

5-1-1987

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Roger D. Colton

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Dr. Michael F. Sheehan

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### Recommended Citation

Roger D. Colton, Kathleen Uehling, and Dr. Michael F. Sheehan, *Seven-Cum-Eleven: Rolling the Toxic Dice in the U.S. Supreme Court*, 14 B.C. Env'tl. Aff. L. Rev. 345 (1987), <http://lawdigitalcommons.bc.edu/ealr/vol14/iss3/2>

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## SEVEN-CUM-ELEVEN: ROLLING THE TOXIC DICE IN THE U.S. SUPREME COURT

*Roger D. Colton\**  
*Kathleen Uehling\*\**  
*Dr. Michael F. Sheehan\*\*\**

Recent years have seen the development of an increasing conflict between state environmental statutes and the federal bankruptcy laws. In 1978, Congress enacted legislation designed to facilitate the commercial reorganization of financially strapped businesses.<sup>1</sup> One impact of these reforms has been a dramatic increase in the number of business bankruptcies.<sup>2</sup> The number of businesses that filed for either liquidation or reorganization nearly doubled between 1980 and 1982 alone.<sup>3</sup>

Federal bankruptcy laws, however, have also increasingly become a bar to the enforcement of state and federal environmental statutes.<sup>4</sup> In a recent report on the impacts of the financial closure of

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\* B.A., Iowa State University, 1975; J.D., University of Florida, 1981. Attorney, National Consumer Law Center ("NCLC"), Boston, MA. The views expressed in this article do not necessarily reflect the views of the NCLC.

\*\* Master of Urban and Regional Planning, University of Iowa, 1987; J.D., University of Iowa College of Law, 1987.

\*\*\* B.S., University of California, Riverside, 1972; M.S. University of California, Riverside, 1973; Ph.D. University of California, Riverside, 1979; J.D. University of Iowa College of Law, 1987. Economic and Financial Consultant, Fisher, Sheehan and Colton.

<sup>1</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (amended 1984) (codified 11 U.S.C. §§ 101-151104 and in scattered sections of 28 U.S.C. (1982 & Supp. III 1985)). For example, under the prior Bankruptcy Act, a company had to prove its insolvency to succeed in bankruptcy court. Chapter X, Bankruptcy Act Amendments of 1938, Pub. L. No. 75-696, §§ 101-276, 52 Stat. 840 (1938). Under the new statute, however, a company need not make such a demonstration. 11 U.S.C. §§ 109, 301 (1982).

<sup>2</sup> Mersch and Cheng, *The Impact of the Bankruptcy Reform Act on Business Bankruptcy Filings*, 36 ALA. L. REV. 539 (1985). This study involved a regression analysis (controlling for seasonal variations and economic trends) run on bankruptcy statistics from 1972 until 1983.

<sup>3</sup> Statistical Abstract of the United States, 1984, at 536 (104th ed.).

<sup>4</sup> Sibling, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 871 n.14 (1985). One commentator posited that

hazardous waste disposal sites, the United States General Accounting Office (GAO) concluded that federal financial assurance requirements<sup>5</sup> may not ensure that financially troubled or bankrupt firms pay closure and post-closure costs.<sup>6</sup> In addition, GAO said, in three of the eight instances of closed or closing bankrupt facilities that it studied,<sup>7</sup> the courts restricted federal and state efforts to force owners/operators to properly close the facilities.<sup>8</sup> In some instances today, rather than paying the costs of complying with environmental and safety regulations, companies and individuals instead simply opt for bankruptcy.

It is reasonable to expect this conflict between financial and environmental policy to increase.<sup>9</sup> Congress has enacted strict new laws for the disposal<sup>10</sup> and cleanup<sup>11</sup> of toxic wastes. The federal government has chronicled its concern over the heightened clash between these laws, which are designed to protect the public's health and safety, and those laws designed to maintain or encourage the financial viability of industries.<sup>12</sup> The United States Supreme Court recently examined two different aspects of this conflict. In *Ohio v. Kovacs*,<sup>13</sup> the Supreme Court held that the state-imposed obligations of an industry to spend money on toxic waste cleanup could be

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Congress simply did not foresee the conflict that would arise between the bankruptcy and environmental statutes. Aaron, *Bankruptcy Stays of Environmental Regulation: Harvest of Commercial Timber as an Introduction to A Clash of Policies*, 12 ENVTL. L. 1, 3 (1981) [hereinafter Aaron].

<sup>5</sup> See *infra* notes 18-30 and accompanying text for a discussion of the requirements of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6962 (1982 & Supp. 1985). See *infra* notes 31-34 and accompanying text for a discussion of the requirements of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601-9657 (1982 & Supp. 1985).

<sup>6</sup> United States General Accounting Office, *Hazardous Waste: Environmental Safeguards Jeopardized When Facilities Cease Operating*, (February 1986) [hereinafter GAO Report]. GAO noted that 74 hazardous waste facilities had filed for bankruptcy by summer, 1985. *Id.* at 16.

<sup>7</sup> The GAO studied hazardous waste sites in six states. Seventeen of those sites had declared bankruptcy. Of those seventeen, eight were closed or closing. *Id.* at 16.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> See generally Aaron, *supra* note 4.

<sup>10</sup> See generally Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6962 (1982 & Supp. III 1985).

<sup>11</sup> See generally Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985).

<sup>12</sup> For example, GAO said that the potential exists for an increasing number of conflicts between the bankruptcy statute and hazardous waste requirements "in the next few years" as costly new federal hazardous waste requirements are implemented. GAO Report, *supra* note 6, at 29.

<sup>13</sup> 469 U.S. 274 (1985).

discharged through bankruptcy.<sup>14</sup> In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,<sup>15</sup> the Court held that a debtor company could not abandon property under the Code<sup>16</sup> by arguing that the asset had no value.<sup>17</sup>

This article examines the development of the conflict between environmental and financial policy, reviews the status of the law in light of these recent Supreme Court decisions, and recommends necessary reforms. The article critiques the holdings of the *Kovacs* and *Midlantic* decisions. It concludes that sound legal and economic principles support refusing to permit the discharge of environmental clean-up costs.

## I. THE SOURCE OF THE CONFLICTS

### A. *The RCRA and CERCLA Financial Assurance Requirements*

The Resource Conservation and Recovery Act (RCRA)<sup>18</sup> sets out financial assurance requirements for the closure of hazardous waste facilities as well as their post-closure operations. "The assurances of financial responsibility and continuity of operation," Congress said, must be "consistent with the degree and duration of risks associated with the treatment, storage, or disposal of specified hazardous wastes."<sup>19</sup> Congress directed the Administrator of the Environmental Protection Agency to promulgate standards respecting, among other things, operations of hazardous waste facilities and qualifications as to ownership, continuity of operation, training for personnel, and financial responsibility (including financial responsibility for corrective action) "as may be necessary or desirable."<sup>20</sup> RCRA stated that "financial responsibility" may be established by any one or any combination of insurance, guarantee, surety bond, letter of credit, or qualification as a self-insurer.<sup>21</sup>

The EPA has promulgated rules setting forth the closure and post-closure financial responsibility requirements for hazardous waste

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<sup>14</sup> *Id.* at 283. For a more detailed discussion of this case, see *infra* notes 67-77 and accompanying text.

<sup>15</sup> 54 U.S.L.W. 4138 (January 28, 1986).

<sup>16</sup> 11 U.S.C. § 554(a) (1982 & Supp. 1985).

<sup>17</sup> 54 U.S.L.W. at 4139. For a more detailed discussion of this case, see *infra* notes 204-222, and accompanying text.

<sup>18</sup> 42 U.S.C. § 6901-6962 (1982 & Supp. 1985).

<sup>19</sup> 42 U.S.C. § 6924(a) (1982).

<sup>20</sup> 42 U.S.C. § 6924(a) (1982 & Supp. III 1985).

<sup>21</sup> 42 U.S.C. § 6924(f)(1) (1982 & Supp. III 1985).

facilities.<sup>22</sup> The rules require owners or operators of hazardous waste facilities to close the facility in a manner that both minimizes any need for further maintenance and “controls, minimizes or eliminates” post-closure escape to the ground or surface waters or to the atmosphere to the extent “necessary to protect human health and the environment.”<sup>23</sup> Post-closure care of hazardous waste facilities is to begin upon completion of the closure of the facility and to extend for thirty years.<sup>24</sup> Closure involves certain monitoring and maintenance requirements as well as restrictions on the post-closure use of the property.<sup>25</sup>

The EPA rules require an owner or operator of a hazardous waste facility to establish financial assurances for compliance with both the closure<sup>26</sup> and post-closure<sup>27</sup> requirements. To make such assurances, the owner/operator must have a detailed written estimate, in current dollars, made of the cost of closing the facility in accordance with RCRA regulations. This estimate must equal the cost of final closure at the point in the facility’s active life “when the extent and manner of its operation would make closure the most expensive.”<sup>28</sup> The closure cost must be adjusted annually for inflation.<sup>29</sup> Similar requirements exist for post-closure operating costs.<sup>30</sup>

In a like fashion, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund)<sup>31</sup> imposes certain financial assurance requirements on hazardous waste facilities. CERCLA imposes liability on hazardous waste facility owners or operators for all costs of removal or remedial action by the United States or any state, for any other “necessary costs of response” by “any other person,” for the costs of any health assessment or health effects study, and for “damages or injury to, destruction of, or loss

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<sup>22</sup> 40 C.F.R. §§ 264.110–264.120; Congress set forth the policy behind these rules in the preamble to the rules when adopted. 51 F.R. 16444 (May 2, 1986).

<sup>23</sup> 40 C.F.R. § 264.111 (1986).

<sup>24</sup> 40 C.F.R. § 264.117(a) (1986).

<sup>25</sup> 40 C.F.R. § 264.117 (1986). Requirements similar to those placed on “facilities” are placed on containers (40 C.F.R. § 264.178 (1986)), tanks (40 C.F.R. § 264.197 (1986)), surface impoundments (40 C.F.R. § 264.228 (1986)), waste piles (40 C.F.R. § 264.258 (1986)), land treatment (40 C.F.R. § 264.280 (1986)), landfills (40 C.F.R. § 264.310 (1986)) and incinerators (40 C.F.R. § 264.351 (1986)).

<sup>26</sup> 40 C.F.R. § 264.143 (1986).

<sup>27</sup> 40 C.F.R. § 264.145 (1986).

<sup>28</sup> 40 C.F.R. § 264.142(a) (1986).

<sup>29</sup> 40 C.F.R. § 264.142 (1986).

<sup>30</sup> 40 C.F.R. § 264.144 (1986). *See also* 40 C.F.R. §§ 265.1–265.430 (1986); 40 C.F.R. §§ 267.1–267.64 (1986).

<sup>31</sup> 42 U.S.C. §§ 9601–9657 (1982 & Supp. III 1985).

of natural resources, including the reasonable costs of assessing such injury, destruction or loss . . . ."<sup>32</sup> While facilities are responsible for the entire costs of response, there is a fifty million dollar liability limit on damages.<sup>33</sup> CERCLA authorizes the Administrator of the EPA to require financial assurances consisting of "evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances."<sup>34</sup>

### B. *The Bankruptcy Amendments of 1978*

Beginning in 1970, Congress began a review of the long-standing issue of insolvency administration.<sup>35</sup> This process finally produced the Bankruptcy Reform Act of 1978.<sup>36</sup> The purpose of this statute was more than to account for "the pathology of moribund business."<sup>37</sup> It was also an attempt to "salvag[e] a source of jobs, products and taxes."<sup>38</sup> With reorganization proceedings in particular,<sup>39</sup> allowing the bankrupt a "fresh start" is a major goal.<sup>40</sup>

Under the 1978 amendments, two types of actions are permitted for debtor corporations: (1) liquidation under chapter 7; and (2) reorganization under chapter 11.<sup>41</sup> In a liquidation proceeding, all company property becomes part of an "estate."<sup>42</sup> The property is then

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<sup>32</sup> 42 U.S.C. § 9607(a)(1)-(4) (1982 & Supp. 1987). The total cost includes the payment of interest. *Id.*

<sup>33</sup> 42 U.S.C. § 9607(c)(1)(D) (1982).

<sup>34</sup> 42 U.S.C. § 9608(b)(1) (1982). Post-closure liability, however, transfers to the federal "Post-closure Liability Trust Fund" if the owner or operator of the facility obtains a post-closure permit pursuant to 42 U.S.C. §§ 6921-6934 (1982 & Supp. 1985) and complies with the permit as well as with the standards of the statute and implementing regulations. 42 U.S.C. § 9607(k) (1982).

<sup>35</sup> A. RESNICK & E. WYPYSKI, *BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY* [hereinafter RESNICK & WYPYSKI].

<sup>36</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (amended 1984) (codified in 11 U.S.C. §§ 101-1501 and in scattered sections of 28 U.S.C.) (1982 & Supp. III 1985) [hereinafter Bankruptcy Code or Code].

<sup>37</sup> Aaron, *supra* note 4, at 2.

<sup>38</sup> *Id.*

<sup>39</sup> See generally text accompanying notes 55-64 for a discussion of reorganization.

<sup>40</sup> H. SOMMER, *CONSUMER BANKRUPTCY LAW AND PRACTICE*, 6. This has been accepted as a goal of bankruptcy statutes for over 80 years. See, e.g., *Hanover National Bank v. Moses*, 186 U.S. 181 (1902); accord, *In Re Aveni*, 458 F.2d 972, (6th Cir. 1972), cert. denied, 409 U.S. 877 (1972). The other goal is equity among creditors. See, e.g., *Burlingham v. Crouse*, 228 U.S. 459 (1913); accord, *Simonson v. Granquist*, 369 U.S. 38 (1962).

<sup>41</sup> Pub. L. No. 95-598, 92 Stat. 2558-59 (amended 1984) (codified in 11 U.S.C. §§ 301-303 (1982)).

<sup>42</sup> 11 U.S.C. § 541(a) (1982 & Supp. III 1985). For a discussion, however, of what constitutes property "of the company," see *infra* notes 195-203 and accompanying text. In addition,

distributed among creditors according to a fixed scheme. The bankrupt's remaining debts are subsequently discharged.<sup>43</sup> A discharge bars the further enforcement, against the debtor, of debts incurred prior to filing the bankruptcy petition.<sup>44</sup> The discharge not only "voids any judgment" that is a determination of the personal liability of the debtor,<sup>45</sup> but enjoins "any act" that seeks to "collect, recover or offset" a debt as a personal liability of the bankrupt.<sup>46</sup>

Two general exceptions exist to discharge.<sup>47</sup> First, there are debtors who cannot have their debts discharged.<sup>48</sup> Grounds for denying discharge are related primarily to some sort of wrongdoing by the bankrupt such as fraud.<sup>49</sup> Second, there are debts that cannot be discharged.<sup>50</sup> These include, but are not limited to, taxes, and compensation for willful and malicious injury to another entity.<sup>51</sup>

The estate of a chapter 7 debtor is administered by a trustee whose role is to represent the estate during the pendency of the bankruptcy proceeding.<sup>52</sup> The trustee is to collect and reduce estate property to money, to close the estate as expeditiously as possible, and to account for all the property of the estate.<sup>53</sup> In addition, it is

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during the pendency of the liquidation, the court may authorize the trustee to operate the business of the debtor for a limited period of time. 11 U.S.C. § 721 (1982). The income derived from such operations becomes part of the general fund to be used first for payment of administration expenses and, second, to expand the fund for payment to creditors. In Re Richter, 40 F. Supp. 758, 760 (D.C.N.Y. 1941).

<sup>43</sup> The right to a discharge and the effect of a discharge are two distinct legal questions. The right to a discharge is governed by 11 U.S.C. § 727 (1982 & Supp. III 1985); the effect of a discharge is governed by 11 U.S.C. § 524 (1982 & Supp. III 1985).

<sup>44</sup> 11 U.S.C. § 727(b) (1982). "In effect, a chapter 7 liquidation separates the discharged debtor from his financial past, appropriating nonexempt assets for distribution to holders of pre-bankruptcy claims and barring further enforcement of those claims against the debtor in the absence of a statutory exception to discharge." Hennigan, *Accommodating Regulatory Enforcement and Bankruptcy Protection*, 59 AM. BANKR. L.J. 1, 7 (1985).

<sup>45</sup> 11 U.S.C. § 524(a)(1) (1982).

<sup>46</sup> 11 U.S.C. § 524(a)(2) (1982 & Supp. III 1985).

<sup>47</sup> Individual debtors are provided exceptions to discharge. 11 U.S.C. § 523(a) (1982 & Supp. III 1985) and 11 U.S.C. § 727(a)(1) (1982).

<sup>48</sup> For a listing of when the court shall not grant the debtor a discharge, see, 11 U.S.C. § 727(a)(1)-(10) (1982 & Supp. III 1985).

<sup>49</sup> Culpability is a necessary element in the denial of discharge in such instances. For example, discharge is denied if the debtor "with [the] intent to hinder, delay, or defraud a creditor" transfers, removes, destroys, mutilates, or conceals property. 11 U.S.C. § 727(a)(2) (1982). So, too, is there a denial if the debtor "knowingly and fraudulently" makes a false accounting. 11 U.S.C. § 727(a)(4) (1982).

<sup>50</sup> For a listing of the debts that cannot be discharged, see, 11 U.S.C. § 523(a)(1)-(9) (1982 & Supp. III 1985).

<sup>51</sup> *Id.*; see also 11 U.S.C. § 727(b) (1982 & Supp. 1985).

<sup>52</sup> The appointment of a trustee must be done in compliance with 11 U.S.C. § 323 (1982).

<sup>53</sup> 11 U.S.C. § 704 (1982 & Supp. III 1985).

within the prerogative of the trustee to abandon property of the estate determined to be of no value to the estate.<sup>54</sup>

In contrast to liquidation proceedings, a chapter 11 reorganization proceeding usually leaves the bankrupt in control of its assets.<sup>55</sup> The bankrupt prepares a plan to repay debts from post-bankruptcy income.<sup>56</sup> The plan may be either accepted or rejected by creditors.<sup>57</sup> In either case, the plan is to be presented to the courts for "confirmation." If all creditors accept the plan, the court "shall confirm the plan" if it meets the requirements of 11 U.S.C. sec. 1129(a). To be confirmed, the reorganization plan must be feasible.<sup>58</sup> In addition, creditors are guaranteed to receive at least as much under a chapter 11 reorganization as they would have received under a chapter 7 liquidation.<sup>59</sup> If one or more classes of impaired creditors object to the plan, however, the debtor must invoke the Code's "cramdown" procedures.<sup>60</sup> To be confirmed in a cramdown proceeding, the plan must meet each of the requirements of section 1129(a).<sup>61</sup> The plan must also meet the requirement of section 1129(b) that the plan be "fair and equitable."<sup>62</sup> To be "fair and equitable," the string of deferred payments to the creditor must have a present value as of the effective date of the plan that is equal to the creditor's allowed claim.<sup>63</sup> Under either type of corporate reorganization confirmation, all types of corporate debts are dischargeable.<sup>64</sup>

In *Kovacs* and *Midlantic*, the Supreme Court was faced with two procedural aspects of the Bankruptcy Code. In *Kovacs*, the Court addressed the issue of whether financial liability for hazardous waste cleanup was a "liability on a claim" and thus subject to discharge in

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<sup>54</sup> For a discussion of abandonment see *infra* notes 214-224 and accompanying text.

<sup>55</sup> 11 U.S.C. § 1107(a) (1982 & Supp. III 1985). All of the rights of a trustee also inhere in the debtor in possession in a reorganization with certain limited exceptions. *Id.*

<sup>56</sup> 11 U.S.C. §§ 1121-1129 (1982 & Supp. III 1985).

<sup>57</sup> 11 U.S.C. § 1126 (1982 & Supp. III 1985).

<sup>58</sup> Feasibility is defined by 11 U.S.C. § 1129(a)(11) (1982). See, e.g., *In Re Monnier Bros.*, 755 F.2d 1336, 1341-42 (8th Cir. 1985); *cf.*, *In Re Fursman Ranch*, 38 Bankr. 907, 911-12 (W.D. Mo. 1984).

<sup>59</sup> See 11 U.S.C. § 1129(a)(7)(A)(ii) (1982).

<sup>60</sup> 11 U.S.C. § 1129(b) (1982 & Supp. III).

<sup>61</sup> 11 U.S.C. § 1129(b)(1) (1982 & Supp. III). The one exception, by definition, is that the requirement of section 1129(a)(8), that all classes be unimpaired or accept the plan, need not be met.

<sup>62</sup> The term "fair and equitable" is defined at 11 U.S.C. § 1129(b)(2) (1982 & Supp. III 1985).

<sup>63</sup> See generally 5 Collier on Bankruptcy, ¶ 1129.03 (15th ed. 1979). For an excellent general discussion of the "cramdown" requirements, see Klee, *All You Ever Wanted to Know About 'Cram Down' Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979).

<sup>64</sup> 11 U.S.C. § 1141(d)(1) (1982). The same limits are placed on the discharge of individual debts in reorganization as in 11 U.S.C. § 523. 11 U.S.C. § 1141(d)(2) (1982).



bankruptcy.<sup>65</sup> In *Midlantic*, the Supreme Court construed provisions of the Code that permit a bankruptcy trustee to abandon property which is either burdensome or of inconsequential value to the estate.<sup>66</sup>

## II. THE RECENT U.S. SUPREME COURT DECISIONS

### A. *The Case of Kovacs*

William Kovacs was the chief executive officer of the Chem-Dyne Corporation, an industrial and hazardous waste disposal facility located in Hamilton, Ohio.<sup>67</sup> In July, 1979, the State of Ohio obtained an injunction in state court requiring the removal of all hazardous waste from certain dumps owned by Chem-Dyne.<sup>68</sup> That order set a schedule that the company was required to keep.<sup>69</sup>

Following Kovacs' failure to comply, the Ohio trial court appointed a receiver.<sup>70</sup> The court directed the receiver to take possession of all property and assets of Kovacs and to implement the cleanup.<sup>71</sup> Kovacs then filed a petition for personal bankruptcy in bankruptcy court.<sup>72</sup> His filing occurred after the receiver had taken possession of the assets but before the receiver had completed the cleanup.<sup>73</sup>

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<sup>65</sup> 11 U.S.C. § 101(4) (1982 & Supp. 1985).

<sup>66</sup> 11 U.S.C. § 554(a) (1982 & Supp. 1985).

<sup>67</sup> The Chem-Dyne business involved "brokering, hauling, storing disposing and recycling . . . industrial and hazardous waste . . ." In *Re Kovacs*, 29 Bankr. 816, 817 (Bankr. S.D. Ohio 1982), *aff'd as to application of automatic stay provision* 681 F.2d 454 (6th Cir. 1982); *aff'd as to dischargeability in bankruptcy* 718 F.2d 984 (6th Cir. 1983), *aff'd* 469 U.S. 274 (1985).

<sup>68</sup> In *Re Kovacs*, 681 F.2d 454 (6th Cir. 1982). Ohio alleged that Kovacs and Chem-Dyne "had caused water pollution, nuisance conditions and fish kills in violation of Ohio law." 681 F.2d at 454. The injunction was part of a July 18, 1979 "Stipulation and Judgment Entry," personally signed by Kovacs and filed in Ohio's Butler County Common Pleas Court. 681 F.2d at 454. The state proceeding was brought pursuant to Ohio's water pollution statute, OHIO REV. CODE ANN. §§ 6111.01-6111.99 (Baldwin 1982) and pursuant to OHIO REV. CODE ANN. § 3767.12. Appendix at 43-44, *Ohio v. Kovacs* 469 U.S. 274 (1985) (No. 83-1020) [hereinafter Appendix].

<sup>69</sup> The waste site, at the time of the order, was estimated to contain 850,000 gallons of toxic waste in liquid form and 4000 barrels in solid or semi-solid form. Appendix, *supra* note 64, at 45. The schedule required the removal of 75,000 gallons, and 340 drums, per month with compliance to be determined on a quarterly basis. *Id.* at 46.

<sup>70</sup> 681 F.2d at 454. *See also* *Ohio v. Kovacs*, 717 F.2d 984, 985 (6th Cir. 1983) (quoting "pertinent portions" of the state court receivership order) *aff'd* 469 U.S. 274 (1985).

<sup>71</sup> 469 U.S. at 276.

<sup>72</sup> *Id.* at 276, n.2. He originally filed for reorganization pursuant to chapter 11 of the Bankruptcy Code but subsequently converted it to a liquidation pursuant to chapter 7. 681 F.2d at 455.

<sup>73</sup> 469 U.S. at 276.

Nevertheless, hoping to apply part of Kovacs' personal post-bankruptcy income to the work at the waste site,<sup>74</sup> the State of Ohio sought discovery in state court of his current income and assets.<sup>75</sup>

The conflict over the cleanup obligation of Kovacs resulted in two separate court proceedings. First, Kovacs responded to the discovery requests by seeking in bankruptcy court to stay the state court proceedings. (*Kovacs I*).<sup>76</sup> In a separate action, the state sought both a declaration that Kovacs' cleanup obligation was not ultimately dischargeable in bankruptcy, and an injunction preventing the bankruptcy trustee from recovering Kovacs' assets from the receiver. (*Kovacs II*).<sup>77</sup>

In brief, Kovacs argued that the State of Ohio sought a monetary payment from him that was in essence simply a money judgment subject to discharge in bankruptcy as were all of his other "claims" and "debts."<sup>78</sup> In contrast, the State of Ohio argued that, because it was only seeking payment to effectuate the cleanup of Kovacs' hazardous wastes, as directed by a state court, and was not seeking payment of money as an alternative to that cleanup or as compensation for damages, there was no "claim" or "debt" subject to discharge in bankruptcy.

## 1. The *Kovacs* Decisions

The *Kovacs I* bankruptcy judge concluded that the state sought information about Kovacs' current income "as a preliminary to requesting an order from that court which would require that part of debtor's current income be applied" to the receiver's efforts to complete the unfulfilled obligation to clean up the Chem-Dyne wastes.<sup>79</sup> The judge determined that Kovacs was entitled to an automatic stay under the Bankruptcy Code and enjoined the state from proceeding

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<sup>74</sup> The state court excepted from the receivership "any property exempt from the control of a receiver by operation of law." 717 F.2d at 985. Nevertheless, the state expected that Kovacs "would generate sufficient funds in his ongoing business to pay for the clean-up." 29 Bankr. at 818.

<sup>75</sup> 29 Bankr. at 816. The Bankruptcy Court stayed these state court proceedings per 11 U.S.C. § 362 (1982 & Supp. 1985). The federal district court agreed and the Sixth Circuit affirmed. In *Re Kovacs*, 681 F.2d 454 (6th Cir. 1982), *vacated and remanded on unrelated grounds*, 459 U.S. 1167 (1983).

<sup>76</sup> 717 F.2d 984 (6th Cir. 1983).

<sup>77</sup> See *infra* notes 91-94 and 115-116 and accompanying text for a discussion of what constitutes "claims" and "debts."

<sup>78</sup> See *supra* text accompanying notes 99-103.

<sup>79</sup> 681 F.2d at 455.

further in its attempt to levy on Kovacs' post-petition earnings.<sup>80</sup> According to the court, "there is no difference in substance between efforts to collect money from a debtor by securing a court order, and efforts to enforce a money judgment against him."<sup>81</sup>

The Sixth Circuit Court of Appeals affirmed.<sup>82</sup> Under the automatic stay provision, the court noted, "all entities" are prevented from pursuing collateral actions. "Entity" is statutorily defined to include a "governmental unit."<sup>83</sup> While the Bankruptcy Code *does* allow governmental agencies to enforce police or regulatory powers, even in these instances agencies may apply for and enforce an injunction, and may seek entry of a "money judgment," but they may not enforce "money judgments."<sup>84</sup> The Sixth Circuit stated that the Bankruptcy Code indicated "a clear intent . . . to deny [governmental] units the power to collect money in their enforcement efforts."<sup>85</sup> According to the Sixth Circuit, the Ohio court's appointment of a receiver "ordered that Kovacs turn over all his non-exempt assets to the receiver, and authorized the receiver to collect any sums of money that would become payable to Kovacs in the future."<sup>86</sup> There is, the Sixth Circuit said, "very little in substance to distinguish that order and a money judgment."<sup>87</sup>

In *Kovacs II*, the State of Ohio sought to determine whether Kovacs' clean-up obligation was dischargeable in bankruptcy.<sup>88</sup> Like *Kovacs I*, this argument resolved itself into whether the money to be expended on cleaning up the toxic waste site constituted a "money judgment."<sup>89</sup> According to the bankruptcy court: "The parties have crystalized the issue here in simple fashion, [Ohio] stoutly insisting that the just identified affirmative obligation is not a monetary obligation, while [Kovacs] says it is."<sup>90</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 455-56 (quoting bankruptcy court).

<sup>82</sup> *In Re Kovacs*, 681 F.2d at 456.

<sup>83</sup> 11 U.S.C. § 101(14) (1982 & Supp. III 1985).

<sup>84</sup> 11 U.S.C. § 362(b)(5) (1982). *E.g.*, *In Re Tauscher*, 7 Bankr. 918 (Bankr. E.D. Wis. 1981).

<sup>85</sup> 681 F.2d at 456.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 29 Bankr. at 818.

<sup>89</sup> *Id.* *Kovacs I* and *Kovacs II* thus presented essentially the identical issue in different contexts. In the latter case, if Ohio was successful, the state could levy on the wages of Kovacs after the bankruptcy proceeding closed or the automatic stay was no longer in effect. In the first case, a levy on wages by Ohio was prevented only during the pendency of the bankruptcy proceeding. *Id.*

<sup>90</sup> *Id.*

The Bankruptcy Code provides for the discharge of both "debts" and "claims."<sup>91</sup> "Debt" is defined as "liability on a claim."<sup>92</sup> A "claim" is either: (1) a right to payment, or (2) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.<sup>93</sup> Thus, a right to an equitable remedy is a "claim" and a debt dischargeable in bankruptcy if, but only if, the equitable remedy is for breach of performance and the breach creates an alternative right to payment.<sup>94</sup>

The bankruptcy court agreed with Kovacs that the clean-up obligation was indeed a money judgment, thus entitling Kovacs to a discharge in bankruptcy.<sup>95</sup> The bankruptcy court's decision was upheld by the district court and affirmed by the Sixth Circuit.<sup>96</sup> The State of Ohio, the Sixth Circuit held, was seeking a right to a payment. Further, the court said that the state, could not obtain performance of the equitable remedy (i.e., cleanup) from Kovacs because the receiver, and not Kovacs, possessed the waste site.<sup>97</sup> According to the court then, all that could be gained from Kovacs, and indeed all that was sought, was a money payment.<sup>98</sup>

On appeal to the United States Supreme Court, Ohio argued that its action was not dischargeable because it was neither a right to payment nor a right to an equitable remedy also giving rise to an alternative right to payment.<sup>99</sup> Ohio did not have a right to payment because the requirements of the injunction that were at issue re-

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<sup>91</sup> 11 U.S.C. § 727(b) (1982).

<sup>92</sup> 11 U.S.C. § 101(11) (1982).

<sup>93</sup> 11 U.S.C. § 101(4) (1982).

<sup>94</sup> In *Kovacs II*, the state of Ohio also argued that only a breach of a commercial contract could give rise to a claim. The state reasoned that because Ohio's injunction arose from a breach of a statute, a claim had not been created. The Supreme Court summarily dismissed that argument, stating that Congress had intended a broad application of the word "claim" and no attempt had been made to limit the term only to contractual breaches. 469 U.S. at 279.

<sup>95</sup> It is important to remember the two *Kovacs* cases. *Kovacs I*, 681 F.2d 454 (6th Cir. 1982) addressed the issue of an automatic stay. This Sixth Circuit decision was vacated and remanded on unrelated grounds by the Supreme Court. 459 U.S. 1167 (1983). *Kovacs II*, 717 F.2d 984 (6th Cir. 1983) addressed the issue of whether the payment sought from Kovacs was dischargeable in bankruptcy. This decision was affirmed by the Supreme Court in the case discussed in this article, 469 U.S. 274 (1985).

<sup>96</sup> In *Re Kovacs*, 717 F.2d 984, 988 (6th Cir. 1983).

<sup>97</sup> The court held that, effectively, Ohio was seeking an alternative right to payment. "Not surprisingly, Ohio encounters great difficulty in distinguishing its actions to date from an attempt to enforce an alternative right to payment." 717 F.2d at 987.

<sup>98</sup> "In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup." *Id.*

<sup>99</sup> 469 U.S. at 279, 282 citing 717 F.2d at 987.

quired Kovacs to perform certain acts rather than to pay money.<sup>100</sup> The expenditure by Kovacs, Ohio said, was secondary or incidental to the cleanup of the property.<sup>101</sup> Neither did Ohio have a right to an equitable remedy also giving rise to an alternative right to payment.<sup>102</sup> An expenditure by Kovacs, the state said, would simply assist in the performance of the cleanup and would not be an alternative to it. Ohio claimed that Kovacs should merely be required to spend money in the process of performing an equitable remedy and that many equitable remedies require such an expenditure.<sup>103</sup>

In upholding Kovacs' right to have his hazardous waste clean-up obligation discharged in bankruptcy, the Supreme Court endorsed the Sixth Circuit's approach.<sup>104</sup> The remedy sought by Ohio, the Court said, did in fact constitute a "money judgment."<sup>105</sup> As a result, the sought-after money was a "debt" dischargeable in bankruptcy.<sup>106</sup> According to the Court, however, were it not for the receiver, the

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<sup>100</sup> In contrast, the original state court injunction (*see supra* note 68) also required the payment of \$75,000 to the State to compensate for injury to wildlife. Ohio conceded, however, that that was a debt dischargeable in bankruptcy. 469 U.S. at 279.

<sup>101</sup> Ohio disputed the notion that the receivership dispossessed Kovacs of his interest in the property and stood in the shoes of Kovacs. Brief for Petitioner at 31-35, *Ohio v. Kovacs*, 469 U.S. 274 (1985) (No. 83-1020). The purpose of the receiver, Ohio said, was simply to manage the property and to coordinate the efforts of the three parties interested in the property: the State of Ohio, Kovacs, and the generators of the wastes which were kept at Chem-Dyne. Brief for Petitioner at 34.

Instead of preventing defendants from complying with injunctions, including the expenditure of funds in such compliance, Ohio said, the appointment of a receiver was designed to effectuate such compliance. *See, e.g.*, *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976) (to achieve desegregation of Boston schools); *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979) (to alleviate unconscionable prison conditions); *United States v. City of Detroit*, 476 F. Supp. 512, 521 (E.D. Mich. 1979) (to cleanup water pollution).

<sup>102</sup> The Ohio statute is absolute on its face. It states that "[n]o person shall violate or fail to perform any duty imposed by sections 6111.01 to 6111.08 of the Revised Code, or violate any order, rule, or term or condition of a permit issued by the director of environmental protection pursuant to such sections." The statute proceeds to impose a mandatory duty upon the attorney general (using the term "shall") to "upon the written request of the director of environmental protection . . . prosecute any person who violates, or who fails to perform any duty" imposed by these legal standards. The statute finally imposes a mandatory duty upon the attorney general (again using the term "shall") to, "upon written request of the director of environmental protection . . . bring an action for an injunction against any person violating or threatening to violate" any of these legal standards. OHIO REV. CODE ANN. § 6111.07.

<sup>103</sup> *See infra* notes 147-154 and 162-167 and accompanying text. The Third Circuit Court of Appeals, in *Penn Terra, Ltd. v. Department of Env'tl. Resources*, perhaps stated the principle best: ". . . we cannot ignore the fundamental fact 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." 733 F.2d 267, 278 (3d Cir. 1984) (footnote omitted).

<sup>104</sup> 469 U.S. 274, 285 (1985).

<sup>105</sup> *Id.* at 285.

<sup>106</sup> *Id.* at 279, 283.

State of Ohio might have prevailed.<sup>107</sup> Through the receiver, the state possessed Kovacs' property and assets.<sup>108</sup> Having been dispossessed of his property, Kovacs no longer had control of the property subject to the environmental dispute.<sup>109</sup> The Court noted that Kovacs was "disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property."<sup>110</sup> As a result, the Court held, Kovacs' post-bankruptcy income was all that Ohio could possibly have hoped to gain from its state court action and, in fact, the "only performance sought from Kovacs was the payment of money."<sup>111</sup> This, the Court indicated, strengthened the argument that Ohio's request was a "debt," or a "liability on a claim," against which the income would be applied.<sup>112</sup>

Several factors, however, support the conclusion that payment by Kovacs was not an alternative to cleanup of the dump site and, accordingly, was not a claim subject to discharge. First, the original injunctions were not conditional. The state ordered Kovacs to remove the hazardous chemicals and did not give him the choice of making a monetary payment instead.<sup>113</sup> Second, no Ohio law provided that a payment to the state treasury could be considered adequate performance of an order to clean up a toxic dump. The state statutory framework did not provide an owner or operator of a toxic waste site with an "alternative right to payment" in lieu of compliance with the statutory requirements. As a result, under the statutory scheme, Ohio argued, no "claim" existed as defined by the Bankruptcy Code.<sup>114</sup>

By allowing discharge in *Kovacs*, the Court seems to have defied the expressed intent of Congress that to be eligible for discharge, equitable remedies must have alternative rights to payment. The legislative history of the Bankruptcy Code indicates that requiring an alternative right to payment was a clear congressional policy choice. In the original version of the Bankruptcy Reform Act, "claim"

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<sup>107</sup> *Id.* at 282-83.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Although not analyzed on these grounds in this article, the Supreme Court decision seems subject to criticism on the grounds that it misapplied state law regarding receiverships. If, under state law, Kovacs was not considered to have been "dispossessed" of his property by the receiver, the Supreme Court analysis fails.

<sup>110</sup> 469 U.S. at 283.

<sup>111</sup> *Id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See In Re Kovacs*, 681 F.2d at 454 (noting that the injunctions ordered Kovacs to cooperate with the receiver in cleaning up the waste).

<sup>114</sup> *See supra* notes 99-103 and accompanying text.

included a "right to an equitable remedy for breach of performance if such breach does *not* give rise to a right of payment . . ." <sup>115</sup> After other definitions were proposed, the current wording was eventually enacted. The sponsor's remarks explaining the definition of a claim indicated that the language was intended, in those instances where the existence of a monetary payment and an equitable remedy stood on equal footing, to force an "election" of the monetary remedy; that remedy would then unquestionably fall within the definition of "claim." <sup>116</sup>

Ignoring this legislative history and instead relying on her own policy analysis, Supreme Court Justice O'Connor, in a special concurring opinion, said the finding that the clean-up order was a "liability on a claim" within the meaning of section 101(4) avoids the potentially adverse consequences for a state's enforcement of an environmental order when the debtor is a corporation, rather than an individual. <sup>117</sup> In liquidation proceedings under chapter 7 of the Bankruptcy Code, Justice O'Connor said, a trustee's distribution of the bankrupt's property is limited to creditors holding "claims." <sup>118</sup> Because the corporation ceases to exist, there are no post-bankruptcy earnings to use in fulfilling a clean-up order. As a result, Justice O'Connor concluded, a state's "claim" to the debtor's pre-bankruptcy assets could be the state's only chance to recover any of the debtor's estate. <sup>119</sup>

## 2. The *Penn Terra* Comparison

In the case of *Penn Terra v. Pennsylvania Department of Environmental Resources*, <sup>120</sup> the Third Circuit Court of Appeals faced a situation much like *Kovacs* but reached an opposite result. In *Penn Terra*, the court looked at a debtor corporation that operated coal surface mines in western Pennsylvania. Pennsylvania's state environmental protection agency, the Department of Environmental Re-

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<sup>115</sup> RESNICK & WYPYSKI, *supra* note 35, at vol. 12, doc. 41, p.3 (emphasis added).

<sup>116</sup> The sponsor stated: "[This] is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy." 469 U.S. at 280.

<sup>117</sup> *Id.* at 286.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* Any part of the state's claim not fulfilled by distribution of the estate would then be subject to discharge. See *supra* notes 42-46 (liquidation) and 63-64 (reorganization) and accompanying text.

<sup>120</sup> 733 F.2d 267 (3d Cir. 1984).

sources (DER), found the company in violation of a number of state environmental statutes.<sup>121</sup>

In 1981, the DER and Penn Terra's president entered into a consent order that would have brought Penn Terra into compliance with the state laws. The consent decree listed the violations and established a schedule for Penn Terra's corrective measures.<sup>122</sup> After the consent decree was entered into, Penn Terra filed for liquidation under chapter 7.<sup>123</sup> When Penn Terra subsequently failed to comply with the consent decree, the DER filed an enforcement action in state court.<sup>124</sup> One month later, Penn Terra sought protection from that state court action, arguing that because the company had previously petitioned for bankruptcy, it was entitled to an automatic stay of all collateral court proceedings.<sup>125</sup> The State of Pennsylvania replied that the proceedings fell within the exception for governmental agencies acting pursuant to state police powers.<sup>126</sup> The bankruptcy court enjoined the state court proceedings and the federal district court affirmed.<sup>127</sup>

In reversing the bankruptcy and district court injunctions,<sup>128</sup> the Third Circuit said the Bankruptcy Code should be read "so as to leave to the states as much of their police power as a fair reading of the statute allows."<sup>129</sup> The court noted the importance of state environmental protection statutes, stating that "the police power of the several states embodies the main bulwark of protection by which they carry out their responsibilities to the People; its abrogation is therefore a serious matter."<sup>130</sup>

The *Penn Terra* court departed from the Sixth Circuit *Kovacs* analysis, which held that the state's requested remedy "in essence amounted to a money judgment."<sup>131</sup> Instead, *Penn Terra* relied upon

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<sup>121</sup> Pennsylvania claimed violation of the Penn. Clean Streams Law, PA. STAT. ANN. tit. 35, §§ 691.1-1001 (Purdon 1977 & Supp. 1983) and of the Bituminous Coal Open Pit Mining Conservation Act, PA. STAT. ANN. tit. 52, §§ 1396.1-23 (Purdon 1966 & Supp. 1983). DER served Penn Terra with 36 citations, none of which the corporation contested. 733 F.2d at 269 n.1.

<sup>122</sup> 733 F.2d at 269.

<sup>123</sup> *Id.* at 270.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* The consent decree was filed in 1981. The bankruptcy was filed on March 15, 1982; the enforcement action was filed on April 14, 1982; the action seeking bankruptcy protection was filed on May 28, 1982. *Id.*

<sup>126</sup> *Id.* citing 11 U.S.C. §§ 362(b)(4)-(5) (1982 & Supp. III 1985).

<sup>127</sup> *Id.* The bankruptcy court relied on the "obvious insolvency" of *Penn Terra*. *Id.*

<sup>128</sup> *Id.* at 279.

<sup>129</sup> *Id.* at 273.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 277. "We find, however, that the definition of 'money judgment' implied in *Kovacs*



a more traditional legal definition. A "money judgment," the Third Circuit said, "is an order entered by the court or by the clerk, after a verdict has been rendered for plaintiff, which adjudges that the defendant should pay a sum of money to the plaintiff."<sup>132</sup> The court went on to find that the state court action "was neither in form nor substance the type of remedy traditionally associated with the conventional money judgment."<sup>133</sup> According to the Third Circuit, the court action was not intended to provide compensation for past injuries nor was it reducible to a sum certain; no monies were sought by the Commonwealth as a creditor or obligee. The Commonwealth was not seeking a traditional form of damages in tort or contract.<sup>134</sup> The court said that, rather than requesting a "judgment" which would "seek compensation for past damages," the state's sanction "was meant to prevent future harm to, and to restore, the environment."<sup>135</sup> It concluded by positing that "were we to find that any order which requires the expenditure of money is a 'money judgment,' then the exception to section 362 for government police action, which should be construed broadly, would instead be narrowed into virtual non-existence."<sup>136</sup>

The critical difference between *Kovacs* and *Penn Terra* was the presence of the receiver. Because of the receiver in *Kovacs*, the Supreme Court held that the expenditure of money sought by the State of Ohio was essentially a money judgment that was in turn a "claim" dischargeable in bankruptcy.<sup>137</sup> Two different lines of analysis lead to the conclusion that this is not an appropriate distinction.

a. *Overreaching Analysis*

The *Kovacs* decision presents the potential for serious abuse. Applying the thesis articulated in *Kovacs* to *Penn Terra* shows how the doctrine can backfire. One can argue that *Kovacs* stands for the proposition that when, due to the disability of a debtor, all that the state is seeking is the payment of funds, the relief requested is "in essence" a money judgment. In *Kovacs*, the debtor's disability was created by the appointment of the receiver in state court. Because

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. . . is unduly broad." *Id.* (referring to the Circuit Court decision). This *Penn Terra* Circuit Court decision, of course, pre-dates the Supreme Court *Kovacs* decision.

<sup>132</sup> *Id.* at 275.

<sup>133</sup> *Id.* at 278.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 277-78.

<sup>137</sup> 469 U.S. at 283.

of that receiver, the Supreme Court held, Kovacs was "disabled . . . from personally taking charge of and carrying out the removal of wastes from the property."<sup>138</sup> As a result, Kovacs' post-bankruptcy income was all that Ohio could possibly have hoped to gain from its state court action and, in fact, the "only performance sought from Kovacs was the payment of money."<sup>139</sup>

A similar argument could have been made in *Penn Terra*, the only distinction being what element disabled the debtor. In *Penn Terra*, the circuit court noted that the claimed assets of the debtor corporation totalled only \$14,000, with the cost of the sought after cleanup alone substantially exceeding that amount.<sup>140</sup> When other debts were considered, according to the court, the debtor's total liability was roughly \$660,000.<sup>141</sup> Indeed, the bankruptcy court labelled the equitable relief sought by the state as "meaningless."<sup>142</sup>

Language identical to the *Kovacs* holding could thus be substituted into a hypothetical *Penn Terra* appeal. Because of the significant disparity between the cost of the cleanup and the available assets, the debtor would be viewed as "disabled . . . from personally taking charge of and carrying out the removal of wastes from the property."<sup>143</sup> As a result, *Penn Terra*'s post-bankruptcy income, what there was of it, would be all that Pennsylvania could possibly hope to gain from its state court action. Under the *Kovacs* reasoning, because the equitable relief was expressly labelled by the court as "meaningless," the only performance actually sought from *Penn Terra* would be the payment of money.<sup>144</sup>

*Kovacs* articulates the principle that any expenditure of funds by a bankrupt debtor is in essence a money judgment when the debtor is "disabled from personally taking charge and carrying out the removal of wastes from the property." A disability, however, can be caused by many factors. In *Kovacs*, the disability was the "dispossession" of Kovacs' property by the receiver; in *Penn Terra*, the disability was due to the great disparity between the costs of clean-

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Penn Terra*, 733 F.2d at 270.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *In Re Kovacs*, 469 U.S. at 283.

<sup>144</sup> Indeed, in language close to the Supreme Court's *Kovacs* holding, the district court decision noted that: "[i]n the instant case, although the DER's action was ostensibly undertaken to enforce state environmental laws, the effect of the action, in light of the disparity between the costs and funds available to do the reclamation work, was to collect a money judgment against *Penn Terra* . . ." 733 F.2d at 270 (quoting District Court).

up and the assets of the bankrupt. Because by definition, most if not all bankrupt debtors could argue disability akin to the *Penn Terra* hypothetical outlined, the *Kovacs* doctrine is a dangerous principle which the courts should not allow to prevail.

*b. Inconsistent Doctrine*

Aside from the ominous policy implications of the decision, in *Kovacs*, the Supreme Court seems to have broken from its traditional analysis of what is "in essence a money judgment."<sup>145</sup> The phrase is not unique to the *Kovacs* litigation and the Supreme Court could have looked to current state sovereign immunity litigation for guidance.<sup>146</sup> The eleventh amendment to the federal Constitution provides that a state may not be sued, without its consent, by one of its citizens or by the citizens of another state.<sup>147</sup> The apparent dictates of the eleventh amendment have been eroded over the years. The rule has evolved to bar only suits by private parties seeking to impose a liability that must be paid from public funds in the state treasury.<sup>148</sup> So too are suits against individual public officials barred when they are "in essence . . . for the recovery of money from the state . . . ."<sup>149</sup>

Building upon the Supreme Court decision in *Ex Parte Young*,<sup>150</sup> the doctrine of sovereign immunity was construed to allow prospective relief against the states even when such relief would require the expenditure of state funds.<sup>151</sup> Retroactive relief, however, was nevertheless prohibited as was prospective relief when it in essence

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<sup>145</sup> See, e.g., *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny.

<sup>146</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

<sup>147</sup> *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 577 (1946).

<sup>148</sup> 323 U.S. at 464. See also *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945).

<sup>149</sup> In *Ex Parte Young*, the Supreme Court first approved the use of litigation against the states that sought injunctive relief. To permit such relief, the Court held, was necessary to enforce the supremacy of federal law. 209 U.S. at 149-68.

<sup>150</sup> See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977). A remedy requiring the expenditure of state revenues was permissible under the eleventh amendment, *Milliken* held, if the petitioners sought "payment of state funds . . . as a necessary consequence of compliance in the future with a substantive federal—question determination . . ." 433 U.S. at 289 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)); accord, *Banas v. Dempsey*, 742 F.2d 277, 285 (6th Cir. 1984).

<sup>151</sup> 415 U.S. 651 (1974). Retroactive relief involving the payment of funds was allowed against cities in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Recently, however, the Supreme Court has expressly held that notwithstanding *Monell's* holding regarding cities, *Edelman* remains intact for states. *Green v. Mansour*, 474 U.S. 64 (1985) (addressing Michigan AFDC payments).

constituted a money judgment against the state. One of the leading decisions articulating this doctrine is *Edelman v. Jordan*.<sup>152</sup>

In *Edelman*, petitioners challenged the manner in which Illinois administered the federal Aid to the Aged, Blind and Disabled (AABD) program.<sup>153</sup> Petitioners charged that Illinois was not processing applications for AABD assistance within the time dictated by federal law and that the state was authorizing grants to commence only with the month in which an application was approved rather than including prior eligibility months to which an applicant was entitled under federal law. Petitioners requested the court to direct the state to provide appropriate benefits in the future as well as to award "all AABD benefits wrongfully withheld."<sup>154</sup>

The Supreme Court approved the equitable relief in *Edelman*, holding that the expenditure of funds on future compliance would have "an ancillary effect on the state treasury [which] is a permissible and often an inevitable consequence . . . ."<sup>155</sup> The Court however, disapproved the retroactive monetary award in *Edelman*. The Court held:

While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many respects from an award of damages against the State.<sup>156</sup>

The Court's disapproval of this monetary award did not rest simply on the fact that the debt would "to a virtual certainty be paid from state funds . . . ."<sup>157</sup> Instead, the Court adopted a functional test. The purpose of the retroactive award, the Court held, was to compensate the litigant for "a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."<sup>158</sup>

The Supreme Court in *Edelman* articulated three different tests for when relief that appeared on its face to be equitable was to be deemed "in essence a money judgment:" (1) if it sought compensation

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<sup>152</sup> 415 U.S. at 653.

<sup>153</sup> *Id.* at 655-56.

<sup>154</sup> *Id.* at 668. A subsequent federal district court decision has construed the term "ancillary," which the Supreme Court has used only once again, in *Quern v. Jordan*, 440 U.S. 332, 337 (1979). *Moore v. Miller*, 612 F. Supp. 952, 956 (D. Ill. 1985).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*; *accord*, *Banas v. Dempsey*, 742 F.2d at 286 (rejecting argument that an act that "will lead inexorably to the payment of state funds . . . in effect, amounts to a monetary award").

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 658.

for "a monetary loss resulting from a past breach of a legal duty;"<sup>159</sup> (2) if it constituted "an accrued monetary liability;"<sup>160</sup> and (3) if it was retroactive not prospective in nature.<sup>161</sup> In addition, according to one of the most recent Supreme Court pronouncements, the *Edelman* "money judgment" language does not apply to "relief that serves directly to bring an end to a present violation of federal law . . . ." <sup>162</sup>

The lower courts in sovereign immunity litigation have further developed the distinction between funds sought to be spent on prospective injunctive relief and those spent on retroactive damages. The Circuit Court for the District of Columbia, for example, picked up on the *Edelman* language,<sup>163</sup> noting that whether the grant of relief is impermissible retroactive relief or permissible prospective relief turns on whether such relief respectively represents an "accrued monetary liability" or an expenditure to ensure future compliance with federal law.<sup>164</sup>

The Fourth Circuit decision in *Reed v. Health and Human Services*<sup>165</sup> exemplifies this particular distinction. In *Reed*, the Fourth Circuit refused to order retroactive relief when petitioners challenged Virginia's treatment of compensation for personal injuries as income in making AFDC eligibility determinations. The court held that the retroactive payment of benefits sought by petitioners: "cannot be seen as an adjunct of the court ordered prospective relief, but could only constitute redress for past violations of federal law. As such, the award would be indistinguishable from damages."<sup>166</sup> If the expenditure is to compel the defendant to cease actions in violation of the law, according to these cases, it would not constitute a money judgment. The "key," according to the Eighth Circuit, "is whether [the remedy] requires payment of . . . funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation."<sup>167</sup> According to the Eleventh Circuit, if a payment is a necessary

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<sup>159</sup> *Id.* at 664.

<sup>160</sup> *Id.* at 664. See also *Appleyard v. Wallace*, 754 F.2d 955, 960-61 (11th Cir. 1985).

<sup>161</sup> *Papasan v. Allain*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 2932, 2940 (1986).

<sup>162</sup> 415 U.S. at 664.

<sup>163</sup> *Maryland Department of Hum. Res. v. Dept. of Health and Human Services*, 763 F.2d 1441, 1448, n.2 (D.C. Cir. 1985).

<sup>164</sup> 774 F.2d 1270 (4th Cir. 1985).

<sup>165</sup> *Id.* at 1276.

<sup>166</sup> *Slaughter v. Levine*, 801 F.2d 288, 300 (8th Cir. 1986), citing *Edelman*, 415 U.S. at 668.

<sup>167</sup> *Appleyard v. Wallace*, 754 F.2d 955, 960-63 (11th Cir. 1985).

consequence of compliance, it is merely ancillary to the equitable remedy.<sup>168</sup>

It is not at all clear why the Supreme Court in *Kovacs* moved away from this doctrine on when equitable relief under federal law is "in essence a money judgment." At least one circuit court, the Third Circuit in *Penn Terra*, was moving down the same road in the bankruptcy context. In *Penn Terra*, the Third Circuit held that the hazardous waste clean-up obligation of an industry was not dischargeable in bankruptcy.<sup>169</sup> The court found that the cleanup involved no compensation for "a past breach of a legal duty" on the part of the defendants.<sup>170</sup> Indeed, the *Penn Terra* court expressly distinguished between funds spent to compensate for past actions and funds spent to assure future compliance. The *Penn Terra* court relied on the fact that rather than requesting a "judgment" that would "seek compensation for past damages," the state sought a sanction that "was meant to prevent future harm to, and to restore, the environment."<sup>171</sup>

The legal doctrine in *Edelman* and *Penn Terra* is thus similar even though the cases were resolved differently on the facts. The *Edelman* court expressly found that the retroactive award of AFDC benefits was to compensate the litigants for "a monetary loss resulting from a past breach of a legal duty . . ."<sup>172</sup> In contrast, the *Penn Terra* court expressly found that "no monies were sought by the Commonwealth as a creditor or obligee. The Commonwealth was not seeking a traditional form of damages in tort or contract."<sup>173</sup>

Application of the same reasoning to *Kovacs* would have led to a decision consistent with *Penn Terra*. In *Kovacs*, the monetary award sought by Ohio was an "adjunct of the court ordered prospective relief," (i.e., the cleanup).<sup>174</sup> The expenditure of money by *Kovacs* would have been a "necessary consequence of compliance in the future."<sup>175</sup> The clean-up expenditure did not constitute an "accrued monetary liability,"<sup>176</sup> nor did it constitute a "redress for past violations of [the] law."<sup>177</sup> Based on these past legal definitions of when

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<sup>168</sup> See *supra* notes 120-137 and accompanying text.

<sup>169</sup> 733 F.2d at 278.

<sup>170</sup> *Id.*

<sup>171</sup> 415 U.S. at 668.

<sup>172</sup> 733 F.2d at 278.

<sup>173</sup> See, e.g., 774 F.2d at 1276.

<sup>174</sup> 801 F.2d at 300.

<sup>175</sup> 415 U.S. at 664, 668; *accord*, 763 F.2d at 1448, n.2.

<sup>176</sup> 774 F.2d 1276.

<sup>177</sup> *Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring).

the expenditures of equitable funds represented "in essence a money judgment," the Supreme Court should have reversed the Sixth Circuit's *Kovacs* decision. The failure of the Supreme Court to do so was not only bad policy, but bad law as well.

### 3. Impact on State Enforcement

Notwithstanding the ominous repercussions of the *Kovacs* decision, Justice O'Connor said the resolution of that case was not "hostile to state enforcement of environmental laws."<sup>178</sup> Justice O'Connor, in particular, took pains to assert that governments wishing to force bankrupt petitioners' compliance with environmental regulations still have multiple options.<sup>179</sup>

Perhaps the most readily available enforcement mechanism is injunctive relief. Not only are injunctions against continuing pollution and dumping at an industrial waste site unaffected by personal bankruptcy, but environmental injunctions which relate to ongoing activities are not stayed by corporate bankruptcy. This principle holds even though such injunctions may require the expenditure of funds. Injunctive relief requiring the expenditure of funds has been used in diverse situations. The State of Pennsylvania, for example, has been awarded injunctive relief under three different environmental statutes against certain strip mining.<sup>180</sup> Also by injunction, Puerto Rico has been permitted to enforce the federal Clean Air Act against a corporate chapter 11 bankrupt.<sup>181</sup> In this case, the money issue was particularly clear-cut. The Puerto Rico Environmental Quality Board sought to enforce air pollution standards against a quarry. The enforcement measures included the required installation of dust control equipment costing \$323,000.<sup>182</sup> Notwithstanding the debtor's chapter 11 bankruptcy, the district court refused to stay the Board's cease and desist order directing an end to the quarry's pollution including, in lieu of closure of the facility, installation of the dust control equipment.<sup>183</sup>

In addition to court action prohibiting designated activity, various sanctions based upon violations of environmental statutes may be imposed against individuals, trustees and similarly situated entities

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<sup>178</sup> *See id.*

<sup>179</sup> Commonwealth—Dept. of Env. Res. v. Peggs Run Coal Company, 423 A.2d 765 (1980).

<sup>180</sup> In the Matter of Canarico Quarries, Inc., 466 F. Supp. 1333 (D.P.R. 1979).

<sup>181</sup> *Id.* at 1334.

<sup>182</sup> *Id.* at 1340.

<sup>183</sup> Ohio v. Kovacs, 469 U.S. at 274, 284.

notwithstanding the pendency of bankruptcy proceedings. The Bankruptcy Code, for example, does not shield violators from criminal prosecutions.<sup>184</sup> Moreover, the Code expressly prevents the discharge of fines or monetary penalties imposed, prior to bankruptcy, for violation of state laws.<sup>185</sup>

Aside from these enforcement mechanisms created by federal law, it is state law, Justice O'Connor said, that largely classifies creditors' interests in a bankrupt's assets.<sup>186</sup> State legislatures, in other words, could amend their statutes to make environmental judgments either statutory liens or secured claims.<sup>187</sup> In fact, the State of Iowa did precisely that. In Iowa, a person having control over a hazardous substance is strictly liable for, among other things, the "reasonable clean-up costs incurred by the state as a result of the failure of the person to clean up a hazardous substance involved in a hazardous condition caused by the person."<sup>188</sup> Strict liability extends, as well, to "the reasonable damages to the state for the injury to, destruction of, or loss of natural resources resulting from a hazardous condition" caused by such a person.<sup>189</sup>

In 1986, after the *Kovacs* decision, the Iowa legislature modified the rights of the state in relation to bankrupt owners of abandoned or uncontrolled disposal sites.<sup>190</sup> According to that legislation, liability to the state for the articulated costs "is a debt to the state."<sup>191</sup> Moreover, the new Iowa legislation provided that, with the exception of single and multi-family residential property, such a debt constitutes "a lien on real property," which is dissolved only if the debt is "paid or legally abated."<sup>192</sup> To provide the state with early warning of possible future financial problems, "[i]mmediately upon the incurrance of any liability to the state under this [statute]," the debtor is to submit "a report consisting of documentation of the debtor's liabilities and assets" and is to continue such reporting "for the life of the debt."<sup>193</sup>

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<sup>184</sup> See 11 U.S.C. § 6523(a)(7) (1982).

<sup>185</sup> See also *Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring); *Butner v. U.S.*, 440 U.S. 48, 54 (1982).

<sup>186</sup> *Kovacs*, 469 U.S. at 286.

<sup>187</sup> 25 IOWA CODE ANN. § 455B.392 (1987).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at §§ 455B.396, *et seq.*

<sup>190</sup> *Id.* at § 455B.396.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 455B.397.

<sup>193</sup> 42 U.S.C. § 9607(1) (Supp. 1987). These arise at the time which is the latter of the time costs are first incurred under the statute or the time that the affected person is provided specified written notice of potential liability. *Id.* at § 9607(1), (2).



In addition to the various state statutes, in 1986, Congress amended CERCLA to create a statutory lien for "all costs and damages for which a person is liable to the United States" under that statute.<sup>194</sup> The CERCLA lien attaches to all real property and rights to such property that belong to the person subject to CERCLA and are subject to, or affected by, a removal or remedial action.<sup>195</sup>

As a result of this legislation, it seems possible to take certain clean-up obligations out of the *Kovacs* analysis.<sup>196</sup> While proceedings to collect the obligation would be stayed,<sup>197</sup> the debt itself, as secured by the statutory lien, would not be subject to discharge. Because property on which a state holds a lien does not become part of the debtor's estate, a lien on an allowable claim<sup>198</sup> is not "discharged" in bankruptcy. Section 541 generally limits property of the estate to "all legal or equitable interests of the debtor in property."<sup>199</sup> A lien is considered a current property interest of the creditor and not simply a claim on the property of the debtor.

Several limitations exist, however, on the protections offered by a statutory lien. First, a statutory lien is narrowly defined in the Bankruptcy Code. A statutory lien is a "lien arising solely by force of a statute on specified circumstances or conditions . . ." <sup>200</sup> A

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<sup>194</sup> Because of the conjunction in the federal statute, the lien provision of this law is substantively weaker in providing bankruptcy protections than the corresponding Iowa, New Hampshire and Massachusetts statutes. Under the Bankruptcy Code, the value of the lien is secured only to the extent of the value of the creditor's interest in the property. If one assumes that little value inheres in a toxic waste disposal site wherein clean-up problems exist, see *infra* note 202 and accompanying text, the limitation of the lien only to that property "subject to or affected by a removal or remedial action" is a major loophole in securing liability against bankruptcy. For a general discussion of these state "super lien" statutes, see *generally* Note, *Priority Lien Statutes: The State's Answer to Bankrupt Hazardous Waste Generators*, 31 WASH. U. J. URB. & CONTEMP. L. 373 (1987).

<sup>195</sup> Several states have enacted similar legislation. New Hampshire, for example, has legislation similar to Iowa. N.H. RSA, § 147-B: 10, *et seq.* (1986 Supp.). That state created a statutory lien "upon the business revenues and all real and personal property of any person subject to liability" under its toxic waste clean-up statute. § 147-B: 10-b, I (1986 Supp.). So, too, has Massachusetts legislatively declared that any debt, with interest, incurred under its toxic waste liability statute "shall constitute a lien on all property" owned by persons liable under the act. M.G.C.A., § 21E.13 (1986 Supp.).

<sup>196</sup> 11 U.S.C. § 362 (1982).

<sup>197</sup> A number of situations might exist where a lien would not be "allowable." Examples include: (1) if it did not meet the definition of a "lien" per section 101(28) of the Code; (2) if it did not meet the definition of a "statutory lien" per section 101(39) of the Code; (3) if the statutory lien falls within the restrictions of section 545 of the Code; or (4) if the obligation was fraudulent per section 548 of the Code.

<sup>198</sup> 11 U.S.C. § 541(a)(1) (1982).

<sup>199</sup> 11 U.S.C. § 101(39).

<sup>200</sup> In *Re Trahan*, 283 F. Supp. 620, 623 (W.D. La. 1968), *aff'd* 402 F.2d 796 (5th Cir. 1968); *NAPCO Graphic Arts, Inc., v. Ludwig*, 51 Bankr. 757, 760-61 (E.D. Wis. 1985).

statutory lien is only one that arises automatically, and is not based on an agreement to give a lien or on judicial action.<sup>201</sup> A statutory lien does not include judicial liens and security interests, even if provided for in a statute or dependent on a statute and even if made fully effective by a statute.<sup>202</sup> Second, a creditor's claim is generally secured by the lien only to the extent of the value of the creditor's interest in the property; the value of the claim beyond the value of the creditor's interest in the property is considered an unsecured claim.<sup>203</sup> Finally, section 545 of the Code, as limited by section 546, outlines circumstances in which statutory liens can be avoided altogether.<sup>204</sup>

### B. *The Case of Midlantic*

In contrast to the outcome in *Kovacs* is the 1986 Supreme Court decision in *Midlantic National Bank v. New Jersey Department of Environmental Protection*.<sup>205</sup> In *Midlantic*, the Court considered whether a bankrupt corporation could avoid its obligation to cleanup hazardous waste sites by abandoning those sites pursuant to the Bankruptcy Code. In *Midlantic*, the Supreme Court majority held that given the public policy inherent in controlling toxic wastes, historic limitations on the abandonment powers were not to be ignored.<sup>206</sup> In contrast, the *Midlantic* dissent urged that the statutory language permitting abandonment was "absolute in its terms" and "limited only by considerations of the property's value to the estate."<sup>207</sup> The Bankruptcy Code, the dissent said, does not allow for the consideration of external policies such as environmental protection.<sup>208</sup>

In 1981, Quanta Resources Corporation, a waste oil processor, filed for a chapter 11 corporate bankruptcy.<sup>209</sup> The trustee appointed to handle the bankruptcy filed a notice of intention to abandon prop-

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<sup>201</sup> 11 U.S.C. § 101(39) (1982 & Supp. III 1985).

<sup>202</sup> 11 U.S.C. § 506(a) (1982).

<sup>203</sup> See generally Schneyer, *Statutory Liens Under the New Bankruptcy Code—Some Problems Remain*, 55 AM. BANKR. L.J. 1 (1981).

<sup>204</sup> 54 U.S.L.W. 4138 (Jan. 27, 1986).

<sup>205</sup> *Id.* at 4140-42.

<sup>206</sup> *Id.* at 4142 (Rehnquist, J., dissenting).

<sup>207</sup> *Id.* at 4144.

<sup>208</sup> The next month, the corporation converted the proceeding to one of liquidation pursuant to chapter 7. *Id.* at 4139.

<sup>209</sup> The corporation undertook a number of separate abandonments. Initially, it sought only to abandon the real property at the two facilities, Edgewater and Long Island. Subsequently, however, it sought also to abandon its personal property, which was comprised of the contaminated oil itself, at the Edgewater facility. *Id.*

erty held by Quanta Resources at its two processing facilities, one in Long Island City, New York and one in Edgewater, New Jersey.<sup>210</sup> At the time of the notice, there were on-site storage tanks containing at least 470,000 gallons of fuel contaminated with polychlorinated biphenyls (PCBs).<sup>211</sup> Because the mortgages on the facility's real property exceeded the property's value, the estimated cost of disposing of the waste oil plainly rendered the property a net burden to the estate.<sup>212</sup> The trustee attempted to sell the property and filed its notice of abandonment only upon finding an inability to do so.<sup>213</sup>

The Code provides for abandonment of "assets"<sup>214</sup> when the trustee cannot expect to sell the property for a price sufficiently in excess of encumbrances to offset the costs of administration.<sup>215</sup> This doctrine is intended to help expeditiously reduce the debtor's property to money for equitable distribution to creditors.<sup>216</sup>

The City of New York opposed the abandonment proposed by the corporate bankrupt in *Midlantic*. New York claimed that the chemicals that constituted the affected assets represented a safety hazard which violated state environmental statutes.<sup>217</sup> New York argued that the abandonment would itself violate both state and local law. The action, the city said, would revest title in the contaminated oil, subject to liens, in Quanta.<sup>218</sup> Quanta, however, having lost title to all of its other assets in favor of the estate upon commencement of

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<sup>210</sup> Of this waste, 400,000 gallons were at the Edgewater facility with an additional 70,000 gallons at Long Island. 54 U.S.L.W. at 4139 n.3. PCBs have been legislatively determined to be toxic, 15 U.S.C. § 2605(e) (1982), and detailed rules have been promulgated to govern their manufacturing, processing, distribution and use. See 40 C.F.R. § 761 (1986).

<sup>211</sup> 54 U.S.L.W. at 4139.

<sup>212</sup> *Id.*

<sup>213</sup> 11 U.S.C. § 554(a) (1982). Abandoned property reverts from the trustee to the person or entity having possessory interest. *Kovacs*, 469 U.S. at 284 n.12. 4 COLLIER ON BANKRUPTCY, 554.01 (15th ed. 1985).

<sup>214</sup> *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227 (1930).

<sup>215</sup> The city and state relied upon 28 U.S.C. section 959(b) (1979) which requires a trustee to "manage and operate" property of a bankrupt's estate "according to the requirements of the valid laws of the State in which such property is situated." 54 U.S.L.W. at 4139. The city urged that Quanta Resources was violating N.Y. Envtl. Conserv. Law § 27-0900 to 27-0923 (McKinney Supp. 1982); N.Y. ADMIN. CODE Tit. 6, Sec. 366.4(e) (1982); New York, N.Y. ADMIN. CODE § 019-050.0; 739 F.2d at 913.

<sup>216</sup> Abandonment by a trustee of an asset immediately revests title to that asset in the bankrupt. In *Re Motley*, 10 Bankr. 141, 145 (M.D. Ga. 1981); *accord*, In *Re Polumbo*, 271 F. Supp. 640, 643 (W.D. Va. 1967). Title to the property is regarded as the bankrupt's just as if he had never been in bankruptcy. The title stands as it was just before the bankruptcy filing. In *Re Tarpley*, 4 Bankr. 145, 146 (M.D. Tenn. 1980); *accord*, *Schram v. Tobias*, 40 F. Supp. 470, 472 (E.D. Mich. 1941).

<sup>217</sup> 11 U.S.C. § 541 (1982 & Supp. III 1985).

<sup>218</sup> In the Matter of Quanta Resources Corp., 739 F.2d 912, 914 (3d Cir. 1984).

the bankruptcy proceeding,<sup>219</sup> would be unable to do anything with respect to the storage site. The city concluded that, as a result, the abandonment itself would constitute "disposal" of the hazardous wastes pursuant to state law.<sup>220</sup>

In addition, New York argued that abandonment of the facility in its then state of disrepair—itsself irreparable by Quanta—would create a *continuing* violation of state and local hazardous waste storage laws.<sup>221</sup> After abandonment, the trustee would not be required to take "even relatively minor steps to reduce imminent danger," such as providing security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents.<sup>222</sup> The trustee's abandonment at both sites<sup>223</sup> "aggravated already existing dangers by halting security measures that prevented public entry, vandalism and fire."<sup>224</sup>

The City of New York lost in both the bankruptcy court and the district court.<sup>225</sup> The Third Circuit, however, reversed,<sup>226</sup> holding:

the goals of the federal bankruptcy laws, including rehabilitation of the debtor, do not authorize transgression of state laws setting requirements for the operation of the business even if the continued operation of the business would be thwarted by applying state laws . . . .<sup>227</sup>

Stating that "equitable principles are applicable in determining whether a trustee may abandon property in contravention of state law," the Third Circuit found that the action requested "clearly contravened applicable law, and did so not merely technically, but with severely deleterious implications for the public safety."<sup>228</sup>

No federal statute insulates current possessors of dangerous resources from relevant environmental protection requirements. The federal bankruptcy statute requires a trustee holding assets of an

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<sup>219</sup> *Id.*

<sup>220</sup> 54 U.S.L.W. at 4139 n.3.

<sup>221</sup> As noted above, Quanta sought to abandon three types of property: (1) real property at its Edgewater, New Jersey facility; (2) real property at its Long Island, New York facility; and (3) personal property, consisting of its contaminated oil, at the New Jersey site. *See supra* note 209.

<sup>222</sup> 54 U.S.L.W. 4139 n.3.

<sup>223</sup> *Matter of Quanta*, 739 F.2d at 912.

<sup>224</sup> *Id.* at 923; *see also* *In re Quanta Resources Corp.*, 739 F.2d 927 (3d Cir. 1984) (New Jersey's appeal).

<sup>225</sup> *Matter of Quanta*, 739 F.2d at 919.

<sup>226</sup> *Id.* at 921.

<sup>227</sup> 28 U.S.C. § 959(b) (1982).

<sup>228</sup> *Id.*

insolvent corporation to "manage and operate its property . . . according to the requirements of the valid laws of the State in which such property is located."<sup>229</sup> A bankruptcy trustee, the statute dictates, must manage its property "in the same manner that the owner or possessor would be bound to do if in possession thereof."<sup>230</sup>

The Circuit Court in *Midlantic* weighed the policy advanced by the bankruptcy statute against these environmental interests. The Code seeks to preserve as much of the estate as possible for distribution to creditors.<sup>231</sup> Compliance, however, with the hazardous waste disposal statutes in the first place, the Circuit Court said, would have required the substantial expenditure of funds.<sup>232</sup> Thus if *Midlantic* had obeyed the law, there would have been, in the first instance, a "depleting [of] the assets of the estate available for distribution to creditors . . ."<sup>233</sup> In other words, the court concluded that there was no reason in law or policy to allow for the creditors of the estate to be enriched because of the pre-bankruptcy unlawful actions of the debtor. By denying permission to abandon the assets, the creditors would only be placed in the position in which they would have been had no unlawful activity taken place.

The U.S. Supreme Court affirmed the Third Circuit in *Midlantic*.<sup>234</sup> The Court held that the bankruptcy "abandonment power" has always been subject to a "judicially developed doctrine intended to protect legitimate state or federal interests."<sup>235</sup> The Court noted that strict limitations have been placed on abandonment, particularly when questions of the public's health and safety were at issue.<sup>236</sup> Thus, a trustee could not abandon barges that would have constituted an obstruction in a navigable waterway;<sup>237</sup> an insolvent transit company could not cease operation of a branch rail line in contravention of state law;<sup>238</sup> and a debtor public utility, while permitted to abandon an unexpired lease, was first required to seal its underground steam lines.<sup>239</sup>

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<sup>229</sup> *Matter of Quanta*, 739 F.2d at 921.

<sup>230</sup> *Id.* at 913.

<sup>231</sup> *Id.* at 921.

<sup>232</sup> *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 54 U.S.L.W. 4138 (1986).

<sup>233</sup> *Id.* at 4140.

<sup>234</sup> *See id.*

<sup>235</sup> *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952), *aff'g* *In Re Eastern Transp. Co.*, 102 F. Supp. 913 (D. Md. 1952).

<sup>236</sup> *In Re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir. 1942), *cert. denied*, 317 U.S. 683 (1942).

<sup>237</sup> *In Re Lewis Jones*, 1 B.C.D. 277 (Bankr. Ct. E.D. Pa. 1974).

<sup>238</sup> 54 U.S.L.W. at 4140.

<sup>239</sup> *Id.* at 4140-41.

The *Midlantic* Court cited *Kovacs* for the proposition that bankruptcy trustees do not have *carte blanche* authority to ignore non-bankruptcy laws.<sup>240</sup> Moreover, the *Midlantic* Court cited several other examples of the application of this doctrine. For example, the automatic stay provision, one of the "fundamental debtor protections provided by the bankruptcy laws,"<sup>241</sup> the Court said, still allows a governmental unit to sue a debtor to "prevent violation of . . . environmental protection . . . safety or similar police or regulatory laws . . . ."<sup>242</sup> In addition, the Code requires a trustee, who is managing an estate rather than liquidating it, to operate the property in her possession according to the requirements of all valid state laws.<sup>243</sup>

These restrictions on the operation of the abandonment provisions of the Bankruptcy Code, according to the Supreme Court, were first established judicially and only subsequently codified.<sup>244</sup> The *Midlantic* Court held that particularly given the continuing concern by Congress in toxic waste disposal, it was unwilling to presume that by expressly recognizing the abandonment restrictions in statute, Congress implicitly overturned such long-standing restrictions on the common-law abandonment power.<sup>245</sup>

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<sup>240</sup> *Id.* at 4141 (citing H.R. Rep. No. 95-595).

<sup>241</sup> *Id.*

<sup>242</sup> *See id.* at 4140.

<sup>243</sup> *Id.*

<sup>244</sup> *U.S. v. Johns-Manville Sales Corp.*, 18 Env't Rep. Cas. (BNA) 1177 (D.N.H. 1982). The status of Manville remains uncertain today. The reorganization involves assessing and meshing the competing interests of creditors, stockholders and the corporate board of directors. In *Re Johns-Manville Corp.*, 801 F.2d 60, 61 (2d Cir. 1986). "The challenge all the [interest groups] have faced is to fashion a [reorganization] plan that will preserve Manville's capacity to generate enough revenue to pay existing creditors, to cover its liabilities to present and future tort claimants where liability is certain though its precise extent is unknown, and to satisfy Manville's shareholders." *Id.* at 62. In August, 1985, Manville and the representatives of the tort claimants "formulat[ed] a plan that would earmark billions of dollars for payment to present and future asbestosis victims as well as to others damaged by the asbestos products that Manville once manufactured and sold." *Id.* Noting that this plan may dilute equity by 90 percent, the committee of shareholders sought to compel a shareholder meeting the acknowledged purpose of which was to replace Manville directors so as to reconsider submitting the plan. *Id.* at 63. Holding that whether such a shareholder meeting was lawful or not could not be decided on summary judgment, the Second Circuit in September 1986 reversed and remanded the issue to the Bankruptcy Court for trial. *Id.* at 69.

<sup>245</sup> "Drug Company Asks for Protection from Consumers," *N.Y. Times*, Aug. 22, 1985, at 1. From 1975 to mid-1985, A.H. Robbins, along with its insurer, Aetna Casualty and Surety Company, had paid approximately \$517 million for 25 trial judgments and 9300 settlements. *A.H. Robbins Co., Inc. v. Piccinin*, 788 F.2d 994, 996 n.4 (4th Cir. 1986). By August, 1985, when Robbins filed its petition under chapter 11, there were 5000 suits against Robbins. *Id.* at 996. In May, 1986, the Fourth Circuit held that the Robbins chapter 11 reorganization proceeding stayed not only suits against Robbins but against the non-bankrupt defendants as well. *Id.* at 1016. Since then, there have been no reports of further progress.

### III. RECOMMENDATIONS

In creating financial and economic policy, one of the first priorities of Congress should be to assure that polluters pay for the cleanup of their industrial waste sites. People who are known to have little regard for the public's health and the environment, or the laws protecting them, should not be permitted to continue managing businesses as a result of bankruptcy protections. The danger of this abuse is illustrated by the recent bankruptcies of Manville<sup>246</sup> and A.H. Robbins.<sup>247</sup> Each of these companies filed for reorganization pursuant to chapter 11 of the Code. In each case, the bankrupt "had strong balance sheets at the time of filing but faced potentially devastating claims."<sup>248</sup> Manville sought protection from asbestos-related health claims; A.H. Robbins, producers of the Dalkon Shield, filed for protection against thousands of petitioners claiming injury from use of the intrauterine device. These cases illustrate the challenge to health and environmental laws created by corporate managers seeing bankruptcy as an option to paying the costs of disposal, management or cleanup.<sup>249</sup>

This result is contrary to a long line of jurisprudence that has held that a polluter can and should be required to pay for the prevention or clean-up of its wastes. Indeed, this requirement is being codified to an increasing extent in federal statutes. In RCRA<sup>250</sup> and CERCLA,<sup>251</sup> Congress chose to provide for the payment by industry of the care and handling of hazardous wastes. In effect, Congress sought to provide incentives for the internalization of externalities.<sup>252</sup> Moreover, under recent hazardous waste legislation,<sup>253</sup> many traditional methods of treatment and disposal will become obsolete or extremely expensive because of the congressional mandate for a reduction in and disposal of hazardous waste.<sup>254</sup> So, too, in the Clean

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<sup>246</sup> N.Y. Times, Aug. 22, 1985, at 36.

<sup>247</sup> GAO Report, *supra* note 6, at 29.

<sup>248</sup> See *supra* notes 18-30 and accompanying text on RCRA's financial assurance requirements.

<sup>249</sup> See *supra* notes 31-34 and accompanying text on CERCLA's financial assurance requirements.

<sup>250</sup> See generally Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 586-87 (1981) [hereinafter *Allocating the Costs*].

<sup>251</sup> Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S. CODE CONG. & ADMIN. NEWS (98 Stat.) 3221.

<sup>252</sup> 16 Env't Rep. (BNA) 1155 (November 1, 1985).

<sup>253</sup> 42 U.S.C. §§ 1857-1857(l) (1970).

<sup>254</sup> A primary air quality standard is one which, "allowing an adequate margin of safety, [is] requisite to protect the public health." 42 U.S.C. § 7409(b)(1) (1982).

Air Act Amendments of 1970,<sup>255</sup> Congress adopted a strict approach to internalizing the costs of pollution. The Clean Air Act required pollution sources to assure that certain national primary air quality standards<sup>256</sup> were met "as expeditiously as practicable but . . . in no case later than three years . . ."<sup>257</sup> The U.S. Supreme Court construed that requirement in *Union Electric Company v. United States Environmental Protection Agency*.<sup>258</sup> In *Union Electric*, the Court rejected claims that cleanup of sulfur dioxide emissions could be postponed because "various economic and technological difficulties had arisen [that] . . . made compliance with the emission limitations impossible."<sup>259</sup> The Court held that the provisions of the Act were "intended to foreclose the claim of emission sources that it would be economically or technologically infeasible for them to achieve emission limitations sufficient to protect the public health within the specified time."<sup>260</sup> Indeed, substantial jurisprudence calls for the prevention of environmental degradation, and the protection of the public health and safety, even if destroying the viability of a commercial entity in the process.<sup>261</sup>

Requiring protection against corporate waste is not simply good public policy, it is dictated, as well, by sound economic theory. If the producer of a toxic hazard is truly without adequate means to fund its cleanup, the polluter's creditors should pay. The creditors may be innocent bystanders, but they are likely most capable of quantifying and distributing the risk. It is this risk-taking ability that led a New York federal district court in *Hall v. E.I. Du Pont de Nemours & Co.*<sup>262</sup> to impose a theory of enterprise liability<sup>263</sup> on an industry-wide basis in tort claim proceedings. Citing workmen's compensation, *respondeat superior*, and strict liability, the court said

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<sup>255</sup> 42 U.S.C. § 7410(a)(2)(A) (1982).

<sup>256</sup> 427 U.S. 246 (1976).

<sup>257</sup> *Id.* at 253-55.

<sup>258</sup> *Id.* at 258-59.

<sup>259</sup> *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416-22 (1922) (Brandeis, J., dissenting).

<sup>260</sup> 345 F. Supp. 353 (E.D.N.Y. 1972).

<sup>261</sup> Enterprise liability combines features of alternative and concert of action theories for proof of causation of an injury. For a discussion of alternative liability, *see, e.g., Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948). For a discussion of the concert of action theory, *see, e.g., Sam Finley, Inc. v. Waddell*, 207 Va. 602, 151 S.E.2d 347 (1966). In contrast to these theories, however, the policy behind enterprise liability is that the industry, as a whole, not the individual corporation, should pay for damages that cannot be traced to one defendant with certainty where the industry, as a whole, has created the risk. 345 F. Supp. at 376-78.

<sup>262</sup> *Id.* at 374.

<sup>263</sup> *Id.* at 376-77.



that public policy may call for liability to be placed on those best able to distribute the costs of the risk.<sup>264</sup> For liability to attach, the industry must be aware of the risk and able to make the expenditures necessary to eliminate it.<sup>265</sup> Internalizing the costs of the risk and spreading the additional costs to the industry, when coupled with the pressures of market competition, may make the industry upgrade its practices.<sup>266</sup>

In the bankruptcy context, a similar analysis should apply. Companies that deal with polluters should be fully apprised of the costs of such business. The creditors should be informed of the costs of dealing with a creator of toxic wastes so that they may make informed economic decisions as to the desirability of, or type of, a continuing business relationship with that industry.<sup>267</sup> If financiers supporting producers of toxic wastes knew that liability for clean-up could fall on them, for example, credit terms may be less friendly, thereby in turn internalizing the pollution costs to the polluter.<sup>268</sup>

Such an approach incorporates principles of economism into the arena wherein the environmental/bankruptcy conflict has developed. Economism is the belief that the economic goals and principles espoused by the neoclassical economic paradigm ought to be the major determinant of public policy and legal decisionmaking.<sup>269</sup> Central to economism is the belief, derived from Adam Smith, that the unimpaird operation of the modern economy's markets for goods and services will produce the best of all possible worlds.<sup>270</sup> In such a

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<sup>264</sup> *Id.* at 378.

<sup>265</sup> Comm. on Environmental and Public Works, 97th Cong., 2d Sess., *Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies*, part 1, 46 (Comm. Print 1982).

<sup>266</sup> See, e.g., *Penn Terra, Ltd. v. Dept. of Env'tl. Resources*, 733 F.2d at 269.

<sup>267</sup> CERCLA embodies a system, today, that holds persons other than the operator of the hazardous waste facility liable. CERCLA establishes four categories of "persons" who are to be held strictly liable for the release or threatened release of hazardous substances. These include: (1) the owner or operator of the vessel or facility; (2) those who owned or operated the facility when the hazardous waste was disposed; (3) those arranging the disposal, treatment or transportation of the waste; and (4) those who accept hazardous substances for transport to a site where there is a release, or a threatened release, which incurs response costs. 42 U.S.C. § 9607(a)(1), (2), (3)-(4) (1982). For a discussion of whether a "creditor" falls within the statutory term "owner or operator," see Korhonen and Smith, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 WASH. U.J. URB. & CONTEMP. L. 289, 296-97 (1987).

<sup>268</sup> A. SMITH, *AN ENQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (6th ed. 1950).

<sup>269</sup> Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. OF LEGAL STUD. 103, 119 (1979).

<sup>270</sup> See, e.g., W. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION*

system, "the only kind of preference that counts . . . is thus one that is backed up by money—in other words that is registered in a market."<sup>271</sup> Forcing creditors rather than governments to pay for cleanup in the event of polluter insolvency, in other words, uses the market economy to help regulate hazardous waste production.

This use of the marketplace as a pollution control mechanism has been endorsed in a variety of contexts. Some argue that imposing fees that equal the cost that polluters impose on others is an appropriate government regulatory scheme.<sup>272</sup> Such fees would give polluters the incentive to balance the losses caused by pollution against the cost of abatement.<sup>273</sup> When the costs of repairing the damage done by a company are greater than its assets, reorganization should not be allowed.<sup>274</sup>

The costs of pollution could be measured by either the tort claims of its victims or the costs of cleaning up the polluter's wastes. *Boomer v. Atlantic Cement Company*<sup>275</sup> discusses these two particular measures. In *Boomer*, neighboring land owners accused a large cement plant near Albany, New York of causing "injury to property from dirt, smoke and vibration emanating from the plant."<sup>276</sup> The court found a nuisance existed, but denied an injunction halting operation of the plant pending development of a pollution control scheme.<sup>277</sup> The court decided that imposing upon one company the industry-wide costs of finding a clean-up mechanism was unreason-

(1974). See also Roberts & Stewart, Book Review, 88 HARV. L. REV. 1644 (1975) [hereinafter Book Review].

<sup>271</sup> Book Review, at 1646. The problems with sole reliance on such fees as a clean-up mechanism, however, are numerous. *Id.* at 1647-53. For a general critique of relying only upon fee-based regulation, see Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981).

<sup>272</sup> For an excellent discussion of this type of economic analysis, see generally Markovits, *A Basic Structure for Microeconomic Policy Analysis in our Worst-than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950 (1975).

<sup>273</sup> 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970). In *Boomer*, the court said: "One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations." *Id.* at 225, 309 N.Y.S.2d at 316-17, 257 N.E.2d at 873. A discussion of which of these approaches was appropriate is beyond the scope of this article.

<sup>274</sup> *Id.* at 222, 309 N.Y.S.2d at 314, 257 N.E.2d at 871.

<sup>275</sup> *Id.* at 228, 309 N.Y.S.2d at 319, 357 N.E.2d at 875. The court noted that investment in the plant was "in excess of \$45,000,000" and said that it sought to avoid the "drastic remedy" of "clos[ing] down the plant at once." *Id.* at 225, 309 N.Y.S.2d at 316, 257 N.E.2d at 873.

<sup>276</sup> *Id.* at 225-26, 309 N.Y.S.2d at 317, 257 N.E.2d at 873.

<sup>277</sup> *Id.* at 226, 309 N.Y.S.2d at 317, 257 N.E.2d at 873.

able.<sup>278</sup> The court ultimately held, however, that "to grant the injunction unless defendant pays petitioners such permanent damages as may be fixed by the courts seems to do justice between the contending parties."<sup>279</sup>

One legal commentator more recently articulated a cost allocation scheme involving greater detail than *Boomer*. According to this analysis, there are four types of pollution costs: (a) "avoidance costs," which are the costs of proper disposal; (b) "abatement costs," which are the remedial costs of removal and cleanup following an improper disposal; (c) "compensation costs," which are the measure of injuries that occur as a result of improper disposal; and (d) "transaction costs," which are the costs of controlling and allocating the costs of hazardous wastes.<sup>280</sup> This typology was used to quantify the estimated costs associated with the hazardous wastes at the Love Canal in Niagara Falls, New York. Love Canal revealed a "typical pattern:" avoidance costs of \$4 million; abatement costs of \$125 million, and compensation costs suggested by more than \$2.5 billion in claims for personal injury.<sup>281</sup>

Whatever the cost measurement device, placement of the financial responsibility for toxic wastes on a bankrupt or its creditors does frustrate the policies of the insolvency statute by denying a bankrupt a "fresh start."<sup>282</sup> This goal, however, is not one that should be pursued at all costs. Certain companies should be forced into liquidation rather than being allowed to continue to threaten health, safety and the environment.<sup>283</sup>

#### IV. CONCLUSION

Two recent Supreme Court cases have highlighted the growing conflict between policies regulating insolvency administration and policies seeking to protect local health and environment. In the 1985 case of *Ohio v. Kovacs*, the Court held that a bankrupt's obligation to expend money to fulfill a state-ordered cleanup of hazardous waste disposal sites was a "liability on a claim" and a "debt" dischargeable in bankruptcy. In *Midlantic National Bank Company v. New Jersey*

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<sup>278</sup> *Allocating the Costs*, *supra* note 250, at 585.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 585-86 (citations omitted).

<sup>281</sup> *Id.*

<sup>282</sup> See *supra* note 40, and accompanying text.

<sup>283</sup> *But see, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Smith v. Staso Milling Co.*, 18 F.2d 736 (2d Cir. 1927); *Union Electric Co. v. United States Env'tl. Protection Agency*, 427 U.S. 246 (1976) (Powell, J., concurring).

*Department of Natural Resources*, the Court held that a bankrupt could not abandon such sites as assets having no value to the bankruptcy estate.

The *Kovacs* decision is particularly problematic. In that case, the Supreme Court held that the debtor was disabled from personally taking charge and effecting the cleanup. Because of the debtor's disability, the Court held, all the state could realistically hope to gain was the payment of money from post-bankruptcy income. The Court therefore, deemed the remedy sought in *Kovacs*, to be in essence a money judgment dischargeable in bankruptcy.<sup>284</sup>

The *Kovacs* decision departs from prior construction of when equitable remedies are "in essence" a money judgment. The Supreme Court, as well as a variety of lower courts, have discussed that distinction in detail in a series of eleventh amendment sovereign immunity cases. Until *Kovacs*, the cases have held that when the expenditure of funds was ancillary to, or an adjunct to, bringing a program into compliance with the law, an equitable remedy did not constitute "in essence a money judgment."<sup>285</sup> The *Kovacs* decision abandoned the well-established principle that for a money judgment to be found, the expenditure must be retroactive, act as compensation for past damages, and represent payment for a monetary loss resulting from a past breach of a legal duty.<sup>286</sup> In addition, the *Kovacs* principle that any debtor who for some reason is disabled from performing a cleanup may discharge the clean-up obligation in bankruptcy is a dangerous principle that should quickly be rejected.

Congress should act quickly to assure that hazardous waste owners and operators bear the full economic cost of their enterprise. In the event that these corporations cannot afford to pay for cleanup, the costs should fall to the creditors.

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<sup>284</sup> See *supra* notes 95-103 and accompanying text.

<sup>285</sup> See *supra* notes 146-67 and accompanying text.

<sup>286</sup> See *supra* notes 158-61 and accompanying text. Compare *supra* notes 131-36 and accompanying text.