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NOTE

***Pennsylvania v. Conroy*: Expanded
Administrative Expense Priority for
State-Funded CERCLA Cleanups**

BY SETH M. MANDELBAUM*

I. Introduction

In *Pennsylvania v. Conroy*,¹ the United States Court of Appeals for the Third Circuit affirmed the decision of the United States District Court for the Western District of Pennsylvania.² The court held that cleanup expenses incurred by a state environmental agency to remove the threat posed by hazardous wastes should be treated as administrative expenses under the Bankruptcy Code.³ Thus, the Third Circuit afforded state response costs high priority when the assets of the bankruptcy estate were distributed. In addition, this case expanded prior decisions by holding that administrative and

* The author would like to thank his family for their patience and support, and Susan for putting up with me. Also thanks to Arlene Diamond and her group for a great editing job.

1. *Pennsylvania v. Conroy*, 24 F.3d 568 (3d Cir. 1994).

2. *In re Conroy*, 153 B.R. 686 (W.D. Pa. 1993).

3. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)) [hereinafter Bankruptcy Code].

legal costs incurred by a state agency, usually around 10% of the total costs, should also be awarded to the agency.⁴ This expansion is the most important contribution of *Conroy*.

Unfortunately, the Third Circuit, like other circuit courts before it, as well as the U.S. Supreme Court, failed to resolve two extreme views on the conflict between the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)⁵ and the Bankruptcy Code. The conflict is whether the state agency should be denied administrative expense priority (making site cleanup nearly impossible), or whether it should receive such priority (and sometimes the entire proceeds of the bankruptcy estate), possibly leaving the estate with no assets to satisfy the debtors' obligations to other creditors.

This paper will suggest amending the Bankruptcy Code to include an express administrative expense priority for hazardous waste remediation. Such an amendment is necessary, since neither the courts nor Congress has resolved the issue. Since 1986, however, the trend in the federal circuit courts has been toward affording state cleanup costs a high priority.⁶

II. Background

A. CERCLA

1. Purpose of CERCLA

In the late 1970s, Congress determined that its existing programs for dealing with hazardous waste were inadequate.⁷ CERCLA was designed to eliminate the problems

4. *Conroy*, 24 F.3d 568, 570-71.

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) §§ 101-405, Pub. L. No. 96-510, 94 Stat. 2767 (1980), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993) [hereinafter CERCLA].

6. See *infra* part II.D.

7. See *U.S. v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111-12 (D. Minn. 1982) (denying Reilly Tar's motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted for a CERCLA claim brought by the United States and the State of Minnesota for contamination of the ground and groundwater in and around the city of St. Louis Park, Minnesota).

presented by hazardous waste sites that were not sufficiently addressed by the Resource Conservation and Recovery Act (RCRA).⁸ The routine practice of burying highly toxic chemical wastes had resulted in serious threats to the environment and to public health, especially to the underground aquifers upon which half the nation relies for its drinking water.⁹

The main policy objectives of CERCLA are twofold. First, Congress intended to give the federal government the tools required for an immediate and effective response to the aforementioned problems resulting from hazardous waste disposal.¹⁰ Second, Congress intended that responsible parties bear the costs and responsibility for remedying the harmful conditions they created.¹¹ To help accomplish this goal, where the environmental harm is indivisible, Congress provided that liability would be made joint and several.¹²

The jurisdictional grant of CERCLA provides that:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health

8. *Id.* at 1111. The national policy of RCRA is "that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." Solid Waste Disposal Act § 1003(b), 42 U.S.C. § 6902(b) (1988). CERCLA, however, deals with hazardous waste that was not treated, stored, or disposed of properly, leaving sites which present an imminent and significant threat to public health or the environment. See CERCLA § 106(a), 42 U.S.C. § 9606(a) (1980).

9. See *U.S. v. Price*, 523 F. Supp. 1055, 1057 (D.N.J. 1981). In *Price*, the United States brought an action for injunctive relief to remedy the hazards posed by chemical dumping that occurred at Price's landfill during 1971 and 1972. The court denied plaintiffs' motion for a preliminary injunction, but also denied defendants' motions for summary judgment, except with respect to plaintiffs' cause of action based on the federal common law of nuisance, which was dismissed with prejudice. *Id.*

10. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (holding that municipal defendants are responsible parties under CERCLA if their solid waste contains a hazardous substance listed in CERCLA § 101(14), 42 U.S.C. § 9601(14) in any amount).

11. *Id.* at 1198.

12. *Id.* This means that each defendant may be held responsible for the entire damage caused. In addition, a verdict in favor of one defendant will not discharge the others from liability. See *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 47, at 327-28 (5th ed. 1984).

or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat¹³

The statute originally established a \$1.6 billion Hazardous Substance Response Trust Fund, commonly referred to as the "Superfund."¹⁴ In addition to the Superfund-financed cleanup structure, CERCLA provided that the federal government, state governments, and private parties who have performed remedial work can sue potentially responsible parties (PRPs)¹⁵ in order to recover their costs. In *United States v. Alcan Aluminum Corp.*,¹⁶ the court stated:

In bringing an action under this Act, the government must establish that: (1) defendant is one of the four categories of covered persons listed under § 9607(a) as liable for the costs of remedial action,¹⁷ (2) the site of the cleanup is a

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

14. CERCLA § 111(a), 42 U.S.C. § 9611(a) (1980), amended by The Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 42 U.S.C. § 9611(a) (1986). The money for the Superfund was to be generated by an excise tax on petroleum products and chemical feedstocks, based on a theory of unjust enrichment. Since chemical and oil companies had profited from degrading the environment, Congress reasoned they should pay for remediation. The Superfund was to be used to finance governmental response activities, to pay some claims arising from private response activities, and to compensate federal or state governmental entities for damage caused to natural resources. *National Governors' Association Position on Superfund*, 99th Cong., 2d Sess., 132 CONG. REC. E1022 (daily ed. Apr. 8, 1986) (statement of Rep. Florio).

15. PRP is a legal term of art used by Superfund attorneys to refer to covered persons under CERCLA. See *infra* note 17.

16. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993) (upheld summary judgment against Alcan for its contribution to a waste disposal and treatment center in Oswego, New York, which had become contaminated with hazardous substances, rejecting Alcan's arguments concerning minimum concentration requirements and causation).

17. The four classes of responsible persons are:

- a. The owner and operator of a vessel or a facility;
- b. Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;

facility under § 9601(9),¹⁸ (3) there is a release or threatened release of hazardous substances¹⁹ at the facility, (4) as a result of which plaintiff has incurred response costs, and (5) the costs incurred²⁰ conform to the national contingency plan²¹ under § 9607(a)(4)(A) as administered

c. Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and

d. Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

CERCLA § 107(a), 42 U.S.C. § 9607(a).

18. The term 'facility' means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

CERCLA § 101(9), 42 U.S.C. § 9601(9).

19. The term "hazardous substance" is defined broadly by CERCLA § 101(14), 42 U.S.C. § 9601(14). The definition includes substances designated as hazardous or toxic under the Federal Water Pollution Control Act [hereinafter Clean Water Act] §§ 101-120, 33 U.S.C. §§ 1251-1387 (1986), hazardous air pollutants as listed in the Clean Air Act § 112, 42 U.S.C. § 7412 (1984), and hazardous wastes listed pursuant to section 3001 of the Solid Waste Disposal Act, which includes RCRA (42 U.S.C. § 6921), as well as any element, compound, mixture, solution or substance designated pursuant to § 102 of CERCLA. Petroleum and natural gas products are excluded from the definition. CERCLA § 101(14)(f), 42 U.S.C. § 9601(14)(f).

20. CERCLA holds responsible parties liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

21. The National Contingency Plan (NCP) "shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants . . ." CERCLA § 105, 42 U.S.C. § 9605. *See also* 40 C.F.R. § 300 (1994). Part 300.105 provides that federal agencies should plan for emergencies, such as oil spills, and coordinate this planning with affected states, local governments and private entities. Response

by the [United States Environmental Protection Agency] EPA.²²

Thus, the statute imposes strict liability upon PRPs.²³

2. Reauthorization of CERCLA—The Superfund Amendments and Reauthorization Act of 1986 (SARA), The 1990 Reauthorization and S. 1834 (Superfund Reform Act of 1994)

The taxation and funding authority of CERCLA expired on September 30, 1985,²⁴ forcing Congress to reexamine the cleanup program. Among the major changes implemented by SARA were a much larger fund of \$8.5 billion, very ambitious enforcement timetables for EPA, restriction of EPA discretion in settlement and remedial approaches, a public notice and comment requirement on remedial plans, and the deprivation of judicial jurisdiction to review EPA remedial decisions prior to the initiation of enforcement actions.²⁵

While CERCLA was once again reauthorized in 1990, no major modifications other than funding renewal were made at that time.²⁶ However, through the Superfund Reform Act of 1994, the Clinton Administration sought several new changes to CERCLA.²⁷ The main proposals sought by the Ad-

operations are to be performed by the National and Regional Response Teams and directed by the on-scene coordinator.

22. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 719-20 (2d Cir. 1993).

23. *Murtha*, 958 F.2d at 1198. Strict liability, or liability without fault, is imposed where the defendant's activity is unusual and abnormal in the community, and the danger which it threatens to others is unduly great. In addition, the defendant is acting for his own purposes, is seeking a profit from such activities, and is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 75, at 534-38 (5th ed. 1984). Under this theory, as long as the release occurred at a PRP's facility, the PRP is liable.

24. See CERCLA §§ 131-33, 42 U.S.C. §§ 9631-9633.

25. See Pub. L. No. 99-499, 100 Stat. 1613 (1986).

26. See Pub. L. No. 101-508, 104 Stat. 1388-319 (1990). Passed as a trailer to the Omnibus Budget Reconciliation Act of 1990, the reauthorization simply extended the Superfund tax on oil and chemical companies to provide for interim funding. *Id.*

27. John H. Cushman, Jr., *Congress Forgoes Its Bid to Hasten Cleanup of Dumps*, N.Y. TIMES, Oct. 6, 1994, at A1, A22.

ministration included increased community involvement in determining how to treat a waste site; an Environmental Resolution Insurance Fund, financed by insurers, to help reimburse polluters for cleanup costs; and the substitution of mediation for litigation whenever possible.²⁸ In addition, a flexible system was proposed whereby the level of cleanup required would depend on ultimate use of the property.²⁹

No revision to CERCLA was enacted in 1994. Congress failed to pass the bill, "citing inability to come to agreement over a number of controversial amendments in the brief time left in the current congressional session."³⁰ However, the expiring tax authority that funds the cleanups and popular support for reform are reasons for optimism that there will be Superfund reform legislation in 1995. H.R. 228, the Superfund Reform Act of 1995, was introduced on January 4, 1995.³¹ In addition, twelve initiatives covering enforcement, economic redevelopment, community involvement in Superfund decision-making, environmental justice, consistent program implementation, and state and tribal empowerment were announced by EPA at a February 17, 1995 press conference.³²

B. The Bankruptcy Code

1. Purpose of Bankruptcy

The goal of the Bankruptcy Code is to provide for the "equitable distribution of the debtor's assets amongst his creditors"³³ and also allow the honest debtor a chance for a fresh

28. *Id.*

29. *Id.* For example, land to be used for a factory would not have to be as clean as land proposed for use as a playground.

30. *Congress Abandons Superfund Effort, Citing Number of Amendments, Lack of Time*, Daily Rep. for Exec. (BNA) No. 72, at G-192 (Oct. 6, 1994).

31. H.R. 228, 104th Cong., 1st Sess. (1995).

32. *Additional Administrative Reforms for Superfund Program to be Unveiled*, Daily Rep. for Exec. (BNA) No. 45, at A-33 (Feb. 17, 1995).

33. *See, e.g., Kuehner v. Irving Trust Co.*, 299 U.S. 445, 451 (1937) (construing a section of the Bankruptcy Act dealing with claims by landlords for indemnity under a covenant contained in a lease which has been rejected by the trustee in bankruptcy).

start.³⁴ The primary function of the bankruptcy system is to continue the law-based orderliness of the open credit economy when a debtor cannot or will not pay his or her debts.³⁵ By promoting equality of distribution among creditors, the bankruptcy process affects values on which the open credit economy depends in order to function.³⁶ Through a bankruptcy system, persons or businesses who suffer economic hardship through no wrongdoing are protected from their creditors. Without such protections, the economy would be deprived of the entrepreneurial spirit upon which the American economy depends for its growth and prosperity.

2. The Structure of the Bankruptcy Code

The congressional power to enact bankruptcy legislation comes from the Bankruptcy Clause of the Constitution, which provides that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."³⁷ Congress exercised this express grant of power by enacting bankruptcy laws in 1803, 1841, 1874 and 1898.³⁸ The Bankruptcy Reform Act of 1978,³⁹ codified in Title 11 of the United States Code, repealed all laws in force at the time of its enactment relating to bankruptcy.⁴⁰

Remedies under the Bankruptcy Code are designed in the alternative. Corporate debtors are given the choice of either a rehabilitative process under Chapter 11 or liquidation under Chapter 7.⁴¹ Bankruptcy Code Chapter 11 is enti-

34. *Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 554 (1915) (holding that a discharge in bankruptcy acquits the express obligation of the principal to indemnify his surety against loss).

35. *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. 70, 71 (1973).

36. *Id.*

37. U.S. CONST. art. I, § 8, cl. 4.

38. *See* Bankruptcy Act of 1800, 2 Stat. 19 (1800), *repealed by* 2 Stat. 248 (1803); 5 Stat. 440 (1841); 18 Stat. 178 (1874); 30 Stat. 544 (1898).

39. Pub. L. No. 95-598, 92 Stat. 2682 (1978).

40. *See id.*, Title IV, § 401.

41. *See* 11 U.S.C. §§ 701-946; 11 U.S.C. §§ 1101-1330. Liquidation under Chapter 7 of the Code is available for debtors who are unable or unwilling to repay their obligations and involves surrender of all assets (with some exemp-

tled "Reorganization."⁴² "The primary purpose of the reorganization chapters . . . [is] to promote the restructuring of debt and the preservation of economic units."⁴³ Thus, Chapter 11 debtors are permitted to retain assets, to restructure most debts, and to repay obligations over an extended period of time.⁴⁴ In return, the debtor's reorganization plan is expected to preserve interests and to offer at least partial repayment of all obligations, including unsecured debts.⁴⁵

3. Sections of the Bankruptcy Code Pertinent to *Pennsylvania v. Conroy*

Under section 503 of the Bankruptcy Code, "an entity may timely file a request for payment of an administrative expense."⁴⁶ These administrative expenses, which are allowed after notice and a hearing, include "the actual, necessary costs and expenses of preserving the estate."⁴⁷ In addition, the priority scheme of section 507 of the Code gives first distributive priority to "administrative expenses allowed under section 503(b) of this title."⁴⁸ The policy behind the allowance of administrative expenses is that "the estate as a whole is benefitted if general creditors subordinate their pre-bankruptcy claims in order to secure goods and services necessary to an orderly and economical administration of the estate."⁴⁹ Congress, in 1978, "granted priority to

tions) to a trustee. A "person" may be a debtor under Chapter 7 as long as such person is not a railroad or a domestic or foreign bank or insurance company. *Id.*

42. See 11 U.S.C. §§ 1101-1330. Any person who may proceed under Chapter 7 is eligible to be a debtor under Chapter 11, except that railroads may also proceed under Chapter 11, and stockbrokers and commodity brokers, which are allowed to be debtors under Chapter 7, are excluded from Chapter 11. *Id.* See also 11 U.S.C. § 109.

43. See *In re Nite Lite Inns*, 17 B.R. 367, 370 (Bankr. S.D. Cal. 1982) (confirming debtors' redistribution plan despite the objection of one of the creditors).

44. *Id.*

45. *Id.*

46. 11 U.S.C. § 503(a).

47. 11 U.S.C. § 503(b)(1)(A). Some typical administrative expenses include wages, salaries, or commissions for services rendered after the commencement of the case. *Id.*

48. 11 U.S.C. § 507(a)(1).

49. *In re Christian Life Ctr.*, 821 F.2d 1370, 1373 (9th Cir. 1987) (quoting *In re Yermakov*, 718 F.2d 1465, 1470 (9th Cir. 1983), affirming the district court's

administrative expenses . . . to facilitate the efforts . . . of the debtor in possession to rehabilitate the business for the benefit of all the estate's creditors."⁵⁰ For a reorganization to succeed, priority must be given to creditors who are willing to extend credit after a petition in bankruptcy is filed.⁵¹ Thereby, they will feel secure in providing the credit necessary for the debtor to function.⁵²

Section 554 provides that "after notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."⁵³ In addition, "on request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate."⁵⁴ Property abandoned pursuant to section 554(a) ceases to be part of the bankruptcy estate and reverts back to whoever had possessory right to the property at the time of the filing for bankruptcy.⁵⁵

While section 554 refers only to abandonment by a trustee, the section applies to a debtor in possession as well.⁵⁶ Bankruptcy Rule 6007(a) states that "the trustee or debtor in possession shall give notice of a proposed abandonment."⁵⁷ Similarly, Title 28 of the United States Code, on Judiciary and Judicial Procedure, which contains a number of provi-

order disallowing the Christian Life Center Litigation Defense Committee's administrative expense claim and vacating as premature its order subordinating all indemnity claims).

50. *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 101 (2d Cir. 1986) (holding that "withdrawal liability" incurred by McFarlin's under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. §§ 1381-1461, is not entitled to administrative expense priority, and thus must be asserted by the Trustees of the Amalgamated Ins. Fund as a general unsecured claim).

51. *Id.*

52. *Id.*

53. 11 U.S.C. § 554(a).

54. 11 U.S.C. § 554(b).

55. *In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990) (affirming the District Court for the District of Utah's denial of the use by a Chapter 7 debtor of 11 U.S.C. § 506(d) to void the undersecured portion of a lien on real property which has been abandoned by the bankruptcy estate).

56. *See supra* note 53.

57. 11 U.S.C. app. § 6007(a) (emphasis added).

sions relating to bankruptcy judges, trustees and jurisdiction, implies abandonment is available to debtors in possession.⁵⁸ Specifically, 28 U.S.C. § 959 provides that:

. . . 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 requirements of 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.⁵⁹

Thus, section 959 places a limit on the abandonment power of section 554: whoever is managing the property must do so in accordance with all laws that the owner of the property would be bound to follow. This limit has led to the line of case law, followed by this case, which prevents a trustee or debtor in possession from abandoning property in contravention of environmental laws.⁶⁰

4. The Bankruptcy Reform Act of 1994

On October 22, 1994, President Clinton signed the Bankruptcy Reform Act of 1994 (H.R. 5116), saying it "stands out as a significant achievement of the 103d Congress."⁶¹ Among many other provisions, the bill sets up a fast track bankruptcy for the small business debtor whose liabilities do not exceed \$2 million, ensures that a debtor may not use bankruptcy to avoid paying legitimate marital and child support obligations, and creates a bankruptcy review commission to study and recommend future changes to the bankruptcy laws.⁶²

58. See Judiciary and Judicial Procedures, 28 U.S.C. §§ 151-158; 581-589(a); 1334(a), (b), (d) (1994).

59. 28 U.S.C. § 959(b) (emphasis added).

60. See *infra* part II.D.

61. *Bankruptcy Reform Act of 1994 Signed by President Clinton*, Bankr. Law Daily (BNA) (Oct. 26, 1994).

62. *Congress Finally Passes Bankruptcy Reform Legislation*, Bankr. Law Daily (BNA) (Oct. 11, 1994). According to Senator Charles Grassley (R-Iowa), co-sponsor of the Senate version of the law, "[W]hile H.R. 5116 will improve the

C. The Clash Between CERCLA and the Bankruptcy Code

"[T]he Bankruptcy Code and CERCLA point toward competing objectives. The Code aims to provide . . . debtors with a fresh start . . . [and] CERCLA aims to clean up environmental damage."⁶³ "Impairment of a cleanup claim [by bankruptcy] affects more than the economic fate of the claimant; it also compromises the entire national cleanup effort by diminishing the Superfund."⁶⁴ However, "cleanup claims tend to be very large and lay a greater claim on the bankruptcy estate than do tax claims or the other priority claims."⁶⁵

"In practice, the confusion over the proper priority for cleanup claims in bankruptcy puts unnecessary burdens and risks on debtors, creditors and environmental agencies alike."⁶⁶ "All [of these] parties need a predictable and consistent rule which will give proper deference to the important environmental policy goals at stake."⁶⁷ A loophole in the convergence of CERCLA and the Bankruptcy Code would allow the PRP to injure citizens both inside and outside of the PRP's community. By contributing to soil and groundwater contamination, the PRP puts everyone who lives near the site at risk, as well as those who are affected as the contamination migrates. In addition, all taxpayers suffer when governments spend time and money attempting to recover cleanup costs paid originally with federal or state Superfunds. Finally, funds spent to clean up bankruptcy sites are diverted from use on other sites. Thus, CERCLA must prevail in its clash with the Bankruptcy Code.⁶⁸

bankruptcy system, its greatest contributions will come from the commission it creates . . . which will evaluate the code's deficiencies, substantively and operationally, and make recommendations to the Congress for legislative change." *Id.*

63. *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991).

64. Gary E. Claar, *The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims*, 18 WM. MITCHELL L. REV. 29, 33 (1992).

65. *Id.*

66. *Id.*

67. *Id.* at 34.

68. *See infra* part IV.B.

D. Case Law

In *Ohio v. Kovacs*,⁶⁹ decided in 1985, the Supreme Court held that a cleanup order acquired by the State of Ohio against a property owner represented a monetary obligation that was dischargeable in bankruptcy.⁷⁰ In addition, the Court, in its famous footnote 12, raised the issue of what a hypothetical bankruptcy trustee could have done with Kovacs' contaminated property.⁷¹ The Court proposed that the trustee would have to choose between either selling the property and having responsibility for cleaning it up or abandoning it to the prior owner to let them be responsible for the hazardous waste problems.⁷² However, the Court did not indicate which option it preferred the trustee to exercise.

Later that year, the Third Circuit in *Southern Railway Co. v. Johnson Bronze Co.*⁷³ held that a purchaser has no claim for cleanup costs against the previous owner's estate.⁷⁴ The court focused its attention on the unresolved issue in the *Kovacs* footnote. The court stated that, at the time *Kovacs* was decided, case law required a purchaser of property to clean it up when the value of the property was greater than the cost of bringing it into compliance.⁷⁵ If the property was worth less than the cost of cleanup, it would have been abandoned to the prior owner.⁷⁶ In *Southern Railway*, since the debtor in possession (analogous to a trustee) opted to sell, the purchaser had to clean up the site.⁷⁷

In 1986 the Supreme Court responded to the *Kovacs* footnote 12 issue in *Midatlantic National Bank v. New Jersey Department of Environmental Protection*.⁷⁸ There, the Court held that "a trustee may not abandon property in contraven-

69. 469 U.S. 274 (1985).

70. *Id.*

71. *Id.* at 284 n.12.

72. *Id.*

73. *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985).

74. *Id.* at 142.

75. *Id.* at 143.

76. *Id.*

77. *Southern Ry.*, 758 F.2d 143.

78. *Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986).

tion of a state statute or regulation that is reasonably designed to protect the public health or safety.”⁷⁹ Not to be outdone by *Kovacs*, this landmark decision also featured a footnote which has been relied upon by debtors trying to avoid environmental liability. The footnote qualifies the Court’s holding:

[T]his exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health and safety from imminent and identifiable harm.⁸⁰

Since 1986, the case law has been divided into two camps. The first line of cases, following *Southern Railway*, refuses to afford priority status based on the *Midatlantic* footnote.⁸¹ In *In re N.P. Mining Co.*, punitive penalties were not given priority because there was no threat to public health or safety; thus, the fines were not part of the actual, necessary expenses of preserving the estate.⁸² In *In re Dant & Russell, Inc.*, the court asserted that it would not perform a legislative function by granting the priority.⁸³ Finally, in *In re Microfab, Inc.*, the court concluded that “28 U.S.C. § 959(b) does not require a Chapter 7 trustee to clean contaminated real estate, [and that even if the trustee were to spend all the estate’s funds on a cleanup], he would fail in achieving full compliance with the state environmental statute.”⁸⁴ Thus, the court refused to “require a trustee simply to throw money away, even in the name of a worthy cause.”⁸⁵

79. *Id.* at 507.

80. *Id.* at n.9.

81. See, e.g., *In re N.P. Mining Co.*, 963 F.2d 1449 (11th Cir. 1992); *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988); *In re Microfab, Inc.*, 105 B.R. 161 (Bankr. D. Mass. 1989).

82. *In re N.P. Mining Co.*, 963 F.2d 1449, 1458 (11th Cir. 1992).

83. *In re Dant & Russell, Inc.*, 853 F.2d 700, 709 (9th Cir. 1988).

84. *In re Microfab, Inc.*, 105 B.R. 161, 168-69 (Bankr. D. Mass. 1989).

85. *Id.*

The alternative view affords priority status to the state or federal agency which removed the hazardous substances from a site at the taxpayers' expense. The reasoning for this view is that "if property on which toxic substances pose a significant hazard to public health cannot be abandoned, it must follow . . . that expenses to remove the threat posed by such substances are necessary to preserve the estate [and are therefore administrative expenses under 11 U.S.C. § 503(b)(1)(A)]."⁸⁶ This analysis also formed the basis for the holding in the lead case.⁸⁷

III. *Pennsylvania v. Conroy*⁸⁸

A. Facts and Procedural History

Cello Print, Inc. (Cello Print), is a wholly-owned subsidiary of Roy Wood, Inc., engaged in the business of printing.⁸⁹ "Debtor Frank Conroy owns 100 percent of the stock of Roy Wood, Inc. and is its president."⁹⁰ In 1990, Cello Print ceased and abandoned its operations, leaving drums and canisters containing chemicals and solvents used in the printing business.⁹¹

On July 19, 1990, the manager of the town in which Cello Print was located, White Oak Borough, Pennsylvania, notified the state's Department of Environmental Resources (DER) that there were drums of unidentified chemicals at

86. *In re Chateaugay Corp.*, 944 F.2d 997, 1010 (2d Cir. 1991). See *infra* part IV.B. See also *In re Torwico Elec., Inc.*, 8 F.3d 146 (3d Cir. 1993) (discussing Chateaugay approvingly); *In re Wall Tube & Metal Prod. Co.*, 831 F.2d 118 (6th Cir. 1987); *In re Stevens*, 68 B.R. 774 (D. Me. 1987) (state entitled to administrative expense priority for costs it incurred in removing waste from property of the estate); *In re Peerless Plating Co.*, 70 B.R. 943 (Bankr. W.D. Mich. 1987); *In re Mowbray Eng'g Co., Inc.*, 67 B.R. 34 (Bankr. M.D. Ala. 1986) (court permitted EPA to recover the cost of decontaminating property abandoned by the trustee as an administrative expense); *In re Distrigas Corp.*, 66 B.R. 382 (Bankr. D. Mass. 1986) (to the extent that the state expended funds to clean up debtor's contaminated property, it would be entitled to a first priority administrative expense claim).

87. See *infra* part III.B.

88. 24 F.3d 568 (3d Cir. 1994).

89. *In re Conroy*, 153 B.R. 686, 687 (W.D. Pa. 1993).

90. *Id.*

91. *Id.*

Cello Print.⁹² DER inspected the site and found several drums with rusted bottoms sitting in water.⁹³

Conroy was notified by DER on July 23, 1990, that Cello Print had violated the Pennsylvania Solid Waste Management Act and was directed to arrange for proper disposal of the drums within 30 days.⁹⁴ After no action was taken, a formal field compliance order was issued September 14, 1990, ordering Conroy to remove all hazardous wastes by October 3, 1990.⁹⁵

On October 4, 1990, DER inspected the facility and found that the wastes had not yet been cleaned up.⁹⁶ On October 23, 1990, Conroy and his wife filed a voluntary Chapter 11 petition.⁹⁷ DER was not formally notified of the bankruptcy filing, nor was it listed as a creditor.⁹⁸

On December 31, 1990, DER ordered a prompt interim response pursuant to the Pennsylvania Hazardous Sites Cleanup Act (PHSCA).⁹⁹ PHSCA is authorized by CERCLA.¹⁰⁰ Many PHSCA provisions are analogous to the federal law.¹⁰¹ PHSCA was passed for the following reasons:

Many of the hazardous sites in this Commonwealth [Pennsylvania] which do not qualify for cleanup under the Federal Superfund Act pose a substantial threat to the public

92. *Id.*

93. 153 B.R. at 687.

94. *Id.*

95. *Id.*

96. *Id.*

97. 153 B.R. at 687.

98. *Id.*

99. *Id.* See 35 PA. CONS. STAT. § 6020.505(B) (1994). This section authorized an interim response by DER "when, upon the basis of the information available to the department at the time of the interim response, there is a reasonable basis to believe that prompt action is required to protect the public health or safety or the environment." *Id.*

100. CERCLA § 114(a), 42 U.S.C. § 9614(a) states that "nothing in this chapter shall be construed as preempting any State from imposing additional liability or requirements with respect to the release of hazardous substances within such State."

101. These analogous sections include: 35 PA. CONS. STAT. § 6020.505—Development and implementation of response actions; § 6020.507—Recovery of response costs; § 6020.701—Definition of responsible person and § 6020.702—Scope of liability.

health and environment. Therefore, an independent site cleanup program is necessary to promptly and comprehensively address the problem of hazardous substance releases in this Commonwealth, whether or not these sites qualify for cleanup under the Federal Superfund Act.¹⁰²

On January 11, 1991, DER obtained a court order which granted it access to Cello Print to perform the interim response.¹⁰³ DER hired a private contractor to clean up the site at a cost of \$103,293.¹⁰⁴ The following year it filed a proof of claim for its cleanup costs, and requested payment as an administrative expense, pursuant to section 503(b)(1)(A) of the Bankruptcy Code.¹⁰⁵ DER also requested an additional ten percent for administrative and legal fees pursuant to section 6020.507(b) of the Pennsylvania statute.¹⁰⁶

The debtors objected to DER's proof of claim on April 14, 1992 and a hearing on the objection was held on August 19, 1992.¹⁰⁷ The objection was overruled by Judge Markovitz, who awarded DER \$103,293.¹⁰⁸ However, DER was denied the ten percent in administrative and legal costs it had requested.¹⁰⁹

The debtors appealed to the United States District Court for the Western District of Pennsylvania, arguing that DER was not entitled to the contracting costs.¹¹⁰ Moreover, DER appealed the finding that it was not entitled to the additional

102. 35 PA. CONS. STAT. § 6020.102(8) (1994).

103. *In re Conroy*, 153 B.R. 686, 687 (W.D. Pa. 1993).

104. *Id.* at 688.

105. *Id.* See *supra* part II.B.3.

106. 35 PA. CONS. STAT. § 6020.507(B) (1994). This section provides that in an action to recover response costs . . . the department shall include administrative and legal costs incurred from its initial investigation up to the time that it recovers its costs. The amount attributable to administrative and legal costs shall be 10% of the amount paid for the response action or the actual costs, whichever is greater.

Id.

107. *In re Conroy*, 144 B.R. 966, 969 (Bankr. W.D. Pa. 1992).

108. *Id.* at 968.

109. *Id.* at 971.

110. *In re Conroy*, 153 B.R. 686, 688 (W.D. Pa. 1993).

ten percent for legal and administrative fees.¹¹¹ On May 12, 1993, the district court affirmed the bankruptcy court's order that DER was entitled to \$103,293 in cleanup costs.¹¹² In addition, the district court held that DER was entitled to an additional \$10,329.30 as administrative and legal costs, reversing the bankruptcy court's prior holding.¹¹³ Thus, DER was awarded the entire \$113,622.30 it had sought.¹¹⁴ The Conroys appealed to the United States Court of Appeals for the Third Circuit.¹¹⁵

B. Reasoning and Holding

The circuit court affirmed the district court's decision that DER is entitled to \$113,622.30 in administrative expenses.¹¹⁶ The court first considered the reasoning of *Midatlantic*.¹¹⁷ In *Midatlantic*, the Supreme Court held that a bankruptcy trustee could not abandon a piece of property under section 554 of the Code in contravention of a state statute designed to promote public health or safety.¹¹⁸ Thus, the Conroys, as debtors in possession, a position analogous to trustee, could not have abandoned the hazardous property in contravention of the Pennsylvania Hazardous Sites Cleanup Act.¹¹⁹

The court further reasoned that if "Frank Conroy had arranged for cleanup of the facility after he had filed a Chapter 11 petition, the costs of this cleanup would have constituted administrative expenses under 11 U.S.C. § 503(b)(1)(A)."¹²⁰ In *Conroy*, the DER, rather than Conroy, paid for the cleanup. Since the estate could not have avoided such costs through abandonment, the Third Circuit agreed with previ-

111. *Id.*

112. *Id.* at 693.

113. *Id.*

114. *In re Conroy*, 153 B.R. at 693.

115. *Pennsylvania v. Conroy*, 24 F.3d 568 (3d Cir. 1994).

116. *Id.* at 571.

117. *Id.* at 566; see *supra* part II.D.

118. *Midatlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 507 (1986).

119. *Conroy*, 24 F.3d at 569.

120. *Id.*

ous holdings of the Second¹²¹ and Sixth¹²² Circuits that “response costs incurred by environmental agencies should be classified as administrative expenses.”¹²³

The Conroys argued that under the reasoning of *Southern Railway Co.*¹²⁴ and *In re Dant & Russell, Inc.*¹²⁵ a different result was appropriate.¹²⁶ The *Conroy* court distinguished both of these decisions.¹²⁷ *Southern Railway Co.* dealt with a state administrative order requiring cleanup of a site.¹²⁸ As the *Conroy* court pointed out, this case “said nothing about whether a bankruptcy court may grant administrative expense priority to the costs that an environmental agency incurs cleaning up a hazardous waste site that could not be abandoned under state law.”¹²⁹ Moreover, the bankruptcy court in *In re Virginia Builders* stated that *Southern Railway Co.* is “questionable precedent” in light of the Supreme Court’s *Midatlantic* decision.¹³⁰

The Third Circuit also distinguished the Ninth Circuit’s decision in *In re Dant & Russell, Inc.*¹³¹ *In re Dant & Russell, Inc.* dealt with a lessor who had a bankruptcy claim against a lessee for cleanup costs for hazardous wastes placed on site

121. *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) (affirming the holding of the United States District Court for the Southern District of New York that all cleanup costs assessed post-petition by EPA, where there has been a pre-petition release or threatened release of hazardous wastes, will be entitled to administrative expense priority).

122. *In re Wall Tube & Metal Products, Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987). The facts of this case are almost identical to the facts of *Conroy*. Debtor Wall Tube’s manufacturing processes generated hazardous substances which were cleaned up by the Tennessee Department of Health and Environment after Wall Tube had filed for Chapter 7 bankruptcy liquidation. The court held that the trustee of the estate was required to comply with the state’s hazardous waste statute, and that the response costs incurred by Tennessee were recoverable as administrative expenses. *Id.*

123. *Conroy*, 24 F.3d at 569-70.

124. *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985).

125. *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988).

126. *Conroy*, 24 F.3d at 570.

127. *Id.*

128. *Southern Ry.*, 758 F.2d 137.

129. *Conroy*, 24 F.3d at 570.

130. *In re Virginia Builders*, 153 B.R. 729, 734 n.10 (Bankr. E.D. Va. 1993).

131. *Conroy*, 24 F.3d at 570 n.1.

by the lessee.¹³² The lessor was denied administrative expense priority by the court.¹³³

However, the *In re Dant & Russell, Inc.* court pointed out that “quite a different result . . . is warranted when the cleanup costs result from monies expended for the preservation of the bankruptcy estate.”¹³⁴ The Ninth Circuit also noted that *Kovacs* and *Southern Railway Co.* “are significant in that they involved assertions of administrative expense priority by a lessor for cleanup costs resulting from property not owned by the bankruptcy estate.”¹³⁵ The court concluded that “[w]hen a *claimant* expends funds that preserve the estate, treatment as an administrative expense is authorized by the Bankruptcy Code.”¹³⁶ Therefore, *In re Dant & Russell, Inc.* actually undermined the Conroys’ argument, rather than supported it.

The essential aspect of the *Conroy* holding was the allowance of the administrative and legal costs incurred by DER as administrative expenses.¹³⁷ The court held that these costs were not a “surcharge” as suggested by the Conroys, but constituted “actual, necessary costs and expenses of preserving the estate.”¹³⁸ Thus, the court “[saw] no reason why the administrative and legal costs incurred by the DER in arranging for the cleanup [could] not qualify as administrative expenses under 11 U.S.C. § 503(b)(1)(A).”¹³⁹

In addition, the court held that the amount of the award was “sufficiently substantiated” by the Pennsylvania statute, which allows 10% of the amount paid for the response action or the actual costs, whichever is greater, for administrative and legal expenses.¹⁴⁰ The court concluded that “this implicit

132. *In re Dant & Russell, Inc.*, 853 F.2d at 701-02.

133. *Id.* at 709.

134. *Id.*

135. *Id.*

136. *In re Dant & Russell, Inc.*, 853 F.2d at 709 (emphasis added).

137. 24 F.3d 568, 570 (3d Cir. 1994).

138. *Id.* Here, the court is using the language of 11 U.S.C. § 503(b)(1)(A), the section defining administrative expenses. See *supra* part II.B.3.

139. *Conroy*, 24 F.3d at 570.

140. *Id.* at 571. The court is referring to 35 PA. CONS. STAT. § 6020.507(B) (1994).

legislative finding [was] reasonable,” and “it [sufficiently satisfied] the DER’s burden of proving its entitlement to these administrative expenses.”¹⁴¹

IV. Analysis

A. The Third Circuit’s Reasoning in *Conroy*

The Third Circuit properly applied the precedent of *In re Chateaugay Corp.*¹⁴² and *In re Wall & Tube Metal Products, Co.*¹⁴³ in classifying the response costs incurred by DER as administrative expenses. Since the drums on the Cello Print property posed a significant threat to the environment,¹⁴⁴ and Frank Conroy refused to remove the threat,¹⁴⁵ DER was forced to act pursuant to its authority under the Pennsylvania Hazardous Sites Cleanup Act.¹⁴⁶ As the *Conroy* court correctly reasoned, these cleanup expenses¹⁴⁷ were “actual and necessary expenses of preserving the estate.”¹⁴⁸ Thus, they are entitled to administrative expense priority under 11 U.S.C. § 503(b)(1)(A).

The Third Circuit expanded upon precedent in this area by allowing an additional 10% of the total cleanup costs for administrative and legal expense incurred by DER.¹⁴⁹ This

141. *Conroy*, 24 F.3d at 571.

142. *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991).

143. *In re Wall & Tube Metal Prod., Co.*, 831 F.2d 118 (6th Cir. 1987).

144. *In re Conroy*, 144 B.R. 966, 968-69 (Bankr. W.D. Pa. 1992). DER inspected the Cello Print site on July 20, 1990, finding drums and canisters containing hazardous chemicals, several of which had been sitting in water and were rusted on the bottom. In addition, the roof of the building leaked. On December 11, 1990, DER issued a “HSCA Response Justification Document,” determining that an actual or potential threat to the environment existed. *Id.*

145. *Id.* Frank Conroy was sent a Notice of Violation by DER on July 23, 1990, informing him that Cello Print was in violation of the Pennsylvania Solid Waste Management Act. Upon inspection of the facility on October 4, 1990, DER found that the violations had not been remediated. *Id.*

146. 35 PA. CONS. STAT. § 6020.505 (1994).

147. *In re Conroy*, 144 B.R. at 969. DER paid E & E, Inc., a private contractor, to perform remediation work at the site. *Id.*

148. *Pennsylvania v. Conroy*, 24 F.3d 568, 571 (3d Cir. 1994).

149. *Id.*; *Cf. In re Hemingway Transp., Inc.*, 993 F.2d 915 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 303 (1993) (the court granted administrative expense priority for past response costs and affirmed the lower court’s order disallowing an award of attorney fees).

expansion is significant because it will encourage government entities to engage in cleanups since their full expenditures, including costly administrative and legal fees, will receive the highest priority when the bankruptcy estate is ultimately distributed. As a result, more sites will be remediated more quickly.

The original congressional intent in enacting CERCLA (prompt and thorough remediation of the nation's inactive hazardous waste sites) will be furthered by granting administrative expense status to state response costs.¹⁵⁰ Thus, it is sound public policy. While the interests of all creditors to an estate are certainly important and viable, the cleanup of sites must take priority when the proceeds of the estate are distributed. If they do not, the purpose of CERCLA will be completely undermined by the bankruptcy claims of PRPs.

B. Solutions

The *Conroy* decision must now be incorporated into binding law. In refusing to grant certiorari to review *In re Hemingway Transp., Inc.*,¹⁵¹ the Supreme Court passed up an excellent opportunity to rule on the issue of future cleanup costs as administrative expenses. In that case, the Court of Appeals for the First Circuit disallowed a claim for future response costs as administrative expenses, while at the same time allowing such priority for past costs and denying attorneys' fees.¹⁵² Thus, judicial review has been exhausted for the foreseeable future, as the Conroys do not intend to appeal the decision of the Third Circuit.¹⁵³

Congress also has not dealt with this issue. The Superfund Reauthorization Act of 1994/5 failed to address

150. See *supra* part II.A.1.

151. *In re Hemingway*, 993 F.2d 915.

152. *Id.* *In re Hemingway* is distinguished from *Conroy*, in that, *In re Hemingway* concerned an action by a subsequent purchaser of contaminated property for indemnification, under CERCLA, from the debtor-seller of the property. Both parties were PRPs under CERCLA and, therefore, jointly and severally liable. However, in *Conroy*, the party seeking priority for cleanup expenses was the Pennsylvania DER, a state agency facing no liability. *Id.*

153. Telephone Interview with Gregory M. Devine, Esq., attorney for the Conroys (Sept. 1994).

the problems related to the filing for bankruptcy protection by PRPs.¹⁵⁴ While focusing on many important areas, the bill fails to address the problem with which this paper grapples: who gets priority, and to what extent, when a PRP is bankrupt and there are limited funds to be distributed amongst many creditors, including the state which paid for cleanup.¹⁵⁵

In addition, an amendment dealing with hazardous waste site remediation was not included in the Bankruptcy Reform Act of 1994.¹⁵⁶ Specifically, the Act failed to address administrative expense priority for environmental cleanups. Such an amendment has been suggested by, among others, Gregory Devine, the attorney for the Conroys throughout the DER litigation.¹⁵⁷

However, the Act did create the Bankruptcy Review Commission to evaluate the Code's deficiencies and make recommendations to Congress for legislative change.¹⁵⁸ This blue-ribbon panel¹⁵⁹ is charged with submitting to Congress, the Chief Justice, and the President a report within two years of its first meeting.¹⁶⁰ "The report [is to] contain a detailed statement of the findings and conclusions of the Commission,

154. See *supra* notes 27-32 and accompanying text.

155. *Id.*

156. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994) (amending 11 U.S.C. §§ 101-1330 (1988)).

157. Telephone Interview with Gregory M. Devine, Esq., attorney for the Conroys (Sept. 1994). See also Gary E. Claar, *The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims*, 18 WM. MITCHELL L. REV. 29, 33 (1992) (arguing for a similar change to the Bankruptcy Code); *In re Dant & Russell*, 853 F.2d 700, 709 (9th Cir. 1988). In addition, the National Governors' Association has suggested an analogous amendment to CERCLA. *National Governors' Association Position on Superfund*, 99th Cong., 2d Sess., 132 CONG. REC. E1022 (daily ed. Apr. 8, 1986) (statement of Rep. Florio).

158. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 602, 108 Stat. 4106 (1994).

159. The Commission is composed of nine members, appointed as follows: three by the President, one of whom is designated chairman; one by President pro tempore of the Senate; one by the Minority Leader of the Senate; one by the Speaker of the House of Representatives; one by the Minority Leader of the House; and two by the Chief Justice of the Supreme Court. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 604, 108 Stat. 4106 (1994).

160. *Id.* at § 608, 108 Stat. at 4106.

together with its recommendations for such legislative or administrative action as it considers appropriate."¹⁶¹

One of the considerations of this review board should be administrative expense priority for state-funded cleanups of hazardous waste sites,¹⁶² especially in light of the decisions of the Second, Third, and Sixth Circuits approving such priority.¹⁶³ In fact, when Congress tried to create the Commission in 1992, co-sponsor Senator Charles Grassley (R-Iowa) listed among the topics that the Commission should review and study "the highly complex and controversial issues that result from . . . environmental . . . law."¹⁶⁴

Finally, the Third Circuit's decision in *Conroy* creates momentum for the expansion of administrative expenses to include administrative and legal costs. The legacy of this important decision will be to underscore "that bankruptcy is not the solution for escaping liability incurred either under state or federal law for environmental damage."¹⁶⁵

As important as bankruptcy is to our system of credit, CERCLA must be the prevailing law. A PRP should not be able to escape liability, for the contamination which it created, through the protections afforded by the Bankruptcy Code. However, "[t]he Bankruptcy Code, as is, simply does not accommodate the unique and unforeseen problems of cleanup claims."¹⁶⁶ Thus, following the lead of *Conroy*, Congress must amend the Bankruptcy Code to correct this perva-

161. *Id.*

162. Upon publication, a copy of this casenote will be forwarded to the Bankruptcy Review Commission.

163. See *supra* part II.D. In addition, the Ninth Circuit in *In re Dant & Russell, Inc.* commented that "courts are not free to formulate their own rules of super or sub-priorities within a specifically enumerated class." *In re Dant & Russell, Inc.* 853 F.2d 700, 709 (9th Cir. 1988). Thus, the court reasoned that "until . . . Congress amends sections 503 and 507 to give priority to claims for cleanup costs, we are without authority to create such a priority." *Id.* The new mechanism for Congress to create such priority is through the recommendations of the Review Commission. See *supra* note 159.

164. 138 CONG. REC. S17549 (daily ed. Oct. 8, 1992).

165. Marvin Krasny & Kevin J. Carey, *Cleanup Costs Reimbursable As Part of Administration; 3rd Circuit Ruling*, THE LEGAL INTELLIGENCER, June 7, 1994, at 13.

166. Claar, *supra* note 64, at 34.

sive problem in the administration of state cleanup programs.

V. Conclusion

In *Pennsylvania v. Conroy*,¹⁶⁷ the United States Court of Appeals for the Third Circuit held that cleanup expenses incurred by a state environmental agency to eliminate a significant threat to the environment should be afforded administrative expense priority under section 503(b)(1)(A) of the Bankruptcy Code. In addition, the court awarded the state agency administrative and legal costs as well. This important decision, which places CERCLA above the Bankruptcy Code in the legislative hierarchy, will hopefully inspire the newly-created Bankruptcy Review Commission to recommend such priority for all environmental cleanups funded by taxpayers.

167. *Pennsylvania v. Conroy*, 24 F.3d 568 (3d Cir. 1994).