and other soldiers to

Third Circuit upheld the district court's decision to deny the preliminary injunction because the interim relief that the injunction required could complicate pending litigation.⁷⁴ The Third Circuit, however, rejected the district court's reasoning and devoted most of its attention to suggesting a proper analysis for deciding whether to characterize a certain remedy as money damages or as an equitable injunction.⁷⁵

The Third Circuit expressly rejected the *Kovacs*' court's automatic application of a "money judgment" label to any injunction requiring expenditures. The Third Circuit noted that "in contemporary times, almost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity."⁷⁶ The Third Circuit focused on the nature of the injury and considered whether the traditional remedy for such an injury was a judgment for money damages or an equitable injunction.⁷⁷ According to the Third Circuit, courts traditionally award money damages as compensation for past injury, while they grant injunctions to protect against future harm. Furthermore, mere payment of money will not suffice when an injunction is required. The amount of money needed to comply with an injunction is not specified, while the amount of money damages required is reducible to a "sum certain" as liquidated damages.⁷⁸

radiation. The court held that the plaintiff's request for an order requiring the government to provide all necessary medical care and treatment was essentially an action for money damages, as a traditional form of past damages in compensation for medical costs. *Id.* at 715. The *Jaffee* court, however, also held that the plaintiff's request that the court require the government to give warnings of the medical risks to other class members was a request for equitable relief. Although compliance with this order would require monetary expense, the payment of money could not satisfy that claim. *Id.*; see *Penn Terra Ltd.*, 733 F.2d at 276.

74. *Price II*, 688 F.2d at 211.

75. *Id.* at 211-14. The court noted that courts should use the traditional balancing test for issuing an injunction even if the remedy sought is untraditional or novel. *Id.* at 211.

76. *Id.*

77. *Id.* at 212; *Penn Terra Ltd.*, 733 F.2d at 278. "Mandatory" injunctions, which require the defendant to take some affirmative action, are traditionally more difficult to obtain than "prohibitory" injunctions, which prevent the defendant from acting. In the hazardous waste context, the Third Circuit noted that even a "mandatory" injunction may be an appropriate preliminary remedy when such an injunction requires the defendant to take some affirmative action merely to preserve the status quo until a final decision is possible. *Price II*, 688 F.2d at 212. In the mining regulations context, the Third Circuit noted that the mandatory/prohibitory distinction would be less clear and less useful in environmental cases because both types of injunctive relief may cost money and because a "prohibitory" injunction not to pollute may also be a "mandatory" injunction to remove wastes. *Penn Terra Ltd.*, 733 F.2d at 278 n.12.

78. *Price II*, 688 F.2d at 212.

Under this approach, the Third Circuit found that an injunction requiring the defendant to fund a diagnostic study of his hazardous waste dump site would be an appropriate preliminary injunction. Even though the injunction would require a monetary expenditure, the study would be the first step in the remedial process to prevent future harm, not a compensation for past injury.⁷⁹

The court in *Penn Terra Ltd. v. Department of Environmental Resources*⁸⁰ later adopted this same analysis in defining the scope of the section 362(b)(5) exception in the context of mining regulations.⁸¹ The Third Circuit held that an injunction requiring the debtor to take certain remedial and reclamation actions required under state mining regulations was not a money judgment under section 362(b)(5). Instead, the court viewed the state's action as an attempt to obtain an equitable injunction to prevent future harm to the environment. The injunction, therefore, was *not* subject to the automatic stay.⁸²

2. Dischargeability

Closely related to the automatic stay issue⁸³ is the issue of whether a state judgment requiring an individual debtor to clean up a hazardous waste site is a "claim" or "debt" dischargeable in bankruptcy. With some exceptions,⁸⁴ bankruptcy acts to discharge a debtor of responsibility for prepetition "claims" and "debts," including judgments of personal liability.⁸⁵

79. *Id.*

80. 733 F.2d 267 (3d Cir. 1984).

81. *Id.* at 276-77.

82. *Id.* at 278-79. In a footnote, the Supreme Court in *Kovacs II* distinguished *Penn Terra Ltd.* because in *Penn Terra Ltd.* "there had been no appointment of a receiver who had the duty to comply with state law and who was seeking money from the bankrupt." *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068, 4071 n.11 (U.S. Jan. 9, 1985).

83. The automatic stay generally remains in effect until discharge. 11 U.S.C. § 362(c)(2) (1982). If the bankruptcy court eventually discharges a debt or claim, exemption from the automatic stay will not help the government because a dischargeable judgment would not be enforceable. *See* 11 U.S.C. § 524(a) (1982).

84. 11 U.S.C. § 523(a) (1984) (10 exceptions); *see infra* note 99.

85. 11 U.S.C. § 727(b) (1982); 11 U.S.C. § 524(a) (1982). Under 11 U.S.C. § 524(a), a bankruptcy discharge erases the bankrupt's "debt," which is defined as "liability on a claim." 11 U.S.C. § 101(11) (1982). A "claim" is defined as a:

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

(B) 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

In *Ohio v. Kovacs (Kovacs II)*⁸⁶ the State of Ohio sought a declaratory judgment that Kovacs' obligation under the prior state court orders requiring cleanup was not dischargeable.⁸⁷ Ohio argued that Kovacs' obligation was neither a "claim" nor a "debt" susceptible to discharge under section 727(b) of the Bankruptcy Code, but was instead a right to an equitable remedy.⁸⁸ According to the legislative history of the Bankruptcy Code, the right to an equitable remedy is not a "claim" unless the plaintiff seeks a remedy for a breach of performance and that breach also gives rise to an alternative right to payment.⁸⁹ Ohio argued that Kovacs' obligation was based on a violation of law rather than a "breach of performance."⁹⁰ Furthermore, according to the state, there was no alternative right to payment, only a right to effect the cleanup order.⁹¹

The Supreme Court affirmed the decisions of the Bankruptcy Court⁹² and the Sixth Circuit,⁹³ both of which viewed Ohio's efforts to compel Kovacs to finance the cleanup as attempts to enforce an alternative right to payment⁹⁴ and to obtain compensation for the state's pecuniary losses.⁹⁵ The Sixth Circuit expressly reaffirmed its *Kovacs I* rationale in defining Kovacs' obligation under the prior judgment as a "claim" or "debt" dischargeable in bank-

unsecured.

11 U.S.C. § 101(4) (1982).

86. 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

87. *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *aff'd sub nom. Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

88. 717 F.2d at 986; *see supra* notes 45-54 (discussing *Kovacs I*).

89. 717 F.2d at 986; *see* Brief for United States as Amicus Curiae at 17, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

90. Brief for United States as Amicus Curiae at 17-18, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985); Brief for Petitioner at 14-19, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985). In discussing § 101(4)(b), Representative Edwards noted that a creditor entitled to specific performance would have a "claim" in states in which "a judgment for specific performance may be satisfied by an alternative right to payment . . ." Representative Edwards, however, also noted that "rights to an equitable remedy for a breach of performance . . . which . . . [do] not give rise to a right to payment are not 'claims' and would therefore not be susceptible to discharge in bankruptcy." 124 CONG. REC. 32,393 (1978).

91. *Kovacs II*, 717 F.2d at 987; *see* Brief for Petitioner at 14-19, *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

92. Brief for Petitioner at 19-27, *Ohio v. Kovacs*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

93. *In re Kovacs*, 29 Bankr. 816 (Bankr. S.D. Ohio 1982), *aff'd*, 717 F.2d 984 (6th Cir. 1983), *aff'd sub nom. Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

94. *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *aff'd sub nom. Ohio v. Kovacs*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

95. 29 Bankr. at 818; 717 F.2d at 986-87.

ruptcy.⁹⁶ Because Kovacs could perform his obligation only by the payment of money, the Sixth Circuit held that Ohio sought a "money judgment" and thus had a dischargeable claim absent some exemption.⁹⁷

The Supreme Court agreed with the Sixth Circuit and held that Kovacs' obligation to clean up the site essentially had been converted into a money judgment because the receiver was in control of the site and Kovacs had been dispossessed.⁹⁸ The Supreme Court went on to reject Ohio's argument that the criminal restitution exception to dischargeability applied in this case.⁹⁹ The state characterized Kovacs' obligation to comply with Ohio's environ-

96. 717 F.2d at 987-88.

97. *Id.* The Supreme Court's characterization of Kovacs' obligation as a money judgment could be extended to the automatic stay analysis. *See supra* text accompanying notes 49-56.

98. *Kovacs II*, 53 U.S.L.W. 4068. The decision, however, should be limited to its facts because the Court emphasized the narrowness of its holding. *Id.* at 4071. The Court pointed out that Kovacs still would be subject to criminal prosecution for the original violation and contempt proceedings for failing to comply with the state court orders. Furthermore, the Court did not decide what the legal consequences would have been if Kovacs had filed his bankruptcy petition before the appointment of the receiver. In that situation a bankruptcy trustee would have had the various powers and duties that the Bankruptcy Code authorizes. The Court also emphasized that its decision addressed only the dischargeability of the affirmative duty to clean up the site and to pay money for the cleanup. The Court's decision did not address the dischargeability of the state court injunctions against contributing further to the pollution or bringing toxic wastes to the site.

Finally, the Court admitted that any person in possession of the site must comply with Ohio's environmental regulations and could not refuse to remove the source of the pollution. *Id.* The only parties that the Court lists, however, are Kovacs or anyone receiving the property upon abandonment, or a vendee from the trustee or receiver. The Court made no mention of the trustee's obligation to comply with state laws. *Id.*; cf. 28 U.S.C. § 959(b) (1968) (trustee must "operate and manage" business in compliance with state laws).

99. 11 U.S.C. § 523(a)(7) (1982). Section 523 of the Bankruptcy Code exempts certain debts from discharge. *Id.* § 523(a). For example, a fine, penalty, or forfeiture payable to or for the benefit of a governmental unit is not dischargeable unless considered compensation for the government's actual pecuniary loss. *Id.* § 523(a)(7). In addition, courts have excepted orders of criminal restitution on the theory that no creditor/debtor relationship exists between the state and a criminal ordered to pay restitution. *E.g.*, *Matter of Cox*, 33 Bankr. 657 (Bankr. M.D. Ga. 1983); *In re Button*, 8 Bankr. 692 (Bankr. W.D.N.Y. 1981); cf. *In re Daugherty*, 25 Bankr. 158 (Bankr. E.D. Tenn. 1982) (similar ruling under prior bankruptcy act). *But see In re Brown*, 39 Bankr. 820 (Bankr. M.D. Tenn. 1984) (discussing a line of cases basing discharge upon a determination of whether the restitution order is "punitive" and thus nondischargeable or "compensatory" and thus dischargeable). Courts characterize some criminal restitution orders as equivalent to fines and penalties that regulate behavior by threatening financial retribution. *E.g.*, *In re Cox*, 33 Bankr. at 659; *In re Button*, 8 Bankr. at 692. Characterizing a state order as either compensatory or punitive, however, may be especially difficult when the amount of a civil penalty for environmental violations is graduated depending upon the costs of compliance. *See Aaron, supra* note 16, at 7.

mental laws as a civil enforcement of criminal laws.¹⁰⁰ Because the Bankruptcy Code addresses financial concerns and not criminal matters, Ohio argued that Kovacs' obligation should not qualify as a claim or debt in bankruptcy.¹⁰¹ The Supreme Court recognized that Ohio's assessment of a money penalty against Kovacs would have escaped discharge under section 523(a)(7), but refused to characterize Kovacs' obligation as the equivalent of such a fine or penalty.¹⁰² Instead, the Court characterized the affirmative cleanup order as the equivalent of a companion order requiring Kovacs to pay money for damages to natural resources, noting that both orders served to remedy a statutory violation.¹⁰³

3. Abandonment

If the state enforces a cleanup order against a debtor who owns a hazardous waste dump site, the logical response of the trustee or the debtor-in-possession may be an attempt to abandon the property.¹⁰⁴ Section 554 of the Bankruptcy Code allows a trustee or debtor-in-possession to abandon property that is "burdensome" or of inconsequential value to the estate.¹⁰⁵ Upon abandonment, the debtor or another party with a possessory interest obtains title to the property.

In *In re Quanta Resources Corp.*¹⁰⁶ the trustee filed a notice of

100. Brief for Petitioner at 23, *Kovacs II*.

101. *Id.* In the amicus brief in *Kovacs II*, the United States noted that the discharge exception for debts based on the debtor's willful and malicious injury to another's property, 11 U.S.C. § 523(a)(6) (1982), might also cover hazardous waste cleanup orders when the debtor's conduct is in "flagrant disregard" of court orders. Brief for the United States as Amicus Curiae Supporting Petitioner at 18 n.19, *Kovacs II*.

102. *Kovacs II*, 53 U.S.L.W. at 4069-70. *But cf.* *In re Daugherty*, 25 Bankr. 158 (E.D. Tenn. 1982) (under prior bankruptcy act, no discharge for civil penalty assessed against debtor for violation of mining laws, even though penalty amount was to be paid into state fund to provide for other surface reclamation).

103. *Kovacs II*, 53 U.S.L.W. at 4070.

104. *See In re Charles George Land Reclamation Trust*, 30 Bankr. 918, 923 (Bankr. D. Mass. 1983). Following a request by a party in interest, the court may order the trustee to abandon burdensome property. 11 U.S.C. § 554(b) (1982). In *Kovacs II* the Supreme Court expressly did not decide what would have happened if the lower court had appointed a bankruptcy trustee before the receiver. In a footnote, however, the Court assumed that a trustee may have been able to abandon the property. *Kovacs II*, 53 U.S.L.W. at 4071 n.12.

105. 11 U.S.C. § 554(a) (1982).

106. 739 F.2d 912 (3d Cir. 1984) (*Quanta I*), *cert. granted sub nom.* O'Neill v. City of New York, 53 U.S.L.W. 3589 (U.S. Feb. 19, 1985) (No. 84-805). In a companion case, *In re Quanta Resources Corp.*, 739 F.2d 927 (3d Cir. 1984), *cert. granted sub nom.* O'Neill v. City of New York, 53 U.S.L.W. 3584 (U.S. Feb. 19, 1985) (*Quanta II*) (No. 84-805), which dealt with the same debtor's property in New Jersey, the Third Circuit reiterated its holding in *Quanta I*, identifying the determinative issue in both cases as whether the trustee's interest

intent to abandon a disposal site in which fuel storage tanks contained over 500,000 gallons of chemical waste and waste oil, including at least 70,000 gallons contaminated with extremely toxic PCBs.¹⁰⁷ Because bringing the property into compliance with the state hazardous waste disposal laws would be extremely expensive, the trustee argued that the property was burdensome to the estate and, therefore, the court should allow abandonment.¹⁰⁸ The state argued that abandonment would amount to unlawful "disposal" under state hazardous waste disposal laws because abandonment would revert title in the debtor,¹⁰⁹ who was unable to remedy the hazard.¹¹⁰

The Third Circuit found that Congress did not intend that the abandonment provision of the Bankruptcy Code preempt all state regulation.¹¹¹ The court based its decision upon cases under the prior Bankruptcy Act that refused to allow abandonment when important state laws protected the public interest.¹¹² In addition, the court found no express preemption of state regulations within section 554. Instead, the court found evidence implying congressional intent not to subordinate state regulation of hazardous waste disposal to the bankruptcy abandonment power.¹¹³ This evidence included the provision of automatic stay exceptions for the enforcement of police and regulatory power¹¹⁴ and the requirement, under

in preserving the estate should prevail over the public interest in containing such hazards. *Id.* at 928-29.

107. *Quanta I*, 739 F.2d at 913.

108. *Id.* at 914.

109. According to the legislative history of the Bankruptcy Reform Act, "[a]bandonment may be to any party with a possessory interest in the property abandoned." S. REP. NO. 95-989, *supra* note 34, at 2.

110. *Quanta I*, 739 F.2d at 914. Because the assets of the debtor were in the hands of the trustee, under bankruptcy law, the debtor would have no funds to effect the cleanup.

111. *Id.* at 916.

112. *Id.* at 916-18 (discussing *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952)) (trustee not allowed to abandon worthless barges in harbor in violation of federal laws prohibiting harbor obstruction, even though cost of removing barges was much greater than their value); *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942) (trustee for railroad not allowed to abandon service on unprofitable branch line in violation of state law); *In re Lewis Jones, Inc.*, 1 BANKR. CT. DEC. (CRR) 277 (Bankr. E.D. Pa. 1974) (permission to abandon conditioned on trustees' expending funds to close underground system of steam pipes, vents, and manholes, because abandonment without proper treatment would create health and safety hazards); *In re Adelphi Hospital*, 579 F.2d 726 (2d Cir. 1978) (trustee for bankrupt hospital allowed to abandon medical records in violation of state law requiring maintenance of the records of insolvent hospitals).

113. *Quanta I*, 739 F.2d at 918.

114. *Id.* at 918 (discussing 11 U.S.C. § 362(b)(4)-(5) (1982)); *see supra* notes 27-82 and accompanying text.

28 U.S.C. § 959(b), that a trustee or debtor-in-possession manage and operate the property in compliance with state law.¹¹⁵ Although technically the trustee's "abandonment" of property would not qualify as "management" or "operation" of the debtor's property, the court read section 959(b) as evidence that Congress had not "unmistakenably ordained" that the trustee's powers override state law.¹¹⁶

The provisions in the Bankruptcy Code for equitable considerations, along with the traditional treatment of bankruptcy courts as courts of equity, also convinced the *Quanta I* court that Congress did not intend complete federal preemption of state regulations.¹¹⁷ Instead, the court reasoned that federal bankruptcy law would preempt state law only to the extent that equitable principles required the abrogation of state laws that interfere with liquidating the debtor's estate.¹¹⁸

In applying these equitable principles, the *Quanta I* court balanced the relative weight of the state's interest in protecting the public health against the federal interest in preserving the debtor's estate for distribution to creditors.¹¹⁹ The court found that the public interest in protecting against the great dangers of improper toxic waste disposal outweighed the potential damage to the debtor's estate caused by the required expenditures.¹²⁰ Absent a

115. *Quanta I*, 739 F.2d at 919-20. Section 959(b) provides:

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

28 U.S.C. § 959(b) (1982). Section 959(a) provides that a party may bring suit against trustees, receivers, or managers, including debtors-in-possession, without leave of the court that appointed them. *See infra* notes 178-79 and accompanying text; *see also In re Revere Copper and Brass, Inc.*, 29 Bankr. 584 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (Bankr. S.D.N.Y. 1983) (holding that § 959 applies to postpetition conduct and does not allow suits based on debtor's prepetition activities that violated environmental regulations).

116. *Quanta I*, 739 F.2d at 920. The *Quanta I* dissent, however, argued that § 959(b) could not be construed to compel the trustee to "operate" property in liquidation proceedings. *Id.* at 926 (Gibbons, J., dissenting).

117. *Id.* at 921-22.

118. *Id.*

119. *Id.* The court considered that the state regulations advanced an important policy and viewed abandonment as a severe violation of the regulations. The facts of *Quanta I*, therefore, more closely resemble the serious violations found in *Ottenheimer*, 198 F.2d at 290, and in *In re Lewis Jones, Inc.*, 1 BANKR. CT. DEC. (CRR) 277 (Bankr. E.D. Pa. 1974), than the merely technical violations of a less important state regulation as in *In re Adelphi Hospital Corp.*, 579 F.2d at 728-29.

120. *Quanta I*, 739 F.2d at 921.

clear indication that Congress intended to allow "the substitution of governmental action for citizen compliance," these equitable principles convinced the court to prohibit the trustee from abandoning hazardous wastes that would then require "governmental cleanup by default."¹²¹

The dissenting judge in *Quanta I* found the majority's balancing of interests unnecessary and impermissible because section 554 clearly allows abandonment without any exceptions analogous to the exceptions provided for the automatic stay.¹²² The dissent further attacked the majority's holding for raising a substantial question under the takings clause of the fifth amendment.¹²³ The Supreme Court has directed that courts avoid the fifth amendment question by construing the Bankruptcy Code in a way that does not destroy the interests of secured creditors.¹²⁴ Unlike the majority, the *Quanta I* dissent focused on the interests of the creditors, who were not responsible for placing contaminated oil on the site. Furthermore, the terms of the state laws did not put the creditors on notice that eventually they might become liable for the cost of cleaning up the results of their debtor's unlawful waste disposal.¹²⁵

4. Dismissal

In some cases, the serious threat that a debtor's hazardous waste disposal site poses may amount to sufficient cause for dismissal of the bankruptcy petition. A Chapter 7 liquidation proceeding may be dismissed "for cause" under section 707,¹²⁶ and a Chapter 11 reorganization petition may be dismissed or converted

121. *Id.*; see also *In re T.P. Long Chem. Co.*, 45 Bankr. 278, 286 (Bankr. N.D. Ohio 1985) (following *Quanta* and recognizing "public policy" exception to trustee's abandonment power).

122. *Quanta I*, 739 F.2d at 924 (Gibbons, J., dissenting).

123. *Id.* at 925 (Gibbons, J., dissenting). The fifth amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

124. *Quanta I*, 739 F.2d at 924 (Gibbons, J., dissenting) (citing *United States v. Security Indus. Bank*, 459 U.S. 70 (1982)). The majority answered this concern by asserting that state enforcement of environmental regulations is not a "taking" but a permissible "regulation." *Id.* at 922 n.11.

125. *Quanta I*, 739 F.2d at 926 (Gibbons, J., dissenting).

126. Section 707 of the Bankruptcy Code provides:

The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors; and
- (2) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. § 707 (1982). This list of causes is merely illustrative and not exhaustive. H.R. REP. NO. 95-595, *supra* note 24, at 380, 1978 U.S. CODE CONG. & AD. NEWS at 6336.

to a Chapter 7 petition "for cause" under section 1112.¹²⁷

In *In re Charles George Land Reclamation Trust*¹²⁸ the court found cause for equitable dismissal in view of the serious and immediate danger that the debtor's contaminated landfill posed to the public drinking water supply.¹²⁹ Because the debtor's facility was in such flagrant violation of state and federal hazardous waste laws, the court found that a trustee could not manage the property in compliance with state law under section 959(b).¹³⁰ In addition, the court noted that a willing trustee would be impossible to find because of the enormous potential liability under CERCLA for a trustee managing a landfill in violation of so many regulations.¹³¹

In view of the serious threat to public safety posed by the ongoing nuisance and the impossibility of administering the estate in bankruptcy, the court concluded that the possibility of a dividend to creditors¹³² was not sufficient to outweigh the danger to public safety. Furthermore, the court concluded that dismissal would allow the state and federal authorities to take immediate steps to abate the hazard.¹³³

127. 11 U.S.C. § 1112 (1982). Courts will consider the best interests of the creditors and the estate in choosing between conversion or liquidation. "Cause" includes unreasonable delay by the debtor, as under § 707, and evidence that the reorganization plan will not function effectively. See *id.* § 1112(b)(1)-(9).

128. 30 Bankr. 918 (Bankr. D. Mass. 1983).

129. The EPA had identified the Charles George landfill as one of the worst hazardous waste sites in the country and assigned the landfill a high priority on the superfund list. The EPA estimated cleanup costs at \$5-\$10 million with a diagnostic study alone expected to cost \$2 million. State court orders required the debtor to make payments to a trust fund to finance the cleanup and to take other remedial action. Other litigation was pending. In addition, after the filing of the petition, the debtor's landfill discharged huge amounts of contaminated leachate, either intentionally or accidentally, into a catch basin that eventually emptied into the Merrimac River. The Merrimac River was the main source of public drinking water. *Id.* at 920-21.

130. *Id.* at 921; see also *In re 30 Hilltop Street Corp.*, 42 Bankr. 57 (Bankr. D. Mass. 1984) (dismissing petition of nursing home because serious violations prevented administration in bankruptcy). See *supra* note 115 for a discussion of § 959(b).

131. *Charles George*, 30 Bankr. at 923-24.

132. The State and municipality amounted to 75% of the creditors, and both sought dismissal. *Id.* at 922. Both creditors also argued that the cleanup costs would be an administrative claim against the estate, thus leaving little, if anything, for the other creditors. *Id.*

133. The probability of an attempt to abandon the property also influenced the court's decision, because abandonment, if allowed, merely would revert title in the debtor. Thus, the debtor "would again be given an opportunity to demonstrate its inability to operate this facility in compliance with the law," and abandonment would make the automatic stay applicable to efforts to compel the debtor to clean up the property. *Id.* at 923-24.

5. Priorities

The government may seek reimbursement from the debtor's estate if the government, at its own expense, cleans up a hazardous waste site. This situation raises the question of what priority status to give to the government's claim. Generally, the bankruptcy courts use the assets of a debtor's estate to satisfy first the claims of secured creditors, then the claims of certain unsecured creditors, in a given priority order,¹³⁴ and finally, the claims of general unsecured creditors.¹³⁵ The courts give first priority among the listed unsecured claims to "administrative expenses," which include "the actual, necessary costs and expenses of preserving the estate"¹³⁶

The Environmental Protection Agency contends that courts should give claims for reimbursement for cleanup costs under CERCLA first priority as a "necessary" cost of preserving the estate, because Congress, in the public interest, places the duty to clean up a hazardous waste site upon the debtor.¹³⁷ The *Quanta I* court implied, without deciding, that reimbursement for cleanup costs could qualify as an administrative expense, analogous to costs of custodial care, insurance, and necessary repairs to the property.¹³⁸ The *Quanta I* dissent, however, found this suggestion "preposterous" in the abandonment context because abandonment would revert title to the property in the debtor and thereby remove the property from the estate to be "preserved."¹³⁹ The *Charles George* court also was reluctant to classify these reimbursement claims as administrative expenses.¹⁴⁰

In certain cases, a bankruptcy court may assign a creditor "superpriority" over all other claims.¹⁴¹ In *In re Berg Chemical*

134. 11 U.S.C. § 507(a) (1982). Section 507(a) assigns priority among certain unsecured creditor's claims.

135. 11 U.S.C. § 726(a)(1)-(2). General unsecured creditors usually recover only 10¢ to 20¢ to the dollar, on a pro rata basis. *EPA Guidance for Bankruptcy*, *supra* note 13, at 13.

136. 11 U.S.C. § 503(b)(1)(A) (1982); *id.* § 507(a)(1) (1982).

137. *EPA Guidance for Bankruptcy*, *supra* note 13, at 15-16. The EPA relies on *Ottenheimer v. Whitaker*, 198 F.2d 289 (3d Cir. 1952) (under prior bankruptcy act court ordered trustee to spend money as administrative expense to remove barges creating hazardous nuisance in harbor).

138. *Quanta I*, 739 F.2d at 922-23; *see also In re T.P. Long Chem. Co.*, 45 Bankr. 278, 289 (Bankr. N.D. Ohio 1985) (granting administrative expense priority for cleanup expenses only to extent of unsecured assets).

139. *Quanta I*, 739 F.2d at 926 (Gibbons, J., dissenting).

140. *Charles George*, 30 Bankr. at 922.

141. 11 U.S.C. § 507(b) (1982). A government cleaning up a hazardous waste site may be able to receive superpriority status if the government can prove that: (1) it had a claim

Co.¹⁴² the court granted superpriority status to the city of New York in return for the city's agreement to finance the cleanup of the debtor's hazardous waste site because no other funds were available.¹⁴³ The chemical wastes stored and leaking on the premises¹⁴⁴ posed a potential danger to public health and lessened the prospect for a profitable sale of the debtor's interest in the property.¹⁴⁵ The "superpriority," along with a first lien, granted the city first rights in the proceeds of a postcleanup sale.¹⁴⁶

Legislation also may create similar superpriority status for reimbursement claimants under federal and state hazardous waste disposal laws. Congress has considered bills amending CERCLA to provide that governmental claims against the debtor for costs of removal or remedial action have priority over all other claims against the debtor.¹⁴⁷ One of the current proposals would allow the government to impose a federal lien on all real estate owned by a responsible party to secure payment of response costs in an enforcement action.¹⁴⁸ A few states have enacted similar provisions under state environmental regulations.¹⁴⁹ Supreme Court Justice

for administrative expenses, (2) a lien on the debtor's property protected the claim, and (3) the automatic stay had prevented the use or cleanup of the property. *Id.*; see *EPA Guidance for Bankruptcy*, *supra* note 13, at 13 n.17.

142. No. 82-B 12052(HB) (Bankr. S.D.N.Y. July 9, 1984) (Order Granting First Lien and "Superpriority").

143. The cleanup cost estimate was \$235,000. The debtor-in-possession had no funds, and the city was unable to obtain any state funds for the cleanup. *City Wins Priority in Bankruptcy Court in Exchange for Cleaning up Waste Site*, [File Binder] ENV'T REP. (BNA) No. 15, at 584 (Aug. 10, 1984).

144. Of the 400 barrels of waste on the property, over 100 barrels were leaking. Some barrels contained pollutants such as spilled cyanide salt, solvents, and polychlorinated biphenyls (PCBs). *Id.*

145. *Id.*

146. *In re Berg Chem. Co.*, No. 82-B 12052(HB) (Bankr. S.D.N.Y. July 9, 1984).

147. For example, Representative Florio introduced H.R. 2767, 98th Cong., 1st Sess. (1983). It would add a new section to CERCLA:

§ 116(a) Any claim of the United States, a State, or a political subdivision of a State for the costs of removal or remedial action taken under Section 104 of this Act for which a debtor is liable under Section 107 of this Act, and any claim of the United States for any relief or fine for which a debtor is liable under Section 106 of this Act, shall have priority over all other classes of claims against such debtor, without regard to whether such claims are secured.

Id. The bill provided a similar priority for claims under the Safe Drinking Water Act, 42 U.S.C. §§ 6971-6979 (1982).

148. See *Stafford To Seek Approval for Portions of Administration's Superfund Proposal*, [Current Developments] 15 ENV'T REP. (BNA) No. 44, at 1788 (Mar. 1, 1985).

149. See, e.g., Massachusetts Oil and Hazardous Material Release Prevention and Response Act, MASS. GEN. LAWS. ANN. ch. 21E § 1-13 (West Supp. 1983); New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11f (West 1982).

Sandra Day O'Connor, however, suggests that states may be able to enforce their environmental regulations more effectively against bankruptcy debtors by assigning cleanup judgments the status of secured claims or statutory liens.¹⁵⁰

Critics of this approach have warned that "superliens" may affect adversely the real estate market by impairing property titles.¹⁵¹ These critics point out problems in determining which of the debtor's assets are subject to the lien, how the lien is recorded, and whether the lien applies to subsequent owners of the property. In addition, litigants have raised constitutional attacks against the New Jersey statute, which attaches a "superlien" to all the polluter's assets and property for expenditures made from the state superfund, without providing for recording or notice of the lien.¹⁵² A recent New Jersey decision held that the statute was constitutional because it did not violate the due process clause, impair contracts, or allow for taking without just compensation.¹⁵³ Nevertheless, state legislatures must word their "superlien" statutes carefully to avoid creating problems.¹⁵⁴

B. Characterizing the Conflict

In each of the five issues considered, a basic conflict exists between the economic interests that the Bankruptcy Code protects and the interests in public health and safety that state and federal hazardous waste laws protect. Because hazardous waste dump sites usually pose grave threats of immediate danger to large numbers of people, the importance of the interest in protecting the public health and safety is clear and compelling. On the other hand, because the cost of determining the extent of the danger and taking effective remedial steps generally is overwhelming, the threat to the economic interests of the debtor, the government, and other creditors also is apparent and serious.

Courts resolve this conflict by balancing the economic interests against the public health and safety interests. The courts, however, differ in the manner in which they articulate the balancing process. Some courts articulate a balancing approach under the

150. *Kovacs II*, 53 U.S.L.W. at 4071 (O'Connor, J., concurring).

151. Schwenke & Lockett, *Superlien "Solutions" to Hazardous Waste-Bankruptcy Conflicts*, ABA ENVTL. L. NEWSLETTER (Winter 1983/84).

152. N.J. STAT. ANN. § 58:10-23.11f (West 1982).

153. *Kessler v. Tarrats*, 191 N.J. Super. 273, 466 A.2d 581 (1983); see Schwenke & Lockett, *supra* note 151, at 2 n.12.

154. See generally Schwenke & Lockett, *supra* note 151.

guise of deciding the nature of the requested equitable relief,¹⁵⁵ the necessity for equitable dismissal,¹⁵⁶ or the absence of federal pre-emption.¹⁵⁷ The Third Circuit in *Quanta Resources*, for example, specifically found that damage to the creditors' economic interest in the assets of the debtor's estate was not sufficient to outweigh the public interest in protecting against dangers of toxic waste disposal.¹⁵⁸ Similarly, the court in *Charles George* held that the need to protect the public from an ongoing environmental nuisance outweighed the creditors' interest in the debtor's estate.¹⁵⁹

Some courts, on the other hand, balance the competing interests more surreptitiously, announcing only their conclusions about which interests are overriding. The Sixth Circuit twice has characterized Ohio's interest in compelling Kovacs to clean up the Chem-Dyne site as *only* pecuniary or economic, virtually ignoring any interest in public health and safety.¹⁶⁰ The Supreme Court recognized some public health and safety concerns,¹⁶¹ but concluded that Ohio's interest was solely economic, in view of the appointment of a receiver.¹⁶² Similarly, the *Johns-Manville* court focused on only the economic interests of the government, finding them in direct conflict with the bankruptcy court's control of the debtor's

155. See *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984); see also *United States v. Price (Price II)*, 688 F.2d 204 (3d Cir. 1982).

156. See *In re Charles George Land Reclamation Trust*, 30 Bankr. 918 (Bankr. D. Mass. 1983).

157. See *In re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984) (New York case); *In re Quanta Resources Corp.*, 739 F.2d 927 (3d Cir. 1984) (New Jersey case); see also *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984).

158. 739 F.2d at 921. The court also recognized the possibility of trustees abandoning dangerous nuclear power plants. *Id.*

159. 30 Bankr. at 924-25. The court stated:

This was not a bankruptcy case where assets could be liquidated, claims adjudicated, and a distribution made within a relatively short time, but rather it was and is an ongoing environmental nuisance that threatens the health, safety and well-being of the people who surround it. . . . The specter of a dividend in this case was not sufficient to justify the exposure of the surrounding populace to the possibility of a reoccurrence of another leachate discharge, similar to that which took place during the Debtor's Chapter 11 proceedings. Dismissal, with the concomitant elimination of the automatic stay, would allow the EPA and the DEQE to assert their full panoply of powers under the Federal and State Superfund statutes.

Id. (footnote omitted).

160. *In re Kovacs*, 681 F.2d at 456 (*Kovacs I*) ("To permit the state of Ohio to proceed with its state court action would subvert the purpose of the Bankruptcy Act to rehabilitate debtors and to give them relief from harassing creditors."); see also *In re Kovacs*, 717 F.2d at 988 (*Kovacs II*) ("The impact of [Ohio's] attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics.").

161. See *Kovacs II*, 53 U.S.L.W. at 4071.

162. See *id.*

property. Consequently, the court subordinated any interest that the government might have in public health and safety.¹⁶³

III. PROPOSING A SOLUTION: A BALANCING APPROACH

These cases reflect an underlying conflict between the debtor's or creditor's goal of retaining assets and the government's twin goals of protecting the public health and safety from hazardous waste and avoiding unnecessary government expenditure. These kinds of conflicts are inevitable because of the increasing federal regulation of hazardous waste disposal, the huge expense of effective cleanup of dump sites, and the limited availability of state or federal superfund money.¹⁶⁴ The courts, therefore, should devise a balancing test to insure the abatement of immediate danger to the public health and safety, while recognizing the economic interests threatened by such remedial actions.

Courts should develop a balancing test similar to the "balancing-of-the-equities" approach that the Supreme Court proposed in a recent decision addressing a similar conflict between the goals of the Bankruptcy Code and the goals and policies of federal labor law. In *NLRB v. Bildisco & Bildisco*¹⁶⁵ the Supreme Court unanimously held that a Chapter 11 debtor may reject a labor union contract as burdensome to the estate¹⁶⁶ only if, "after careful scrutiny, the equities balance in favor of rejecting the labor con-

163. 13 ENVTL. L. REP. (ENVTL. L. INST.) at 20312 (relying on *Missouri v. United States Bankruptcy Court*, 647 F.2d 769 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982)). According to the *Johns-Manville* court, the *Missouri* case held that "state grain warehouse laws, although regulatory in nature, . . . primarily relate to the protection of the pecuniary interest in the debtor's property and not to matters of public health and safety." *Id.*; see also Rosenbaum, *supra* note 11, at 10101.

164. See, e.g., *Quanta Resources*, 739 F.2d at 921; Rosenbaum, *supra* note 11, at 10099; Comment, *Abating an Imminent Hazard: Injunctive Relief Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 32 BUFFALO L. REV. 787, 803 (1983) [hereinafter cited as *Abating an Imminent Hazard*]; *City Wins Priority in Bankruptcy Court in Exchange for Cleaning Up Waste Site*, [File Binder] 15 ENV'T REP. (BNA) No. 15, at 584 (Aug. 10, 1984) (New York State funds not available for cleanup of Berg Chemical site in New York City).

165. 104 S. Ct. 1188 (1984).

166. With certain exceptions and subject to the approval of the court, a trustee may reject or assume any executory contract or unexpired lease of the debtor. 11 U.S.C. § 365(a) (1982). Before *Bildisco* the standard used to determine whether or not a court should reject a collective bargaining agreement ranged from the traditional "business judgment" standard to a very strict standard requiring proof that the reorganization would fail if the court did not permit rejection. The *Bildisco* balancing test fits in between these two alternative approaches. See *Bildisco*, 104 S. Ct. at 1195-96.

tract."¹⁶⁷ Under this standard, the Court balanced the equities in the context of a successful reorganization of the business, focusing on the hardships that each party would suffer if a court allowed or prohibited rejection.¹⁶⁸ In addition, the Court emphasized that a court must focus on not only the quantitative degree of hardship that the affected parties would suffer, but also "any qualitative differences between the types of hardship each may face."¹⁶⁹

In response to *Bildisco*, Congress amended the Bankruptcy Code to provide a specially tailored approach for rejecting or modifying labor union contracts.¹⁷⁰ The amendment retains the balance-of-the-equities test and requires good faith by both the debtor and the employees in negotiating necessary contract modifications.¹⁷¹ Courts also have considered the good or bad faith of the parties in attempting to balance the equities.¹⁷²

While the federal labor laws and federal or state hazardous waste laws do not address identical interests, the bankruptcy conflicts in the two areas are similar. The courts, therefore, should use a similar balancing test to resolve the conflicts in both areas.¹⁷³

167. *Bildisco*, 104 S. Ct. at 1196.

168. *Id.* at 1197.

169. *Id.*; see also *In re Pesce Baking Co.*, 43 Bankr. 949 (Bankr. N.D. Ohio 1984) (considering financial and psychological impact of losing health, welfare, and pension benefits on employees who worked for years at low wages to obtain those benefits).

170. 11 U.S.C. § 1113 (1984).

171. The amendment states:

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that —

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1) [requiring that proposed modifications be necessary for reorganization and that the proposal assure "that all creditors, the debtor and all of the affected parties are treated fairly and equitably"]; and

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

11 U.S.C. § 1113(c), Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390-91. See generally 130 CONG. REC. § 8887, at S8891 (daily ed. June 29, 1984) (remarks of Sen. Hatch, describing this amendment as preserving the spirit of *Bildisco* and retaining the same balance of the equities standard).

172. See, e.g., *In re Pesce Baking Co.* 43 Bankr. 949 (Bankr. N.D. Ohio 1984). The court in *Pesce* found bad faith in the debtor company's intentional postpetition violation of the union contract. The company had hired nonunion employees, especially members of the major shareholder's family, and allowed other family members to retain union benefits while acting as management. In addition, the debtor company had kept money the company had deducted from the employees' wages as union dues, instead of sending the money to the union. See also *In re C. & W. Mining Co.*, 38 Bankr. 496, 502-03 (Bankr. N.D. Ohio 1984) (good faith of debtor is relevant on question of employees' motivation in making rehabilitation successful).

173. In both cases, the Bankruptcy Code protects the economic interests of the debtor

Specifically, in the hazardous waste area, a balancing test should take into account three factors: (1) the qualitative nature of the hardships that each affected party would suffer if its interests were subordinated; (2) the quantitative degree of those hardships; and (3) the good or bad faith of the debtor and the government.

A. *Qualitative Differences*

As a first step in such a balancing test, courts should identify the interests of each of the affected parties—the debtor, the government, the creditors, and the public.¹⁷⁴ The courts should then characterize the parties' interests as either economic concerns or public health and safety concerns so that the court can more easily determine qualitative differences between the kinds of hardships that each party would suffer.

Congressional policy, as evidenced in both the Bankruptcy Code and CERCLA, dictates that courts favor protection of the public health and safety over protection of economic interests when balancing the qualitative degree of hardship that the affected parties suffer. The Bankruptcy Code indicates that in some instances the government interest in protecting the public health

and creditors, while the conflicting laws protect economic *and* other interests of additional parties. In the labor law context, employees' interests in keeping their jobs are psychological as well as financial. In the hazardous waste context, the government's interests are related to public health and safety as well as to financial soundness. *See generally* Drebsky & Santoro, *Bankruptcy and Environmental Regulation: A Response*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10262 (1983) (analogizing the *Bildisco* conflict to the conflict in *Johns-Manville*); *In re Total Transp. Serv., Inc.*, 37 Bankr. 904, 907 (Bankr. S.D. Ohio 1984) ("It is apparent that in *Bildisco* the Court directs not only a balancing of the interests of the parties, but also a balancing of the imperatives of the Congress as expressed on the one hand in the Bankruptcy Code, and on the other, in the National Labor Relations Act.").

174. For example, the *Bildisco* court identified several factors as bearing on its decision to allow rejection. These factors include "the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees." 104 S. Ct. at 1197. The relevant factors in hazardous waste cases will be different. For example, *Bildisco* and the resulting amendment, 11 U.S.C. § 1113, are limited to Chapter 11 reorganization proceedings, in which the successful continuation of the business as a going concern is a major goal. In hazardous waste cases, however, courts often convert Chapter 11 petitions to Chapter 7 liquidation proceedings, so that continuation of the business is no longer a major goal. *Cf. In re Total Transp. Serv. Inc.*, 37 Bankr. 904, 907 (Bankr. S.D. Ohio 1984) (in the labor law context, court noted that rejection would serve no rehabilitative purpose because the debtors' business had ceased operations). In addition, federal labor law imposes bilateral obligations on employers and employees to negotiate contracts, *e.g.*, National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982), while federal hazardous waste law imposes a unilateral obligation on parties who create and dispose of hazardous substances, *e.g.*, CERCLA §§ 107, 106(a), 42 U.S.C. § 9607 (1982); RCRA §§ 3002-3005, 42 U.S.C. § 6901 (1982).

and safety takes precedence over the economic interests of the debtor, creditors, and other interested parties. For example, the Bankruptcy Code provides exemptions for the exercise of the government's regulatory or police power to protect the public health and safety.¹⁷⁵ The automatic stay provision of the Code does not apply to this type of government action unless the action is primarily motivated by economic concerns.¹⁷⁶ Similarly, section 1479, the provision allowing litigants to remove state court proceedings to a bankruptcy court, provides an exemption for government actions to enforce laws and regulations for the protection of the public health and safety.¹⁷⁷ Finally, after the bankruptcy proceedings have begun, the trustee or debtor-in-possession must comply with state laws in operating and managing the bankrupt's business.¹⁷⁸ The automatic stay provision does not prevent actions to enforce the trustee's compliance.¹⁷⁹

Similarly, CERCLA¹⁸⁰ protects the public health and safety by addressing the economic interests of the parties involved in the creation and cleanup of hazardous waste sites. CERCLA's purpose is twofold: (1) to facilitate the prompt cleanup of hazardous waste sites; and (2) to place the ultimate financial liability for cleanup

175. See *supra* notes 22-82 and accompanying text; see also *In re Kennise Diversified Corp.*, 34 Bankr. 237, 243 (Bankr. S.D.N.Y. 1983) (viewing 11 U.S.C. § 362(b)(4), 11 U.S.C. § 362(b)(5), and 28 U.S.C. § 959(b) as forming a "smooth continuum" requiring compliance with state regulations).

176. 11 U.S.C. § 362(b)(4)-(5) (1982); see *supra* notes 22-38 and accompanying text.

177. 28 U.S.C. § 1479 (1982); see *In re Kennise Diversified Corp.*, 34 Bankr. 237, 243 n.5 (Bankr. S.D.N.Y. 1983).

178. 28 U.S.C. § 959(b) (1982). Several courts have found that § 959(b) is evidence that debtors may not operate businesses in violation of environmental regulations. See, e.g., *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979) (action to enjoin violation of Clean Air Act not subject to automatic stay under prior bankruptcy act); *In re Kennise Diversified Corp.*, 34 Bankr. 237 (Bankr. S.D.N.Y. 1983) (automatic stay does not apply to action appointing administrator to operate debtor's dangerously substandard apartment building); see also *In re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984) (§ 959(b) is evidence of congressional intent that trustee's abandonment power not preempt state environmental regulations). One bankruptcy court, however, refused to allow a suit under § 959(b) to enjoin a debtor manufacturing company from polluting in violation of the Clean Water Act. *In re Revere Copper and Brass, Inc.*, 29 Bankr. 584 (Bankr. S.D.N.Y.), *aff'd*, 32 Bankr. 725 (S.D.N.Y. 1983). The court found that the thrust of the complaint addressed the debtor's prepetition activities in causing the pollution and that § 959 applied only to postpetition conduct. *Id.* In addition, the court asserted its discretionary power to refuse to allow the entire suit even to the extent that the plaintiff alleged postpetition violations. *Id.* But see Hoffinan, *Environmental Protection and Bankruptcy Rehabilitation: Toward a Better Compromise*, 11 *Ecology L.Q.* 671, 696-97 (1984) (arguing that the *Revere Copper* court applied § 959 improperly).

179. 28 U.S.C. § 959(a) (1982).

180. 42 U.S.C. § 9601-9657 (1982).

upon the parties responsible for creating the hazard.¹⁸¹ To accomplish these goals, CERCLA establishes the "superfund" to finance appropriate remedial actions by the government¹⁸² and identifies several categories of "responsible parties" who must reimburse either the fund or the government for the cost of necessary remedial action.¹⁸³ In addition, CERCLA specifically provides that the federal government may act to obtain whatever relief may be necessary to abate a substantial and imminent hazard.¹⁸⁴ CERCLA thus uses economic interests both as an incentive, encouraging a state to take remedial action and obtain reimbursement from responsible parties, and as a deterrent, threatening responsible parties with enormous financial liability if they do not use proper disposal techniques or take appropriate remedial action. The interrelationship of these CERCLA provisions shows that, in the area of hazardous waste cleanup, Congress intended to subordinate the parties' economic interests to the public interest in health and safety.

CERCLA established the superfund to provide partial reimbursement for appropriate remedial action taken by the government to clean up hazardous waste sites.¹⁸⁵ Recourse to the superfund to finance cleanup efforts is not automatic, but is subject to various limitations and restrictions. First, because the amount of money in the fund is limited, the fund can finance cleanup of only the sites on the EPA's national priority list.¹⁸⁶ Second, the fund generally may be used only if no responsible parties

181. See, e.g., *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982); *Abating an Imminent Hazard*, *supra* note 164, at 796-97; see also H.R. 1016, 96th Cong., 2d Sess. 33 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119-36 ("The purpose of section [107] is to provide a mechanism for prompt recovery . . . from persons responsible. . ."); Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 12 (1982).

182. CERCLA § 132, 42 U.S.C. § 9631 (1982) (establishing fund); CERCLA § 104, 42 U.S.C. § 9604 (1982) (President's authority to take remedial action); CERCLA § 111, 42 U.S.C. § 9611(a)(1) (1982) (fund used for government actions under CERCLA § 104).

183. CERCLA § 107, 42 U.S.C. § 9607 (1982).

184. CERCLA § 106, 42 U.S.C. § 9606 (1982); CERCLA § 104, 42 U.S.C. § 9604 (1982). The President may act, consistent with the National Contingency Plan, 40 C.F.R. § 300 (1984), whenever there is a release, or a substantial threat of release, of a hazardous substance, a pollutant, or a contaminant presenting an imminent and substantial danger to the public health or welfare. CERCLA § 104(a), 42 U.S.C. § 9604(a) (1982). Pollutants and contaminants include substances that may cause disease, death, behavioral abnormalities, cancer, genetic mutation, psychological malfunctions or physical deformities. CERCLA § 104(b), 42 U.S.C. § 9604(a)(2) (1982).

185. CERCLA § 111, 42 U.S.C. § 9611(a)(1) (1982).

186. See *Abating an Imminent Hazard*, *supra* note 164, at 803. See generally 40 C.F.R. § 300.66 (1984) (methods for establishing priorities for removal and remedial action).

are able to take appropriate remedial action.¹⁸⁷ Third, the EPA requires state cooperation that is often difficult to obtain.¹⁸⁸ The state must provide ten percent of the long-term remedial costs, and, if the state ever owned the site, at least fifty percent of the response cost.¹⁸⁹ In addition, the state must provide for proper disposal and future maintenance.¹⁹⁰ Because so many states are unable or unwilling to make these required contributions, access to the superfund has been curtailed greatly.¹⁹¹

Last, remedial action that the fund financed must be "cost effective."¹⁹² Although CERCLA does not define the term "cost effectiveness,"¹⁹³ CERCLA requires balancing the need for cleanup at a particular site against the money available in the fund.¹⁹⁴ In addition, CERCLA implies a need to balance the cost of taking a certain remedial action against the environmental and public welfare benefit that the action will provide.¹⁹⁵ In either case, economic

187. See CERCLA § 104(a)(6), 42 U.S.C. § 9604(a)(1) (1982); *Abating an Imminent Hazard*, *supra* note 164, at 800-01.

188. *Id.*; see also Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 724 (1983).

189. CERCLA § 104(c)(3)(C), 42 U.S.C. § 9604(c)(3)(C) (1982).

190. CERCLA § 104(c)(3)(A), 42 U.S.C. § 9604(c)(3)(A) (1982).

191. See *EPA Guidance Memorandum on Establishing National Priorities Under Superfund Law*, ENV'T REP. (BNA) 339 (July 2, 1982); *Abating an Imminent Hazard*, *supra* note 164, at 804.

192. CERCLA § 104(c)(4), 42 U.S.C. § 9604(c)(4) (1982); see also CERCLA § 101(24), 42 U.S.C. § 9601(24) (1982).

193. See generally Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking*, 4 HARV. ENVTL. L. REV. 191 (1980) (identifying and discussing four different cost/benefit analysis requirements under environmental regulations).

194. See CERCLA § 104(c)(4), 42 U.S.C. § 9604(c)(4) (1982) (The President shall select necessary and appropriate remedial actions that allow "for that cost-effective response which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund . . . to respond to other sites . . ., taking into consideration the need for immediate action.").

195. See CERCLA § 101(24), 42 U.S.C. § 9601(24) (1982). A "remedy" or "remedial action" may call for permanent relocation of residences, businesses, or community facilities when the action is more cost-effective than and environmentally preferable to other offsite disposition. Also, CERCLA does not include offsite disposition of hazardous substances as a "remedy" or "remedial action" unless it is more "cost-effective" than other methods, or when the action is necessary to protect public health and welfare or the environment from a present or potential risk. *Id.* Section 104 authorizes the President to take "remedial action" consistent with the National Contingency Plan to handle the cleanup of hazardous substances. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1982).

The EPA defines a "cost-effective remedy" as "one which, among the alternatives examined, is least costly but technologically feasible, reliable, and adequately protects public health and the environment." Cost-effectiveness thus depends upon the "probable cost and technological feasibility of alternative remedial actions" as well as the "degree of risk" that

considerations may limit the extent of the cleanup of a hazardous site.

CERCLA's imminent endangerment provision, section 106(a), however, does not specify that cost effectiveness is a consideration.

Rather, when an "actual or threatened release of a hazardous substance" poses "an imminent and substantial endangerment to the public health or welfare or the environment,"¹⁹⁶ the government may act without regard to cost effectiveness.¹⁹⁷ In addition, the EPA considers cost effectiveness only for fund-financed cleanup and not for relief sought through administrative or judicial procedures under section 106(a).¹⁹⁸ Thus, in cases of imminent hazard, the economic interests addressed in other parts of CERCLA give way to its primary purpose of protecting the public from the dangers of improper disposal of toxic and hazardous materials.

One of the main goals of CERCLA is to put the cost of cleaning up hazardous waste where the cost belongs—on the parties who caused the problem.¹⁹⁹ CERCLA and RCRA act together to internalize the social costs of hazardous waste generation and disposal in considering the cost effectiveness and the perceived fairness of imposing these costs on the parties conducting such ultrahazardous activity.²⁰⁰ Consequently, CERCLA's section 107 imposes liability

the particular site presents. EPA Memorandum on Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act (Aug. 26, 1983), reprinted in ENV'T REP. (BNA) Fed. Laws 41:2861; see 40 C.F.R. § 300.68 (1984) (National Contingency Plan); see also *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (stating that cost-effectiveness of remedial action is an issue in considering the particular item of damages that a responsible party must pay).

196. See CERCLA § 106(a), 42 U.S.C. § 9606(a) (1982).

197. CERCLA § 106(a) provides that the President may require the Attorney General to secure "such relief as may be necessary" to abate an imminent and substantial endangerment to the public health or welfare or the environment. The appropriate district court may then "grant such relief as the public interest and the equities of the case may require." CERCLA § 106(a), 42 U.S.C. § 9606(a) (1982). In addition, the President may take other action, including issuing orders for violation of which a party may be fined up to \$5000 a day. CERCLA § 106(b), 42 U.S.C. § 9606(b) (1982); see H.R. 1016, 96th Cong., 2d Sess. 30 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6133 ("Emergency actions should not be delayed by having to make a cost-balancing determination."). Courts construing the scope of CERCLA § 106 also have relied on cases interpreting the similar endangerment provision under RCRA § 7003. See, e.g., *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982).

198. See *EPA Guidelines for Using the Imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes* (May 11, 1982), published at 47 Fed. Reg. 20664, reprinted in ENV'T REP. (BNA) Fed. Laws 21:4301. These guidelines, published pursuant to CERCLA § 106(c), state that the "cost-balancing considerations are applicable only to Fund-financed activities." 47 Fed. Reg. at 20666.

199. See CERCLA § 107, 42 U.S.C. 9607 (1982).

200. See *Abating an Imminent Hazard*, *supra* note 164, at 796-97. See generally

on individuals who transport, store, or dispose of hazardous substances, along with operators and owners of hazardous sites.²⁰¹ Section 107 has a dual function. First, the provision allows for reimbursement to the superfund²⁰² or to any other entity that finances the cleanup of the hazardous waste site. Second, the provision regulates the future activities of individuals in the hazardous waste business by threatening financial retribution.²⁰³

Most courts have construed sections 106 and 107 broadly, holding that the parties liable under section 107 are also responsible under section 106.²⁰⁴ Courts have imposed both strict liability and joint and several liability²⁰⁵ and have included even past off-site generators within the pool of responsible parties.²⁰⁶ Further-

Grad, *supra* note 181.

201. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1982).

202. The superfund is financed primarily by industry fees, rather than by general tax revenue, to spread the cost more equitably among individuals who benefit from creating the waste. See Grad, *supra* note 181, at 12.

203. See H.R. 1016, 96th Cong., 2d Sess. 33 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6136 ("The purpose of section 3071 [CERCLA § 107] is to provide a mechanism for prompt recoveries of monies expended . . . and to induce such potentially liable persons to pursue appropriate environmental response actions voluntarily."); *id.* at 63 (Remarks of Rep. Gore) ("[T]he liability sections are also important in addressing the existing problem and creating a strong incentive to ensure that a high standard of care is observed by future generators, handlers and disposers of hazardous waste."). See generally *Abating an Imminent Hazard*, *supra* note 164, at 795-98. This dual purpose is reflected in the EPA's policy to pursue bankrupt responsible parties only if their assets are sufficient to provide reimbursement, or if action against them may deter other parties contemplating bankruptcy to evade CERCLA or RCRA obligations. *EPA Guidance for Bankruptcy*, *supra* note 13, at 2-3; *cf. In re Cox*, 33 Bankr. 657, 659-60 (Bankr. M.D. Ga. 1983) (criminal prosecution costs payable to government not dischargeable under 11 U.S.C. § 523, because purpose was not to compensate government or create new source of revenue, but to "regulate behavior by threat of financial retribution") (quoting 3 COLLIER ON BANKRUPTCY ¶ 57.22 (14th ed. 1977)).

204. See, e.g., *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982). See generally *Abating an Imminent Hazard*, *supra* note 164, at 809-12. CERCLA § 106 does not list parties specifically subject to its reach, while § 107 identifies responsible parties. CERCLA §§ 106, 107, 42 U.S.C. §§ 9606, 9607 (1982).

205. The final version of CERCLA eliminated specific provisions for strict liability as well as joint and several liability, but courts generally have imposed such liability. See, e.g., *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (strict and joint and several liability); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982) (strict liability); *cf. United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (holding development of federal common law necessary because of the complexity and magnitude of problems). *But see United States v. Outboard Marine Corp.*, 556 F. Supp. 54, 56 (N.D. Ill. 1982) (ruling out development of federal common law in view of *Milwaukee v. Illinois*, 451 U.S. 304 (1981), which held that the CWA preempted the federal common law of water pollution).

206. See, e.g., *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (past generators subject to both CERCLA and RCRA); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (past generators subject to CERCLA but not

more, most courts have read the "substantial and imminent endangerment" language of section 106 as a substantive rather than a jurisdictional provision and have allowed action upon a mere threat of endangerment.²⁰⁷ In addition, failure to provide proper remedial action under section 106 may subject a party to criminal²⁰⁸ and civil penalties,²⁰⁹ as well as punitive damages.²¹⁰

RCRA); *see also* *United States v. Waste Indus.*, 734 F.2d 159 (4th Cir. 1984) (past generators subject to RCRA § 7003). *But see* *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982) (past generators not subject to either CERCLA or RCRA), *appeal dismissed*, 713 F.2d 49 (3d Cir. 1983).

207. *See, e.g.*, *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (evidence of imminent and substantial endangerment); *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982) (same); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982) (imminent and substantial endangerment sufficient to assert claim under CERCLA or RCRA); *see also* *United States v. Hooker Chem. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984) (substantive content of emergency provisions under RCRA, CWA, and SDWA, but no private cause of action).

The 1984 RCRA amendments further expand the EPA's enforcement capabilities by adding a provision authorizing the EPA to compel facilities with "interim status" to take "corrective action" upon the release of a hazardous substance. RCRA § 3008(h), 42 U.S.C. § 6928(h) (Supp. 1985). These new powers are similar to the provisions of CERCLA § 106, but even broader because the new powers do not contain "imminent and substantial danger" language. Unlike RCRA's imminent hazard provision, *see* RCRA § 7003, 42 U.S.C. § 6973 (1982), the new § 3008(h) is not restricted to the enforcement of RCRA regulatory requirements, nor is the new section confined to areas within the facility's boundaries. Thus, these amendments possibly could compel a wider array of remedial actions. *Lucero Says 1984 RCRA Amendments Give EPA Broader Power to Require Facility Cleanups*, [Current Developments] 15 ENV'T REP. (BNA) No. 33, at 1374 (Dec. 14, 1984).

208. For example, when a person in charge of a facility fails to notify the authorities of a release of hazardous substances, CERCLA § 103(b) imposes a fine of up to \$10,000 or a prison term of not more than a year. CERCLA § 103(b), 42 U.S.C. § 9603(b) (1982). Improper handling of hazardous waste also invokes criminal penalties of up to \$50,000 per day under RCRA § 3008(d). RCRA § 3008(d), 42 U.S.C. § 6928(d) (1982). RCRA imposes further criminal penalties of up to \$250,000 a day for an individual and up to \$1,000,000 a day for an organization that "knowingly endangers" human life by violating RCRA provisions. RCRA § 3008(e), 42 U.S.C. § 9692(e) (1982). The EPA recently has conducted criminal investigations into alleged extensive dumping of PCBs into open lagoons and has filed suit to impose civil penalties of \$6.8 million. *See U.S. Charges Waste Management, Inc. Dumped PCB's*, Wall St. J., Jan. 25, 1985, at 8, col. 4.

209. Under CERCLA § 106(b), a party that willfully fails to comply with an administrative order under § 106(a) is subject to fines of up to \$5000 for each day of violation. CERCLA § 106(h), 42 U.S.C. § 9606(b) (1982). CERCLA § 109 imposes a civil penalty of up to \$10,000 per day of violation for failure to comply with the financial responsibility requirements of § 108. CERCLA § 109, 42 U.S.C. § 9609 (1982). RCRA § 3008(a) provides civil penalties for failure to take required corrective action under an administrative order or injunction. RCRA § 3008(a), 42 U.S.C. 6928(a) (1982); *see also* *Waste Management Agrees to Pay Penalty, Dispose of PCBs Stored at Emelle, Ala. Site*, [Current Developments] 15 ENV'T REP. (BNA) No. 35, at 1431 (Dec. 28, 1984) (operator/owner of largest U.S. facility agreed to pay a \$600,000 civil penalty and dispose of 2.8 million gallons of PCBs).

210. A party that fails to respond as ordered under § 104 or § 106 must pay punitive damages of up to three times the amount of costs that the superfund incurred. Any money

CERCLA thus subordinates the economic interests of the responsible parties to the public health and safety interest in abating imminent danger from hazardous waste sites. The CERCLA approach is consistent with the Bankruptcy Code's subordination of economic interests in situations concerning government actions and regulations protecting the public health and safety. Similarly, in resolving conflicts between the Bankruptcy Code and hazardous waste laws, a bankruptcy court should give more weight to hardships that are *partly* health and safety related than to hardships that are *solely* economic. When a court assesses the qualitative degree of hardship that a party would face if its interests were subordinated by the Code, the fundamental question should be whether the party's interests are purely economic or are also health related.

The government's interest in cases concerning the cleanup of hazardous waste sites almost always will be both economic and public health and safety related because the debtor's failure to clean up the site will expose the public to hazardous substances and leave the government to bear the cost. In *Kovacs II* the Supreme Court recognized that Ohio's interest was primarily economic because of the financial approach Ohio had taken to implement the cleanup. The Court, however, expressly noted that its decision did not cover situations in which a government uses criminal sanctions to compel a debtor to clean up a dumpsite.²¹¹ In those cases, the government would have more interest in public health and safety than in economic concerns. Accordingly, a court should weigh the government's interests more heavily.

In *Johns-Manville* the court noted that the government could provide funds for the cleanup and then file a claim for reimbursement either against the debtor or against superfunds under state or federal law.²¹² This approach, however, has several drawbacks. First, superfund limitations and restrictions might prevent a government from using those funds, even if the fund contained a suffi-

received as punitive damages is deposited in the superfund. CERCLA § 107(c), 42 U.S.C. 9607(c) (1982).

211. *Ohio v. Kovacs*, 53 U.S.L.W. 4068, 4071 (U.S. Jan. 8, 1985); see also *supra* notes 83-103, and accompanying text (describing *Kovacs*' narrow holding); *supra* note 208 and accompanying text (describing criminal sanctions).

212. *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310, 20310-12 (D.N.H. 1982) (suggesting reimbursement actions under CERCLA §§ 104 and 107 and under New Hampshire's Hazardous Waste Cleanup Fund, RSA 147-B (Supp. 1981), and pointing out that the city in *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) followed this procedure).

cient amount to finance the cleanup.²¹³ Second, a government taking this approach against a debtor would be left with only a "pecuniary loss," a "money judgment," or an "alternative right to payment."²¹⁴ Consequently, government actions against the debtor for reimbursement probably would fall outside the scope of the section 362(b)(4) and (b)(5) provisions, and the government's claim would be dischargeable because the government's interest at that point would be solely pecuniary.²¹⁵ This result would give the government an economic incentive to refrain from financing any cleanup efforts to avoid being left with only a general unsecured claim against the debtor's estate. Third, this approach may contravene CERCLA's intent to provide a deterrent that induces entities involved in the generation and disposal of hazardous waste to conduct their activities properly.²¹⁶

Last, the problem with either the reimbursement or the criminal sanctions approach is that the government may not act quickly to abate the danger to the public health and safety. Both approaches encourage the government to pursue all available methods of extracting payment and cooperation from the responsible party before spending any government money to clean up the site, thus lessening the impact if the responsible party later files for bankruptcy. This kind of incentive directly conflicts with CERCLA's goal of facilitating cleanup by encouraging states to act first and obtain reimbursement later.²¹⁷

Generally, the interests of creditors and debtors in these cases are solely economic in nature. The major problem with subordinating the economic interests of creditors and debtors to public health and safety interests is that creditors would have no incentive to make loans to companies that engage in hazardous waste disposal. Because credit would be more difficult to obtain, the costs of hazardous waste disposal would increase. In *Quanta Resources*, for example, the dissent was concerned that innocent creditors ulti-

213. *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310, 20310 n.7 (D.N.H. 1982) (noting the potential lack of adequate funds). For a further discussion of superfund limitations, see *supra* notes 185-95 and accompanying text.

214. See *supra* text accompanying notes 27-39 and 89-91.

215. See generally *supra* notes 22-82 (discussing cases deciding applicability of automatic stay to government actions); *supra* notes 83-103 and accompanying text (discussing dischargeability).

216. See H.R. 1016, pt. I, 96th Cong., 2d Sess. 17 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6120.

217. See *supra* text accompanying notes 183-84.

mately would bear the cleanup costs.²¹⁸ The majority, on the other hand, was concerned that the debtor could foist the cleanup costs upon the government after causing the problem by failing to comply with the law in the first place.²¹⁹ CERCLA's aim, however, is to impose those costs upon the responsible parties, both as a matter of economics and as a matter of deterrence. One of the goals of CERCLA, in fact, is to achieve this kind of internalization of social costs, forcing the price of goods connected with hazardous waste to reflect the inevitable cleanup costs.²²⁰

B. Quantitative Differences

After examining qualitative considerations, courts applying the balancing test should address the quantitative degree of hardship that each party would suffer if its interests were subordinated. The determination of the degree of hardship that the government suffers should focus on both the magnitude of the risk that the dump site presents to the public and the magnitude of the government's economic loss. In calculating the magnitude of the risk to the public health and safety, courts should assess such factors as the form, amount, and toxicity of substances present, the population at risk, the potential for contaminating the drinking water supply, the danger of fire or explosion, and the danger of human, animal, or food chain exposure to highly toxic substances.²²¹ Under section 106, CERCLA dictates a low threshold for imminent hazard cases in which parties may obtain injunctions or other emergency relief.²²² Courts have interpreted this language broadly to apply to situations in which a threatened release of hazardous substances is present, even if the harmful effect on public health would not occur immediately.²²³ Courts should give considerable

218. *In re Quanta Resources Corp.*, 739 F.2d 912, 926 (3d Cir. 1984) (Gibbons, J., dissenting).

219. *Id.* at 921.

220. *See supra* text accompanying notes 199-200.

221. *See* 40 CFR § 300.65(a) (1984) (factors used to determine appropriateness of immediate removal action); *id.* § 300.68(e)(2) (factors used to determine extent of danger in cases of source control remedial actions); *id.* § 300, app. A (factors used to rate sites on national priority list).

222. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1982).

223. *See, e.g.*, *United States v. Northeastern Pharmaceutical & Chem. Co.* 579 F. Supp. 823 (W.D. Mo. 1984) (allegations of presence of substances with high toxicity at low dosages sufficient); *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982) (allegations of release of PCBs sufficient, even without evidence of specific effects); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982) (allegations of carcinogenic and toxic wastes leaking into ground over 55 years contaminating ground water to

weight in a bankruptcy decision to any degree of risk that would qualify for section 106 treatment. The quantitative degree of the government's economic interest depends upon the cost of cleanup and the available sources of revenue to cover the cleanup costs. If the government can reach other responsible parties, or if superfund money is available under state or federal law, the site will be cleaned up and protecting the debtor will impose less hardship on the public. If the debtor, on the other hand, is the only responsible party, and no superfund money is available, protecting the debtor will create a greater degree of economic hardship for the public because other public funds will have to be used.

In *Johns-Manville*, for example, the governments' failure to pursue other responsible parties, including the current owners of the sites, particularly influenced the court's decision. The court recognized that sufficient funds might not be available to the governments. The court, nonetheless, frowned upon the fact that the governments sought only nominal relief from site owners, while focusing all enforcement efforts on the debtor.²²⁴ In sum, the governments would suffer a lower quantitative degree of economic hardship upon dismissal of the enforcement action against the debtor because other possible sources of funds were available.

The quantitative degree of economic loss that the debtor or the creditors would suffer depends upon the assets of the debtor's estate and the types of creditor claims. If substantial assets remain in the estate, the other creditors will suffer equally substantial loss if most of the assets are used to finance the cleanup. If the estate has no remaining assets, the government is unlikely to bring suit. In general, the EPA pursues bankrupt responsible parties only if the estate has sufficient assets and only if there are few secured creditors with limited claims.²²⁵

Secured creditors²²⁶ whose claims are subordinated will suffer

extent that migration would continue without preventive action).

224. *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310, 20311 (D.N.H. 1982). The individual site owners were asked only to note on their presence the presence of hazardous waste and to permit inspection. *Id.* at 20311 n.11.

225. *EPA Guidance for Bankruptcy*, *supra* note 13, at 2-3; *see also supra* text accompanying notes 199-203 (discussing EPA's goal of deterrence).

226. A secured creditor's claim may be protected by the fifth amendment takings clause, but this issue is not yet clear. Although a secured creditor's rights in a debtor's property generally constitute "property" subject to "taking" under the fifth amendment, *see United States v. Security Indus. Bank*, 459 U.S. 70 (1982), a court may instead classify a state's enforcement of an environmental regulation as "a permissible exercise of the state's regulatory power to promote the public good. . . ." *In re Quanta Resources Corp.*, 739 F.2d 912, 922 (3d Cir. 1984) (citing cases on this issue); *see also Michehnan, Property, Utility*

a greater degree of economic loss than general unsecured creditors because general unsecured creditors, even under normal conditions, usually recover little from a debtor's estate.²²⁷ The secured creditors' economic loss is especially significant when the creditors have claims against unclouded assets of the estate. In cases in which the secured property is the hazardous waste site, however, the degree of the secured creditor's loss might be less significant. In *In Re Berg Chemical Co.* the court noted that the need to undertake expensive cleanup efforts substantially decreases the resale value of property.²²⁸ Thus, the secured creditor recovering the property is left with an asset already subject to huge liabilities, instead of an asset worth enough to allow the creditor to recoup its investment. Courts, therefore, should consider less heavily the economic hardship to the creditor in having its interests subordinated.

C. Good Faith

The third part of the balancing formula requires the court to examine the motives of the parties concerned with the filing of the bankruptcy petition. Although the Bankruptcy Code does not expressly require good faith in filing a petition, courts traditionally have interpreted the Code as retaining the bankruptcy courts' broad equitable powers to dismiss a petition filed in bad faith.²²⁹ The question of bad faith has focused on the debtor's attempt to use the bankruptcy system for some purpose other than for what Congress intended.²³⁰ Labeling a particular petition as filed in bad

and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1183-84 (1967) (discussing factors relevant to characterizing action as either regulation or taking). A full discussion of the scope and clarity of this distinction is beyond the scope of this Note.

227. See *supra* note 135.

228. See *supra* notes 145-46 and accompanying text.

229. See, e.g., *In re Kahn*, 34 Bankr. 574 (Bankr. W.D. Ky. 1983) (good faith required under Chapter 11 and Chapter 13); see also Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121, 1123 (1983). See generally Gaffney, *Bankruptcy Petitions Filed in Bad Faith: What Actions Can Creditors' Counsel Take?*, 12 U.C.C. L.J. 205 (1979). Dismissal "for cause" is allowed under 11 U.S.C. §§ 707, 1112(b), or 1307(c). The courts require good faith for confirmation of a Chapter 11 or Chapter 13 reorganization plan. 11 U.S.C. §§ 1129(a)(3), 1322(b)(7) (1982). Generally, the courts use the same kind of analysis in determining "good faith" in the filing of the original petition. *In re Victory Constr. Co.*, 9 Bankr. 549, 551 (Bankr. C.D. Cal. 1981), *vacated*, 37 Bankr. 222 (Bankr. 9th Cir. 1984) (providing extensive history of development of good faith doctrine).

230. See Gaffney, *supra* note 229, at 225; Note, *supra* note 229, at 1123. See generally *In re Victory Constr. Co.*, 9 Bankr. 549 (Bankr. C.D. Cal. 1981), *vacated*, 37 Bankr. 222 (Bankr. 9th Cir. 1984) (history of development of good faith doctrine).

faith, however, is difficult because the Bankruptcy Code serves many purposes and protects a wide variety of interests.²³¹ Legitimate bankruptcy purposes include ensuring a "fresh start" for the individual debtor,²³² providing equitable treatment for creditors,²³³ and safeguarding existing jobs for employees.²³⁴

The Bankruptcy Code provides the honest debtor with a fresh start and relief from harassing creditors, but does not operate automatically to relieve debtors from the "unpleasant effects" of valid local laws.²³⁵ For example, the automatic stay provision does not apply to criminal actions against the debtor.²³⁶ Courts may refuse to discharge some criminal restitution orders.²³⁷ Statutory exemptions from discharge include penalties payable to the government²³⁸ and claims based on the debtor's willful and malicious injury of property.²³⁹ In these areas the debtor's own actions weaken the interest in a fresh start.

231. See, e.g., Rogers, *In re Johns-Manville Corp.: The Delicate Balance of Fairness Between Bankruptcy and Products Liability Law*, 3 J.L. & Com. 365, 378 (1983) ("The task of defining good faith . . . is difficult in the commercial context. In the bankruptcy context, it may well be impossible.").

232. See, e.g., *In re C. & W. Mining Co.*, 38 Bankr. 496, 503 (Bankr. N.D. Ohio 1984) (The bankruptcy court "provides a safe haven and a fresh start for the honest debtor."); *In re Wheeler*, 38 Bankr. 842, 845 (Bankr. E.D. Tenn. 1984) ("One of the primary goals of the Bankruptcy [Code] is to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh, free from the obligations and responsibilities consequent upon business misfortunes."). See generally Gaffney, *supra* note 229, at 225; Rogers, *supra* note 231. Providing a "fresh start" for corporate or partnership debtors in Chapter 7 liquidations, however, may no longer be a major goal of the Bankruptcy Code because the 1978 Bankruptcy Code does not allow discharge for debts of nonindividuals. 11 U.S.C. § 727(a)(1) (1982); see *In re Quanta Resources Corp.*, 739 F.2d 912, 915 n.7 (3d Cir. 1984) (citing S. REP. No. 989, 95th Cong., 2d Sess. 98 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5884).

233. E.g., *In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984).

234. See Gaffney, *supra* note 229, at 225; Note, *supra* note 229, at 1126.

235. *In re Kennise Diversified Corp.*, 34 Bankr. 237, 245 (Bankr. S.D.N.Y. 1983); *Donovan v. TMC Indus., Ltd.*, 20 Bankr. 997, 1001 (Bankr. N.D. Ga. 1982) (the government's interest in enforcing federal labor law outweighed debtor's interest in "disentangling himself from sundry creditors"); see also *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979) (although one of main goals of prior Bankruptcy Act was rehabilitation of debtor, rehabilitation must occur within the law, and debtor company must comply with requirements of Clean Air Act).

236. 11 U.S.C. § 362(b)(1) (1982).

237. See *supra* notes 99-103 and accompanying text. In *Kovacs II* Ohio argued that the order, although entered as a civil remedy, was based on Kovacs' statutory violations and thus should be nondischargeable. The Supreme Court rejected this argument. *Ohio v. Kovacs*, 53 U.S.L.W. 4068, 4069 (U.S. Jan. 8, 1985). The Court, however, expressly disclaimed that its decision would affect Ohio's criminal remedies against Kovacs or other polluters. *Id.*

238. 11 U.S.C. § 523(a)(7) (1982).

239. *Id.* § 523(a)(6).

Beyond the debtor's motive in filing for bankruptcy, the court's determination of good faith should include whether the debtor has adhered to legal duties. For example, in balancing the equities under the *Bildisco* test for rejecting union contracts, some courts identify as a factor the debtor's bad faith in refusing to cooperate with union members in attempting to work out a compromise arrangement.²⁴⁰ On the other hand, efforts by the employer and employees to negotiate an agreement may amount to good faith.²⁴¹ These courts view good faith as a factor in the *Bildisco* test, focusing on not only the debtor's motives in filing for bankruptcy, but also the debtor's bad faith violation of the labor laws.

Similarly, courts should view a debtor filing for bankruptcy solely to evade obligations to dispose of hazardous waste as acting in bad faith. The debtor's conduct immediately prior to filing the petition and during the proceedings also may amount to bad faith if the debtor knowingly allows further release of hazardous substances.²⁴²

In *In re Charles George Land Reclamation Trust*,²⁴³ for example, the court stressed that the debtor had released a huge amount of highly toxic waste at the beginning of the Chapter 11 proceedings. In contrast, in the two *Kovacs* decisions, neither the Sixth Circuit nor the Supreme Court emphasized *Kovacs*' continued operation of his business in flagrant disregard of the cleanup order that the court entered with his consent after three years of negotiation.²⁴⁴ These types of activities should be classified as bad faith

240. See, e.g., *In re C. & W. Mining Co.*, 38 Bankr. 496, 500 (Bankr. N.D. Ohio 1984) (debtor must prove it is not "improperly motivated" by desire to rid itself of union); *In re Pesce Baking Co.*, 43 Bankr. 949 (Bankr. N.D. Ohio 1984) (debtor's president hired nonunion family members and refused to negotiate with union employees who had worked at low wages to retain health and pension benefits).

241. See, e.g., *In re Briggs Transp. Co.*, 39 Bankr. 343 (Bankr. D. Minn. 1984) (rejection of contract allowed, especially in light of extensive efforts by debtor company and employees to relieve problems in other ways).

242. This approach is in keeping with CERCLA § 107(c)(2), which provides an exception from the ordinary liability limitations when "willful misconduct or willful and knowing negligence causes the release of hazardous waste substances, or when the responsible party fails or refuses to cooperate fully with the proper officials. CERCLA § 107(c)(2), 42 U.S.C. 9607(c)(2) (1982); see also Rosenbaum, *supra* note 11, at 10103 n.56 (arguing that an intentional environmental violation in contemplation of bankruptcy is "roughly analogous" to a preference, see 11 U.S.C. § 547, because the illegal dumping would protect economic creditors at public expense).

243. 30 Bankr. 918 (Bankr. D. Mass. 1983); see *supra* notes 126-33 and accompanying text (discussing *Charles George*).

244. See *supra* notes 40-56 and 83-103 and accompanying text (discussing *Kovacs I* and *Kovacs II*).

on the debtor's part, and consequently, the court should give less weight to the debtor's interests. If the debtor, on the other hand, has been acting in good faith by making initial efforts to comply with the laws, by cooperating with enforcement authorities in negotiating a compromise, and by attempting to comply with the terms of that agreement, then the court should give more weight to the debtor's interest.

The major problem with conditioning bankruptcy protection partially upon the debtor's good faith is that this approach essentially saddles creditors with a duty to monitor their debtor's conduct to protect their investments. The costs of monitoring could discourage creditors from making loans to companies connected with hazardous waste. Again, federal hazardous waste regulation contemplates this kind of internalization of social costs.²⁴⁵ Imposing such a monitoring duty on creditors is not completely unacceptable; a creditor who knowingly loans money to a debtor that engages in improper and illegal hazardous waste disposal does not deserve the full protection of the Bankruptcy Code. The loan might be favorable to the economic interests of the debtor and the creditor, but might completely ignore the danger to the public health and safety. Under CERCLA, present owners of dump sites may be liable for cleanup costs even when the activities of the past owner actually caused the danger.²⁴⁶ Creditors making loans in "studied indifference"²⁴⁷ to companies involved with hazardous waste should occupy an equivalent position.

Courts also should examine the motives and conduct of the government. Pursuing the bankrupt while failing to involve other responsible parties or use other available funds may amount to bad faith by the government. In *United States v. Johns-Manville Sales Corp.*,²⁴⁸ for example, the court emphasized both the governments' failure to bring substantial claims against other responsible parties and the governments' failure to use either superfund money or their own funds to effect the cleanup.²⁴⁹ In other cases, the state may own, or may have owned, a hazardous waste site,

245. See *supra* text accompanying notes 199-201.

246. CERCLA § 107, 42 U.S.C. § 9607 (1982).

247. In *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982), the court held that the present owners of dump sites were contributing to the release of hazardous substances by refusing to act and by maintaining a "studied indifference" to the presence of hazardous wastes. *Id.* at 1073.

248. 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310 (D.N.H. 1982); see *supra* notes 57-70 and accompanying text (discussing *Johns-Manville*).

249. 13 ENVTL. L. REP. (ENVTL. L. INST.) at 20310-11.

thus qualifying as a responsible party under CERCLA.²⁵⁰ In these circumstances, the amount of the financial contribution required from the state depends in part upon its "degree of responsibility."²⁵¹ A state then may attempt to avoid its responsibility by pursuing all other responsible parties instead of cleaning up the site on its own. Because CERCLA requires state cooperation for access to federal superfund money,²⁵² courts should view a state's refusal to cooperate as bad faith.

The government's characterization of its actions as solely an exercise of police and regulatory power to protect the public health and safety, when the government's interests are in fact solely economic, is another form of bad faith. Courts should not allow a government to elevate economic concerns above the responsibility to protect the public health and safety. When the government makes this inappropriate decision, courts should weigh the government's interests less heavily. If, however, the government accepts its responsibilities, takes appropriate remedial action, and pursues the debtor in an effort to force compliance with the law and to deter future violations, then the courts should weigh the government's interests more seriously.

In *Kovacs II*²⁵³ the Supreme Court characterized Ohio's interests as solely economic. Ohio had argued that its interests were exclusively public health and safety related, in an effort to avoid the restrictions of the Bankruptcy Code. Ohio's overall conduct did not constitute bad faith, however, because the state took proper remedial action to clean up the site and pursued other responsible parties for reimbursement. Furthermore, any bad faith by the state in characterizing its interests was less serious than Kovacs' bad faith in acting in flagrant disregard of the cleanup order to which he had consented. The state action was a good faith effort both to enforce compliance and to deter future violations of hazardous waste laws. The Court, therefore, should have given the state's interest more consideration.²⁵⁴

250. See, e.g., *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) (transporters of waste bribed city employees to allow illegal dumping on a city owned site).

251. CERCLA § 104(c)(3)(C)(ii), 42 U.S.C. 9604(c)(3)(C)(ii) (1982).

252. CERCLA § 104(c)(3), 42 U.S.C. 9604(c)(3) (1982); see *supra* text accompanying notes 188-91.

253. *Ohio v. Kovacs*, 53 U.S.L.W. 4068 (U.S. Jan. 8, 1985); see *supra* notes 40-56 and 83-103 and accompanying text.

254. In view of the *Kovacs II* decision, a state still may be able to ensure that its efforts are seen as noneconomic by pursuing the debtor with criminal sanctions rather than

Courts should not allow the state to avoid its obligation to protect the public health and safety by insisting that the obligation only applies to the debtor. Courts also should not allow the debtor to avoid responsibility for dangerous conditions resulting from conduct that state and federal laws prohibit. Courts should recognize that the need to protect the community from the threat of hazardous waste takes priority over the economic interests of the parties, the government, the debtors, and other creditors.

D. Application

Courts applying this balancing approach should place each factor on a continuum that ranges from a strictly economic context to a strictly public health and safety context. At the economic end of the continuum, the Bankruptcy Code should prevail. At the other extreme, courts should subordinate bankruptcy goals to the federal goal of protecting public health and safety. *Johns-Manville*²⁵⁵ serves as an example at the economic end of the spectrum. As in most hazardous waste cases, the government had both economic and public health and safety interests. The government's public health and safety interest, however, was less compelling in this case because the creditors also had health-related interests. Because of the great number of creditors with large claims, the quantitative degree of hardship to the creditors was great. The court, by allowing the state to compel cleanup, would have diverted substantial assets in the estate from claims of the creditors. The quantitative degree of economic harm to the government and the public, however, was not as great because the government could have pursued the present owners or other responsible parties to pay for the cleanup. Furthermore, the state might have had access to superfund money to help finance the cleanup.

In examining the relative good faith of the debtor and the government in *Johns-Manville*, the court should have found that the government's failure to take any cleanup steps, expend any of its own funds, or pursue any other responsible party constituted bad faith. The debtor, on the other hand, had not acted in bad faith in relation to the government's cleanup efforts.²⁵⁶ On balance, then,

through receiverships or other state equivalents of bankruptcy. See *Kovacs II*, 53 U.S.L.W. 4068.

255. *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310 (D.N.H. Nov. 15, 1982); see *supra* text accompanying notes 57-70 (discussing *Johns-Manville*).

256. Admittedly, *Johns-Manville's* motive in filing the bankruptcy petition may have

the court should have defined the government's action against Johns-Manville as economic and should have treated it as an ordinary bankruptcy claim. Indeed, the *Johns-Manville* court actually considered these same factors, although in an unarticulated manner, and appropriately found that the automatic stay prohibited the government's action against the debtor.

*Charles George*²⁵⁷ serves as an example at the public health and safety end of the spectrum. Again, the government had both economic and public health and safety interests. Unlike *Johns-Manville*, however, no other creditors in *Charles George* had countervailing health-related interests. The government in *Charles George* clearly focused more on public health and safety concerns than on economic considerations. Before the bankruptcy, the city had issued numerous health orders, the state had negotiated a consent order that defined the debtor's responsibilities, and a state court judge was actively supervising the debtor's activities. The potential quantitative degree of harm to the public was tremendous because the site presented an imminent danger. The debtor's site already had contaminated neighboring wells, and the debtor subsequently released an additional 10,000 gallons of hazardous material that further threatened the public drinking water supply. The quantitative economic hardship to other creditors, however, would have been minimal because the government's claims were so substantial that the prospects of a dividend to the other creditors would have been "negligible."²⁵⁸

In determining the relative good faith of the government and the debtor, the *Charles George* court should have concluded that the debtor's illegal contamination of the public water source constituted bad faith. The debtor's conduct flagrantly violated the agreement negotiated with the state as well as state and federal law. Furthermore, the debtor's motive in converting his Chapter 11 reorganization petition to a Chapter 7 liquidation may have been to avoid the less stringent dismissal requirements of Chapter 11.²⁵⁹ This motive would have constituted bad faith. The government, on the other hand, acted in good faith by attempting to enforce compliance with the cleanup order prior to bankruptcy and by at-

been the desire to avoid products liability claims, but this motive is unrelated to the hazardous waste cleanup issue.

257. *In re Charles George Land Reclamation Trust*, 30 Bankr. 918 (Bankr. D. Mass. 1983); see *supra* text accompanying notes 126-33 (discussing *Charles George*).

258. *Charles George*, 30 Bankr. at 924 n.9.

259. *Id.* at 920 n.2 (citing 11 U.S.C. § 1112(a) (1982)).

tempting to address the emergency that arose after bankruptcy. On balance, the *Charles George* court appropriately dismissed the debtor's petition and allowed the state to abate the public health hazard.

The two *Kovacs* cases²⁶⁰ occupy different positions along the spectrum between these two extremes. In both *Kovacs* cases, public health and safety concerns initially prompted the action by the state. The state, however, manifested an economic concern by appointing a receiver rather than expending the state's own funds. The Supreme Court, therefore, may have appropriately characterized the interest of the state as economic.

The potential quantitative degree of hardship to the government and the public changed during the interval between the two cases. The potential harm was greater in *Kovacs I* because cleanup had just begun. By the time of *Kovacs II*, however, cleanup was substantially complete, thus lowering the potential harm to the public. The quantitative degree of hardship to the individual debtor and the other creditors was substantially different in the two cases. In *Kovacs I* the court would have decreased or eliminated the assets available for other creditor claims if it allowed an action to enforce the debtor's prepetition cleanup obligation. This action, however, would not have had a negative impact on the debtor because the action would have affected only the bankruptcy estate. In *Kovacs II* the equities were reversed. Refusing to discharge the debtor from prepetition obligations would not have had an effect on prepetition creditors because they already would have received everything that they were entitled to receive from the bankruptcy estate. The debtor, however, would have been subject to continuing liability and denied the "fresh start" mandated by bankruptcy policy.

The "fresh start" policy, however, is less compelling when the debtor has acted in bad faith, as *Kovacs* did by continuing to operate his business in flagrant violation of the state court consent order. The relative good faith of the state is difficult to determine. Actions manifesting good faith include negotiating an agreed order with the debtor, pursuing other responsible parties, and cooperating with the EPA to get superfund financing. Mitigating factors that may cast some doubt on the good faith of the state include

260. *In re Kovacs (Kovacs I)*, 681 F.2d 454 (6th Cir. 1982), *vacated and remanded*, 459 U.S. 1167 (1983); *see supra* text accompanying notes 40-56 and 83-103; *Ohio v. Kovacs (Kovacs II)*, 53 U.S.L.W. 4068 (U.S. Jan. 9, 1985).

failing to bring criminal charges or contempt proceedings against the debtor, neglecting other Bankruptcy Code provisions that allow exceptions from discharge, and attempting to characterize the economic interest of the state as purely public health and safety related.

On balance, the debtor's bad faith should have weighed more heavily against him in the dischargeability issue, especially because the creditors would have suffered no hardship in bankruptcy. Thus, the courts should have defined Kovacs' obligation as an equitable right to performance and refused to discharge that obligation. In *Kovacs I* the debtor's bad faith, however, was balanced to some degree by the state's primarily economic approach to the case and the other creditors' economic interests. Because the state chose an economic approach, the court should have treated the state's claims like other bankruptcy claims and applied the automatic stay. If the state had expended its own funds for cleanup, however, and later sued the debtor for reimbursement, then the court should have characterized the state's action as a police or regulatory action rather than an economic action. This characterization would further CERCLA's goal of encouraging the states to take prompt cleanup measures.

IV. CONCLUSION

Courts have addressed the recent conflict between the Bankruptcy Code and state or federal hazardous waste laws by balancing the economic interests under the Bankruptcy Code against the interests in public health and safety under the hazardous waste laws. Courts have performed this balancing approach sometimes in a conclusory manner and at other times in a more in-depth manner. Because economic and public health and safety interests inevitably overlap and conflict in these cases, courts should develop a balancing test that identifies the nature of the interests. Courts could model this balancing test after the Supreme Court's decision in *Bildisco*, which resolved a similar conflict between the Bankruptcy Code and federal labor laws. The balancing test would focus on the hardships that the affected parties—the debtor, the creditors, and the government—would suffer if their interests were subordinated to other interests. The test would require the courts to consider the qualitative differences between economic and public health and safety interests, the quantitative degree of hardship, and the good or bad faith of the parties.

Federal policy under the federal hazardous waste laws and the

Bankruptcy Code substantially subordinates economic interests to public health and safety interests. A balancing test, therefore, also should give extra weight to the interest in protecting the public health and safety from hazardous wastes. The internalization of social costs under the federal hazardous waste laws may require the subordination of creditors' claims, which are mainly economic in nature, to the public interest in health and safety. The interests of a debtor acting in bad faith, either in violating the hazardous waste laws or in filing a bankruptcy petition, and the interests of a government attempting to avoid its cleanup responsibilities, do not deserve much consideration. Courts should adopt this balancing approach to prevent the operation of the Bankruptcy Code from frustrating the goals of the federal hazardous waste laws.

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