The Bankruptcy Code and Hazardous Waste Cleanup: An Examination of the Policy Conflict

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NOTES

THE BANKRUPTCY CODE AND HAZARDOUS WASTE CLEANUP: AN EXAMINATION OF THE POLICY CONFLICT

Hazardous waste cleanup is expensive. Financially sound owners and operators of hazardous waste dump sites may be able to bear the burden of fulfilling their environmental cleanup duties, but owners subsisting on the economic margin may find the burden unbearable. For these owners, the United States Bankruptcy Code\(^2\) (Code) may provide an attractive refuge.

Perhaps inspired by the Manville Corporation's bankruptcy filing when faced with massive potential tort liability to victims of asbestos exposure,\(^3\) attorneys for hazardous waste site owners are turning to the Code to help their clients avoid the high cost of toxic cleanups.\(^4\) State and federal governments are not anxious to increase the number of sites for which no responsible owner can be found,\(^5\) however, and are asking the courts to enforce environmental laws against bankrupt defendants.\(^6\) In deciding these cases, the

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1. The cost of cleaning up improperly disposed waste is estimated at $2000 per ton. Florio, Foreword to BEYOND DUMPING: NEW STRATEGIES FOR CONTROLLING TOXIC CONTAMINATION at viii (B. Piasecki ed. 1984). Final disposal of hazardous wastes could cost an average of $25.9 million per site. With between 32,000 and 51,000 potentially dangerous sites identified throughout the country, the total cleanup bill might be as much as $44.2 billion. Of this total, only about half is expected to be recoverable from site owners and operators. S. Estein, L. Brown, & C. Pope, HAZARDOUS WASTE IN AMERICA 203 (1984).


5. Florio, supra note 1, at viii.

6. Comment, Bankruptcy and Environmental Regulation: An Emerging Conflict, 13 ENVTL. L. REP. (ENVTL. L. INST.), Apr. 1983, at 10,699; see, e.g., In re Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984); Penn Terra, Ltd. v. Department of Env. Resources, 733
courts face a difficult policy conflict which pits the concerns of environmental protection against the need to protect the bankrupt and its creditors.  

At least three provisions of the Code offer possible relief to a hazardous waste site operator facing massive cleanup costs. Operators most frequently have sought protection under the Code’s automatic stay provision, which automatically enjoins most creditors from enforcing judgments against or otherwise harassing the debtor. The provision applies to all “entities,” including

F.2d 267 (3d Cir. 1984); In re Kovacs, 681 F.2d 454 (6th Cir. 1982), cert. granted, judgment vacated and remanded for consideration of mootness, 459 U.S. 1167 (1983) (Kovacs I).  

7. Comment, supra note 6, at 10,099.  

8. Other Code provisions also may provide shelter to the financially pressed hazardous waste site operator. See, e.g., 11 U.S.C.A. § 727 (West 1979 & Supp. 1985) (discharge of debts by bankruptcy). This provision was at issue recently in Ohio v. Kovacs, 105 S. Ct. 705 (1985), in which the Court upheld the Code’s protections against a state’s efforts to enforce its environmental laws. Because the Supreme Court’s decision examined in detail many of the policy considerations present in the bankruptcy discharge of environmental obligations in the context of a personal bankruptcy, this Note will not discuss section 727 in detail. Section 727 provides an example, however, of another Code provision that may offer sanctuary to individual hazardous waste site operators. Other Code provisions offering similar refuge also are not covered in this Note, but the policy considerations present in any conflict between these Code sections and the environmental laws are similar to the considerations underlying the policy clashes this Note does examine.  

9. 11 U.S.C.A. § 362 (West 1979 & Supp. 1985). This section provides in part:  

Section 362. Automatic stay  
(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—  
(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;  
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; . . .  
(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay— . . .  
(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power;
An exception to the automatic stay applies when a governmental unit seeks to enforce a non-money judgment obtained under its police or regulatory power. If an injunction requiring the expenditure of funds to clean up a hazardous waste site is the functional equivalent of a money judgment, however, the automatic stay may thwart government efforts to force owners to clean up their toxic waste sites.

The Code’s abandonment provision is another means by which toxic waste site owners may avoid environmental cleanup costs. This section permits a bankruptcy trustee to abandon burdensome property or property of no value to the estate. After the property is severed from the estate, the bankrupt or the bankruptcy trustee arguably has no obligation to comply with state or federal cleanup laws.

Finally, the Code’s provision describing the general powers of the court permits a bankruptcy court to enjoin the government from requiring a site owner to clean up hazardous wastes even

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12. See Kovacs I, 681 F.2d at 456.
13. 11 U.S.C.A. § 554 (West Supp. 1985). Subsection (a) provides that “[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” Id. § 554(a).
14. Once severed from the estate by abandonment, ownership of the hazardous waste site technically would revert to the debtor. H.R. REP. No. 595, 95th Cong., 1st Sess. 377, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6333; S. REP. No. 989, 95th Cong., 2d Sess. 92, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5878. The debtor would remain obligated to comply with applicable environmental laws and, in the case of an individual debtor, the state may have some recourse against the individual. See infra notes 262-65 and accompanying text. But see Ohio v. Kovacs, 105 S. Ct. 705, 710-11 (1985), in which the Court held that a debtor’s future earnings cannot be attached after bankruptcy to apply toward fulfillment of cleanup duties once the obligation has been discharged under 11 U.S.C.A. § 727 (West 1979 & Supp. 1985). If the debtor is a corporation with all of its assets under the jurisdiction of the bankruptcy court, however, bankruptcy would leave the state with nothing against which to enforce environmental obligations except a bare corporate charter.
15. 11 U.S.C.A. § 105 (West Supp. 1985). Subsection (a) provides that “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Id. § 105(a). This provision empowers the bankruptcy courts to grant the same injunctive relief as courts of equity.
though an exception to the automatic stay provision applies.\textsuperscript{16} The court could use this power to block government attempts to force a cleanup when enforcement would create a true hardship for the bankrupt’s creditors. These general equitable powers are designed to protect the estate from interference and to ensure its orderly administration.\textsuperscript{17}

Courts have not come to identical conclusions in deciding whether the Code should shield hazardous waste offenders from environmental laws. The United States Court of Appeals for the Sixth Circuit indicated in \textit{In re Kovacs} (Kovacs I)\textsuperscript{18} that the automatic stay would block government attempts to force hazardous waste site cleanup upon a bankrupt if the effort would require a substantial expenditure of funds.\textsuperscript{19} In \textit{Penn Terra, Ltd. v. Department of Environmental Resources},\textsuperscript{20} however, the United States Court of Appeals for the Third Circuit determined that state environmental enforcement actions against a bankrupt estate were entitled to an exception from the automatic stay provision because these actions were valid exercises of the state’s police power.\textsuperscript{21} The Third Circuit also addressed the issue in \textit{In re Quanta Resources Corp.},\textsuperscript{22} in which the court thoroughly discussed the conflicting policies that enter into the analysis.\textsuperscript{23} Over a vigorous dissent,\textsuperscript{24} the court upheld environmental concerns over the policies underlying the Code.\textsuperscript{25}

In favoring environmental protection over the bankruptcy protections offered by the Code, the Third Circuit resolved the conflict differently than the Sixth Circuit. The Third Circuit’s resolution, however, may go against the grain of recent United States


\textsuperscript{17} See Comment, supra note 6, at 10,102; see also Diner’s Club, Inc. v. Bumb, 421 F.2d 396, 398 (9th Cir. 1970).

\textsuperscript{18} 681 F.2d 454 (6th Cir. 1982), cert. granted, judgment vacated and remanded for consideration of mootness, 459 U.S. 1167 (1983).

\textsuperscript{19} See id. at 456.

\textsuperscript{20} 733 F.2d 267 (3d Cir. 1984).

\textsuperscript{21} Id. at 278.

\textsuperscript{22} 739 F.2d 912 (3d Cir. 1984).

\textsuperscript{23} Id. at 916-22.

\textsuperscript{24} Id. at 923-27.

\textsuperscript{25} Id. at 921-23.
Supreme Court decisions. In *NLRB v. Bildisco & Bildisco*, for example, the Supreme Court settled a direct conflict between the Code and labor laws in favor of the Code. Likewise, the Court upheld personal bankruptcy protections over state environmental law enforcement actions in *Ohio v. Kovacs*. Although these decisions may portend the extension of full bankruptcy protections to hazardous waste operators who file under the Code, the Supreme Court refused to state that the Third Circuit had decided *Penn Terra* incorrectly, and emphasized that its decision was not meant to undermine the enforcement of environmental laws. These cases reflect the difficulty the courts have encountered in attempting to find a uniform resolution to the policy conflict.

This Note analyzes the policies underlying the United States Bankruptcy Code and compares them with the policies promoted by environmental protection statutes. The Note also discusses recent cases in which courts have addressed the policy conflicts and the statutory framework in which these conflicts arise. The Note concludes that, without a change in either the law or the courts' statutory interpretation, hazardous waste site owners will continue to receive significant protection in bankruptcy from most government efforts to require environmental cleanup. Any other result under existing law would constitute an inordinate infringement upon the rights of a bankrupt's creditors. Courts possess sufficient discretion under the Code to control flagrant abuse of its protections, but varying interpretations of this discretion may produce inconsistent results. Finally, the Note proposes several solutions to this dilemma, and concludes that the ultimate solution is congressional action to clarify the rights of all parties potentially affected by the bankruptcy of a hazardous waste operator.

27. Id. at 1199 (upholding a debtor's rejection of a collective bargaining agreement).
28. 105 S. Ct. 705 (1985); see supra note 8.
29. See id. at 711-12 & n.11. See also the concurring opinion of Justice O'Connor, in which she emphasized that "the Court's holding . . . cannot be viewed as hostile to state enforcement of environmental laws." Id. at 712 (O'Connor, J., concurring).
Establishing a Framework for Analysis

Purpose of the Bankruptcy Code

The purpose of the Bankruptcy Code is "to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." The Code must serve the needs of both the private entities involved in the bankruptcy action and the public as a whole, because the needs of commerce mandate an efficient and fair resolution of business insolvencies.

The fundamental purpose of the Code is to conserve the debtor's estate for the benefit of his creditors. Bankruptcy laws cannot disregard the property rights of a bankrupt's creditors; they must consider the interests of those who have dealt in good faith with the bankrupt. Although Congress' bankruptcy power, like its commerce power, is plenary, constitutional limitations, including the fifth amendment prohibition of "takings," still apply. Distribution of a debtor's property may discharge some debts and impair preexisting obligations, but such actions must be accomplished fairly and equitably to avoid conflict with constitutional protections.

In a liquidation proceeding, a bankruptcy court focuses on creditors' rights because the goal of liquidation is the equitable distribution of assets. In a reorganization proceeding, however, the goal of providing deserving debtors a fresh start also must be

32. See In re McGoldrick, 121 F.2d 746, 751 (9th Cir.), cert. denied, 314 U.S. 675 (1941).
34. U.S. Const. art. I, § 8, cl. 4.
considered.\textsuperscript{39} Recognizing that the economic worth of the debtor’s business as a going concern may exceed the liquidation value of its assets, reorganization permits a distressed business to continue operating, thereby providing jobs, products, and tax revenues.\textsuperscript{40} The Code, therefore, not only requires that creditors receive their share of the estate as quickly and inexpensively as possible,\textsuperscript{41} but also shelters a financially distressed business from unilateral actions that may disrupt orderly administration of the estate and fair distribution of its assets.\textsuperscript{42} Efficient administration gives the bankrupt the greatest chance of successful rehabilitation.

Although the Code serves many legitimate purposes, businesses occasionally attempt to exploit its protections. Courts have refused to allow use of bankruptcy solely to hinder, delay, or defraud creditors\textsuperscript{43} because these uses would frustrate the Code’s goals of providing fair treatment to creditors and a fresh start to \textit{deserving} businesses. Because the bankruptcy courts act essentially as courts of equity,\textsuperscript{44} an improper request for bankruptcy protection should result in denial of equitable relief.

Once a business properly claims bankruptcy protections, state laws may not frustrate the Code’s federally granted relief.\textsuperscript{45} The supremacy clause\textsuperscript{46} mandates suspension of state laws that conflict with the Code, but general rules of statutory construction dictate that the suspension apply only to the extent of the conflict.\textsuperscript{47} A court must examine the statutory scheme as a whole to determine if a conflict exists.\textsuperscript{48} If the statutory scheme as a whole does not

\textsuperscript{39} Fallick v. Kehr, 369 F.2d 899, 904 (2d Cir. 1966).
\textsuperscript{40} Aaron, \textit{Bankruptcy Stay of Environmental Regulation: Harvest of Commercial Timber as an Introduction to a Clash of Policies}, 12 ENVR. L. 1, 1-2 (1981).
\textsuperscript{42} Aaron, supra note 40, at 3.
\textsuperscript{43} Hill v. Topeka Morris Plan Co., 105 F.2d 299, 301 (10th Cir.), cert. denied, 308 U.S. 595 (1939).
\textsuperscript{44} \textit{In re} Leasing Consultants, Inc., 592 F.2d 103, 107 (2d Cir. 1979).
\textsuperscript{45} \textit{In re} Bonant, 1 Bankr. 335, 338 (Bankr. C.D. Cal. 1979).
\textsuperscript{46} See \textit{U.S. CONST.} art. VI, cl. 2; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). For a supremacy clause decision in a bankruptcy setting, see \textit{Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.}, 302 U.S. 120, 126 (1937).
\textsuperscript{47} \textit{In re} Wittstein, 166 F. Supp. 122, 123 (D.V.I. 1958); see also \textit{Stellwagen v. Clum}, 245 U.S. 605, 613 (1918).
conflict directly with the Code, courts generally will not find a conflict between specific sections because preemption is disfavored unless that conclusion is unmistakable.49

When the conflict arises between the Code and other federal statutes, the proper approach to resolution of the conflict is not as clear. In general, courts try to construe apparently conflicting statutes so that both provisions will stand,50 avoiding a construction that might impair the operation of other laws Congress probably did not intend to repeal.51 To best carry out the will of Congress, the courts examine the statutory schemes and their underlying policies as a whole.52 When a bankruptcy law arguably conflicts with another statute, however, the courts will give effect to a more specific provision over a more general one,53 and then to the more recent statute if the conflict is otherwise irreconcilable.54 Most importantly, in any conflict resolution courts must interpret the statutes in light of the original purpose that prompted Congress to legislate.55

Environmental Protection and Hazardous Waste Cleanup Laws

For several decades, “Americans have put their lead, mercury, chlorinated hydrocarbons, PCB’s, benzene, cyanides, and other assorted poisons into the ground.”56 Most of these poisons have been dumped “into landfills, abandoned wells, holding ponds, open fields, and even old titan missile silos.”57 The quantity of waste is staggering: eighty billion pounds of toxic wastes are dumped annually in the United States, and the volume is growing steadily.58

54. Although disfavored, implied repeal will be found if the conflict is sufficiently direct. See Posadas v. National City Bank, 296 U.S. 497, 503-04 (1936).
57. Id.
58. Gore, Foreword to S. Epstein, L. Brown, & C. Pope, supra note 1, at ix.
Only recently has this country recognized that such disposal "poses unacceptable long-term risks to public health and the environment." Hazards presented by these wastes include groundwater and water supply contamination, well closures, destruction of indigenous plant and animal habitats, human health problems such as kidney and respiratory diseases, soil contamination, fish kills, livestock injuries, damage to sewage treatment facilities, air pollution, and fires.69

The public outcry over these toxic waste hazards61 has spurred government action. The states, exercising their broad police powers,62 enacted the first statutes dealing with toxic wastes. These statutes require comprehensive plans for the tracking of hazardous waste to insure proper disposal.63 The vast scope of the toxic waste problem also has compelled the federal government to act. Congress has used its commerce power to enact legislation designed to cope with severe hazardous waste pollution through emergency cleanup powers, regulatory requirements, guidelines for state governments, and cost recoupment provisions.64 In addition, federal and state courts have used such common law theories as nuisance and trespass to permit recovery for toxic waste injuries and to force private abatement of these hazards.65

60. S. EPSTEIN, L. BROWN, & C. POPE, supra note 1, at 27.
61. Id. at 38.
62. The states' police powers encompass toxic waste hazards because environmental poisons pose a serious threat to the public health, safety, and welfare.
65. See, e.g., State Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983) (corporation strictly liable for abatement of nuisance caused by hazardous wastes and
Each of the above-mentioned legislative or judicial actions places liability on the party responsible for creating the hazard. This feature reflects the notion that wrongdoers should be held responsible for their wrongs and should mitigate the effects of their wrongdoings whether the injured parties are individuals or the general public. Requiring the responsible party to remove any resulting hazards also prevents future wrongs by eliminating a potential source of injuries that might not become manifest until years later, when the wrongdoer or an estate may no longer exist to provide a recovery. The concerted statutory and judicial effort to control toxic wastes evidences a strong public policy aimed at the elimination of toxic waste problems. Those who disregard the hazards posed by indiscriminate toxic waste dumping should not easily avoid their responsibility for repairing the environmental harm they have caused.

The Problem

When hazardous waste site owners use the Code to shield themselves from state-imposed environmental cleanup duties, they create a policy dilemma for the courts. On the one hand, strong policies favor preserving the bankruptcy estate for the bankrupt's creditors and, to some extent, for the debtor. On the other hand, strong policies favor protecting the public health and the environment from hazardous wastes. Federal and state governments have


enacted statutes furthering both policies, but these statutes do not resolve effectively the conflict that arises when these policies clash. Congress, in particular, failed to foresee the potential intersection of these policies, thus forcing the courts to weigh the competing concerns and to solve the conflict on an ad hoc basis.

To solve this conflict, the courts should heed Chief Justice Marshall's observation that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid may be derived." Although extensive legislative histories exist for both the 1978 Bankruptcy Reform Act and the federal environmental laws, Congress did not consider how certain provisions of the Code might apply in the environmental cleanup arena. To determine what Congress might have intended had it foreseen this conflict, proper analysis requires an examination of the purposes and policies underlying applicable provisions of the bankruptcy and environmental laws.

Federal environmental laws do not apply until a site presents an imminent and substantial threat to the public health or safety, while state environmental laws generally require a cleanup before the site presents an imminent threat. Statutory conflicts, therefore, usually arise between the Code and state environmental laws. As a result, courts must consider not only the policy conflict between bankruptcy and environmental laws generally, but also the conflict

68. Aaron, supra note 40, at 2.
between the federal origin of the Code and the state origin of most applicable environmental laws.

**CASES EXAMINING STATUTORY CONFRONTATIONS WITH THE BANKRUPTCY CODE**

**In re Kovacs**

**The Opinion**

Kovacs operated a hazardous waste site in Ohio, and a state court ordered him to clean up all industrial wastes on his property. When Kovacs failed to meet his required cleanup schedule, the court appointed a receiver to perform the work. Kovacs filed for personal bankruptcy and asserted the automatic stay against the State’s attempt to apply part of his current income against the receiver’s cleanup costs. The State claimed that it was exempt from the automatic stay due to the exception contained in Code section 362(b)(5) for actions taken pursuant to the police power of the state. The United States Court of Appeals for the Sixth Circuit affirmed both the bankruptcy and the district courts’ grant of an automatic stay. The court of appeals held that, although section 362 permitted state courts to enforce police power statutes through mandatory injunctions despite bankruptcy filings, it forbade states from collecting money from the estates through their enforcement efforts. The court concluded that the State’s attempt to seek contribution from Kovacs for the cleanup was essentially an attempt to enforce a money judgment. The automatic stay applied.

In reaching this decision, the court based its interpretation of section 362 on the joint comments of the chairmen of the Senate and House committees that drafted the 1978 Bankruptcy Act.

73. *Kovacs I*, 681 F.2d at 453.
74. *Id.* at 455.
75. *Id.* at 455-56.
76. *Id.* at 456.
77. *Id.* The Sixth Circuit relied on a passage in *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333, 1340 (D.P.R. 1979) to support the need for a narrow construction of the exceptions in section 362(b), allowing enforcement of a state’s police power in spite of the automatic stay. In *Canarico*, the Court quoted a statement by Judge Herzog that also was repeated verbatim in statements by the chairmen of the House and Senate committees that drafted the Bankruptcy Act of 1978. See infra note 87. Due to its passage near the end of a session of
The committee chairmen noted that Congress intended a narrow construction of the automatic stay exceptions, to permit governmental units to pursue actions protecting the public health and safety, but not to permit governmental units to protect their pecuniary interests in the property of a debtor or debtor's estate. With this in mind, the court of appeals held that to permit the State to enforce an injunction that was essentially a money judgment "would subvert the purpose of the Bankruptcy Act to rehabilitate debtors and give them relief from harassing creditors."

On appeal to the United States Supreme Court, the Court vacated and remanded Kovacs I for consideration of mootness. The Sixth Circuit, however, reaffirmed the rationale of Kovacs I in Kovacs II, which involved a related appeal concerning the discharge through bankruptcy of Kovacs' obligation to the State to perform cleanup. The court of appeals determined that the State could not use "linguistic gymnastics" to disguise a money judgment as an injunction requiring the payment of money. Because Kovacs personally could not perform the cleanup, he could comply with the state court's injunction only through cash expenditures.

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79. 681 F.2d at 456.

80. Ohio v. Kovacs, 459 U.S. 1167 (1983), granting cert., vacating judgment, and remanding for consideration of mootness In re Kovacs, 681 F.2d 454 (6th Cir. 1982). The Court suspected mootness because, while the appeal was pending, the district court had declared Kovacs' obligation discharged under 11 U.S.C.A. § 727 (West 1979 & Supp. 1985). The case involved a personal bankruptcy, so the automatic stay no longer was essential to protect Kovacs from the State's enforcement efforts.


82. 717 F.2d at 988. Many hazardous waste sites are owned by "mom and pop" operations rather than corporations. Moore, supra note 4, at 9, col. 1. Because the Supreme Court found for the bankrupt in Ohio v. Kovacs, discharge of cleanup obligations in personal bankruptcy under 11 U.S.C.A. § 727 may provide an attractive refuge for small, individual waste site owners who hope to escape their environmental duties. See supra note 8.

83. 717 F.2d at 988.
Analysis of Kovacs I and Kovacs II

Many injunctions may require some expenditure of funds, yet are not considered money judgments. If an injunction requires expenditures by an individual for the performance of functions uniquely within the capability of that individual, the injunction retains its equitable character.\textsuperscript{84} In Kovacs I, however, the injunction ordering cleanup required Kovacs to spend money for a function not uniquely within his capability. The same funds paid to any contractor capable of doing the work could have accomplished the cleanup. The court properly characterized the State’s injunction as the equivalent of a money judgment. Apparently, the State wanted Kovacs to pay the cleanup bill so the State could avoid the expense. If so, the State was attempting to protect a pecuniary interest, not the public interest, and was attempting to place itself ahead of the other unsecured creditors rather than obtaining a money judgment in its traditional form and waiting with other unsecured creditors to collect from the estate.

Although the Sixth Circuit’s analysis of the automatic stay provision in Kovacs I generally was sound, the court may not have gone far enough in considering the strong public policy behind current environmental cleanup efforts. The Kovacs site obviously was a substantial threat to the environment because it attracted the attention of state agencies and moved them to action. Although the threat to public health was not sufficiently imminent and substantial to attract direct federal involvement, public health concerns certainly prompted the State to exercise its police power to correct the problem.

Had it directly considered the tension between state and federal power presented by Ohio’s attempt to force a cleanup of Kovacs’ site, the Sixth Circuit reasonably could have determined that, by

\textsuperscript{84} See Milliken v. Bradley, 433 U.S. 267, 289-90 (1977); see also United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982) (that an injunction requires expenditures of money does not foreclose equitable relief); cf. Rondeau v. Mosinee Paper Corp., 422 U.S. 61, 63 (1975) (injunctive relief is designed to operate prospectively and prevent future activity, not to punish past conduct); Martinez v. Winner, 548 F. Supp. 278, 310 (D. Colo. 1982) (a real and imminent danger must exist, not just a fear that injury will occur, to justify injunctive relief); Automatic Radio Mfg. Co. v. Ford Motor Co., 272 F. Supp. 744, 749 (D. Mass. 1967), aff’d, 390 F.2d 113 (1st Cir.), cert. denied, 391 U.S. 914 (1968) (mandatory injunctions are not issued in doubtful cases or when injury can be compensated adequately by damages).
applying section 362 to all entities, Congress effected a partial withdrawal of state police power.\textsuperscript{85} The Code's legislative history states that Congress intended through section 362 to assert federal bankruptcy power over state governments.\textsuperscript{86} Despite the limited exceptions to the automatic stay it provided in section 362(b),\textsuperscript{87} Congress did intend the automatic stay provision to limit the ability of state governments to exert their police powers over bankrupts and their estates. Because the State did not assert, clearly and primarily, a health or safety concern in \textit{Kovacs I}, the Sixth Circuit reasonably determined that the automatic stay held in abeyance any attempt to exercise the State's police power to recoup cleanup costs from Kovacs or his estate.

In \textit{Kovacs I} and \textit{II}, the Sixth Circuit only cursorily analyzed the meaning of "money judgment" in section 362(b)(5). The court's conclusion concerning this issue, however, was similar to the conclusion of the United States Court of Appeals for the Third Circuit in \textit{Jaffee v. United States}:\textsuperscript{88} "A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money."\textsuperscript{89} More recently, the Third Circuit announced a helpful distinction: "Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss."\textsuperscript{90} By contrast, equitable relief usually prevents further conduct.\textsuperscript{91} In more thoroughly

\begin{footnotes}
\item[85] When the police power of the state is "deemed withdrawn by Congress in bankruptcy legislation, evidence of that withdrawal in fit language should be found within the act." \textit{In re Chicago Rapid Transit Co.}, 129 F.2d 1, 5 (7th Cir.), \textit{cert. denied}, 317 U.S. 683 (1942).
\item[86] Specifically, the legislative history states: "With respect to stays issued . . . to governmental actions, [section 362] and the other sections mentioned are intended to be an express waiver of sovereign immunity of the Federal Government, and an assertion of the bankruptcy power over State governments under the supremacy clause notwithstanding a State's sovereign immunity." H.R. REP. No. 595, supra note 14, at 342, \textit{reprinted in 1978 U.S. Code Cong. & Ad. News} at 6299; S. REP. No. 989, supra note 14, at 51, \textit{reprinted in 1978 U.S. Code Cong. & Ad. News} at 5837.
\item[87] "Section 362(b)(4) . . . is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." 124 CONG. REC. 32,395 (1978) (statement of Rep. Edwards of California); 124 CONG. REC. 33,995 (1978) (statement of Sen. DeConcini).
\item[88] 592 F.2d 712 (3d Cir. 1979).
\item[89] \textit{Id.} at 715.
\item[90] United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982).
\item[91] \textit{Id.}
\end{footnotes}
analyzing whether the State actually was seeking a money judgment, the court in *Kovacs I* might have asked whether the State's main intent was to correct a past wrong to the environment or to prevent a future harm to the public health.

In a similar case, *United States v. Johns-Manville Sales Corp.*, the United States District Court for the District of New Hampshire found that the unwillingness of the involved state and federal governments to bear the financial burden of cleaning up a long-existing dump site caused the injunctive action to resemble a request for a money judgment. The court held that the request for the injunction was subject to the automatic stay. The situation was analogous to *Kovacs I*, in which the State did not find that the prevention of future harmful effects merited its own expenditures to clean up the site, yet sought recovery from the bankrupt to pay for the cleanup. The *Johns-Manville* decision supports the Sixth Circuit's determination that a state is subject to the automatic stay when it in essence seeks to impose a money judgment against the bankrupt estate.

**Penn Terra, Ltd. v. Department of Environmental Resources**

*The Opinion*

Penn Terra operated coal mines which did not conform to state environmental requirements. A Pennsylvania state court ordered Penn Terra to comply with state regulations by backfilling and reclaiming the mine sites to control erosion and sedimentation. Shortly thereafter, Penn Terra filed for liquidation under Chapter 7 of the Bankruptcy Code. The State nevertheless continued to pursue cleanup efforts and obtained an injunction ordering Penn...
Terra to perform site reclamation. The bankruptcy court granted Penn Terra's request to stay this order under section 362, holding that the injunction was an attempt to enforce a money judgment and thus was not excepted from the automatic stay. The district court affirmed, noting that the purpose of the state injunction was not only to enforce the environmental regulation but also to exhaust the debtor's assets ahead of the other creditors. The United States Court of Appeals for the Third Circuit reversed, holding that the State could correct Penn Terra's environmental violations through the exercise of its police power. Because the court determined that the injunction ordering compliance with the state regulation was not a money judgment within the meaning of the Code, the court excepted it from the automatic stay.

**Analysis of Penn Terra**

In *Penn Terra*, the Third Circuit recognized that Congress intended to subject all entities to the automatic stay. The court noted, however, that when the state exercises its traditional police power through environmental regulation, a court should not infer preemption by the Code without clear indication of this congressional intent. The court concluded that, to avoid interference with state police power, exceptions to the automatic stay should be construed broadly, and that the term "money judgment" should be construed narrowly.

The Third Circuit's broad interpretation of the automatic stay exceptions ignores congressional guidance that the exceptions were to be construed narrowly. Although the court acknowledged Congress' guidance in a footnote, it posited that the congressional position did no more than state the problem before the court.

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97. Id. at 270.
98. Id.
99. Id.
100. Id. at 278-79.
101. Id. at 271.
102. Id. at 272-73.
103. Id. at 273.
104. See supra notes 77-78 and accompanying text.
105. 733 F.2d at 274 n.6.
reaching this conclusion, the court defined away a legislative history requiring a construction opposite to that desired by the court. The Third Circuit failed to give proper effect to Congress' intent regarding the application of the automatic stay.\textsuperscript{106}

In addition to its broad and arguably inappropriate construction of the automatic stay exceptions, the court of appeals failed to examine the motives underlying the State's attempt to enforce its environmental regulations in the particular case. In considering the state court's order to Penn Terra, the court of appeals observed that environmental protection falls squarely within the State's police power,\textsuperscript{107} but the court did not analyze whether the State actually acted against Penn Terra to promote the public health, safety, and welfare so that the State warranted an exception from the automatic stay in this case. Because compliance with the environmental regulations primarily required backfilling, site dressing, and seeding to control erosion and sedimentation,\textsuperscript{108} the threat to public health or safety was not as severe as the threat presented by toxic waste sites. Although corrective measures would have prevented any slight threat to safety caused by rough landscape, this result alone was hardly a compelling justification for this use of the police power within the narrow exceptions to the automatic stay, particularly when large expenditures would have been required to perform the ordered work.

The \textit{Penn Terra} opinion did devote considerable attention to whether the State was attempting to enforce a money judgment by its injunction.\textsuperscript{109} The court noted that a money judgment usually requires the payment of a specific amount of damages to a party and does not provide for its own enforcement.\textsuperscript{110} Applying this fairly technical definition, the court concluded that an action for injunctive relief that does not seek a specific sum and provide for

\begin{footnotes}
107. 733 F.2d at 274.
108. \textit{Id.} at 270 n.3, 278.
109. \textit{Id.} at 274-78.
110. \textit{Id.} at 275.
\end{footnotes}
its own enforcement does not constitute a money judgment. This interpretation of "money judgment" ignored the Third Circuit's own observation that when a term is not defined in a statute, "Congress means to incorporate the established meaning" of the term.\textsuperscript{111} The more common understanding of "money judgment" is a judgment for monetary, as opposed to equitable, relief.\textsuperscript{112} Congress apparently meant "money judgment" to refer to legal actions in general, thus excepting only true equitable actions from the automatic stay. Equitable actions are by their very nature those for which money damages will not provide adequate relief. The court in \textit{Penn Terra} should have asked whether the State's claim satisfied the equitable requirement that money damages would not provide adequate relief,\textsuperscript{113} not whether the State's injunction met a fairly technical definition of "money judgment."

In its analysis of whether monetary damages could provide adequate relief, the Third Circuit also should have relied on its own holding in \textit{Jaffee v. United States}.\textsuperscript{114} In \textit{Jaffee}, the court of appeals held that artful pleading could not transform a claim for damages into a claim for equitable relief.\textsuperscript{115} In \textit{Jaffee}, the plaintiff asked the court to order the government to provide medical treatment for the plaintiff's injuries.\textsuperscript{116} The court found that the plaintiff's claim was more akin to a traditional request for damages in tort, and not an action suitable for equitable relief.\textsuperscript{117} Although the payments were sought to cover future medical treatment, they were based on past injuries. Traditional damages awards compensate the plaintiff, in part, for the future economic injury of medical

\textsuperscript{111} \textit{Id.} (quoting NLRB v. Amex Coal Co., 453 U.S. 322, 329 (1981)).

\textsuperscript{112} \textit{See Black's Law Dictionary} 907 (5th ed. 1979).

\textsuperscript{113} Legal relief may be "inadequate" when a defendant is judgment-proof, as is the case with a bankrupt. Inadequacy usually is judged in relation to the form of relief itself, however, not with regard to the collectibility of a judgment against a particular defendant. Nevertheless, some courts have taken this factor into consideration in evaluating the adequacy of a plaintiff's remedy at law. 42 Am. Jur. 2d \textit{Injunctions} § 53 (1969). When injunctive relief has been granted due to the defendant's insolvency, the cases have involved injunctions prohibiting wrongful acts such as the payment of money to a third party or the transfer of property, and not the performance of affirmative obligations requiring expenditure of funds that the defendant does not have. \textit{See} 43 C.J.S. \textit{Injunctions} § 30(b) (1978).

\textsuperscript{114} 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

\textsuperscript{115} \textit{Id.} at 715.

\textsuperscript{116} \textit{Id.} at 714.

\textsuperscript{117} \textit{Id.} at 715.
expenses generated by past physical injuries, as determined using liquidated estimates of these costs.

The Third Circuit adopted the view in *Penn Terra* that damages could not be liquidated because Penn Terra's damage to the environment posed the threat of future harm. This view ignored the fact that any competent earthwork contractor could have reduced the required reclamation work to a sum certain simply by submitting a cost estimate. Although a cost estimate could not account fully for any future harms the site might cause, the only future damages identified in *Penn Terra* were the potential for further erosion and a possible safety hazard. The court's analysis was tantamount to saying that tort damages for physical injury could not be liquidated because medical complications might occur if the patient did not get treatment. Remedial actions to correct past environmental damage at the Penn Terra site would have prevented any future harm. The State sought relief to correct past damages at the site with only a secondary concern for any future harm that might occur if the remedial actions were not performed. A competent contractor could have liquidated the State's claim to a monetary amount in this case by estimating the cost of the required remedial work. Because equitable relief should be available only when money damages are insufficient and because the State could show no direct threat to public health or safety, the State essentially enforced a money judgment through artful pleading, contrary to *Jaffee*.

*In re Quanta Resources Corp.*

The Opinion

Quanta Resources Corporation operated a hazardous waste site in New York. After a brief period of operation in reorganization

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118. *Id.*


120. 733 F.2d at 277.

121. The required work consisted of backfilling and grading, submission of erosion and sedimentation control plans, sealing a mine opening, submission of a plan for removal of stockpiled topsoil, effectuation of plans to remove the topsoil stockpile and to control erosion and sedimentation, and completing topsoil spreading, mulching, and seeding. *Id.* at 270 n.3.

122. *Id.* at 278.
under Chapter 11, the corporation filed for liquidation under Chapter 7 of the Code. The trustee of the bankrupt’s estate sought to abandon corporate land that was filled with waste oil storage tanks, including some contaminated with PCB’s. The trustee brought the abandonment action under section 554 of the Code, which permits abandonment of burdensome estate property. The bankruptcy court and the district court agreed that the abandonment was permissible within the plain meaning of the language in section 554.

The United States Court of Appeals for the Third Circuit reversed. Consistent with its Penn Terra analysis, the Third Circuit maintained that a balance had to be struck between the competing public interests of protection of a bankrupt’s creditors through abandonment of burdensome property and protection of the environment. Despite the express language of section 554, the court found that Congress did not intend to supercede state environmental laws through this Code provision. Noting that another section of the United States Code requires the trustee to operate a bankrupt’s estate in compliance with state law, the court determined that Congress did not intend the abandonment provision to “subjugate state and local regulatory laws.” The court thus concluded that section 554 did not permit the bankruptcy trustee to abandon Quanta Corporation’s hazardous waste site. Finding no irreconcilable conflict between the Code and state environmental law, the court held that the Code did not preempt the state law in this instance.

123. Quanta, 739 F.2d at 913.
124. Id. PCB’s, polychlorinated biphenyls, are extremely hazardous chemicals. See generally McGraw-Hill Encyclopedia of Environmental Science 577-78 (2d ed. 1980) (describing hazards of PCB’s).
126. 739 F.2d at 914.
127. Id. at 921-22.
128. 28 U.S.C.A. § 959(b) (West Supp. 1985) states that a trustee should manage the property of the estate “according to the requirements of the valid laws of the State in which such property is situated.” Although this provision expressly applies only to estates in reorganization as opposed to liquidation, the court held that this provision indicated Congress’ intent regarding the scope of a trustee’s powers. 739 F.2d at 919.
129. 739 F.2d at 919.
130. Id. at 921-22.
131. Id. at 922.
Analysis of Quanta

New York opposed abandonment of the waste site on two grounds: general considerations of public policy, as reflected in the state environmental laws; and congressional intent to limit a trustee's power to disregard local law, as reflected in the language of 28 U.S.C. § 959.132 In evaluating the State's assertions, the Third Circuit cogently analyzed the competing policy considerations. The court addressed federal preemption of state statutes, asking whether Congress intended to permit a trustee to exercise the abandonment power free of state health and safety regulations.133 The court refused to find such an intent absent some explicit congressional expression of total federal preemption.134

The dissent in Quanta criticized the majority's analysis of the federal preemption issue because the majority relied on cases decided under the old bankruptcy law.135 That law did not provide explicitly for abandonment of burdensome property; the courts had developed abandonment as a judicial doctrine.136 Under this doctrine, the courts would decide whether to permit abandonment for the protection of creditors by distinguishing state regulations on the basis of their relative importance to the public.137 The dissent argued that the majority relied incorrectly on the earlier cases. The doctrine of abandonment had been replaced by a specific statutory provision and, unlike some provisions of the Code, the abandonment provision contained no exceptions.138

132. Id. at 914.
133. Id. at 915.
134. Id. at 918.
135. Id. at 923-24 (Gibbons, J., dissenting); see also Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir.), aff'd In re Eastern Transp. Co., 102 F. Supp. 913 (D. Md. 1952) (trustee could not abandon four barges in a harbor when abandonment would violate navigation safety laws, even though the cost of compliance with the laws would exceed the value of the barges); In re Lewis Jones, Inc., 1 Bankr. Ct. Dec. (CRR) 277 (Bankr. E.D. Pa. 1974) (trustee could not abandon underground steam pipes, vents, and manholes when doing so would create health and safety hazards). But see In re Adelphi Hospital Corp., Bankr. L. Rep. (CCH) ¶ 66,882, at 76,856 (2d Cir. 1978) (per curiam) (abandonment of hospital records allowed despite state law requiring insolvent hospitals to store them).
136. 739 F.2d at 923-24 (Gibbons, J., dissenting).
137. Id. at 918.
138. Id. at 924 (Gibbons, J., dissenting).
The limited legislative history of section 554 does not reveal whether Congress intended exceptions to the abandonment authorization.\textsuperscript{139} Under the applicable rule of statutory construction, however, legislation which does not alter common law expressly is interpreted as encompassing common law within its plain meaning.\textsuperscript{140} This rule supports the majority's reliance upon the reasoning of the earlier cases decided under the common law doctrine of abandonment.

The plain language of section 554 strongly suggests that Congress did not contemplate giving the trustee an absolute right to abandon property. The trustee may abandon estate property only after a hearing.\textsuperscript{141} This hearing requirement serves little purpose if the trustee need not obtain the court's permission to abandon property. The hearing requirement permits the court to determine whether the proposed abandonment complies with state law, and to weigh the impact upon creditors if the estate cannot abandon the property. The hearing requirement also embodies the principle that bankruptcy courts are courts of equity; they must balance the competing concerns that influence rulings concerning the estate.\textsuperscript{142} Although courts continue to differ in their interpretations of the abandonment provisions, the interpretation that requires judicial


\textsuperscript{140} Section 554 seeks to clarify the law of abandonment and to codify the case law that resulted from legislative silence on the matter, not to make any significant change in the abandonment law. 4 \textit{COLLIER ON BANKRUPTCY} (MB) ¶ 554.01 (15th ed. 1985). Decisions under the old Bankruptcy Act were intended to fill the gaps left in the 1978 Code's treatment of abandonment in section 554. \textit{BANKR. SERV. (L. Ed.)} ¶ 23:111 (1979); \textit{see} St. Paul Fire & Marine Ins. Co. v. Cox, 583 F. Supp. 1221, 1227 (N.D. Ala. 1984); \textit{see also} Tarlton v. Saxbe, 507 F.2d 1116, 1122 (D.C. Cir. 1974) (absent the clearest statement of congressional policies, a court will not impute a legislative intent to contravene settled common law principles).

\textsuperscript{141} \textit{See} 11 U.S.C.A. § 554(a) (West Supp. 1985); \textit{supra} note 13.

\textsuperscript{142} \textit{See In re Stark}, 26 Bankr. 178, 180 (C.D. Ill. 1982); \textit{In re Supreme Plastics, Inc.}, 8 Bankr. 730, 735 (N.D. Ill. 1980).
approval of abandonment has emerged as the preferred rule and the better practice.\footnote{143}

Assuming that the abandonment provision vests the courts with discretion to deny abandonment on public health or safety grounds, a denial may create a further problem. The majority and dissent in \textit{Quanta} both noted that forced retention of burdensome property and imposition of environmental cleanup duties on the trustee would harm creditors. According to the dissent, this harm could reach constitutional proportions and constitute a "taking" under the fifth amendment.\footnote{144} If cleanup costs for the hazardous waste site consumed the entire estate, that point certainly would be valid.\footnote{146}

Whether the cleanup costs would consume a disproportionate amount of an estate would depend on how the court charged cleanup costs to the estate after refusing to permit abandonment. For example, although the majority in \textit{Quanta} failed to specify the best way to charge cleanup costs to the estate, it implied that these costs could be treated as an administrative expense.\footnote{146} Because the estate pays administrative expenses before any other general obligation,\footnote{147} charging the cleanup costs as an administrative expense

\begin{itemize}
  \item \footnote{143} See Riverside Memorial Mausoleum, Inc. v. UMET Trust, 469 F. Supp. 643, 644 (E.D. Pa. 1979); see also \textit{4 Collier on Bankruptcy, supra} note 140, at \S 554.02; cf. \textit{In re Motley}, 10 Bankr. 141, 147 (Bankr. M.D. Ga. 1981) (if no creditor objects to abandonment, trustee may abandon without leave of court).
  \item \footnote{144} 739 F.2d at 925 (Gibbons, J., dissenting).
  \item \footnote{146} 739 F.2d at 922-23.
  \item \footnote{147} 11 U.S.C.A. \S 507(a) (West 1979 & Supp. 1985). Within the Code's scheme of priorities for the distribution of unencumbered assets, administrative expenses are paid first. \textit{See Rendleman, Liquidation Bankruptcy under the '78 Code}, 21 WM. & MARY L. REV. 875, 658-64 (1980). Whether unsecured creditors have a property interest in a debtor's estate that is subject to a taking is unclear, but secured creditors do have a recognized property interest in a debtor's estate. \textit{United States v. Security Indus. Bank}, 459 U.S. 70, 73-82 (1982).

Although administrative expenses generally are paid from unencumbered assets, the trustee might tap secured assets for some administrative costs as well. Any expense that can be characterized as one to preserve property for the creditor holding a security interest in it can be recovered from that property. \textit{11 U.S.C. \S 506(c)} (1982). Under this authority, a court
might deplete most of the estate's assets, leaving little or nothing for creditors. In a footnote, the majority analogized this problem to land use cases in which the state's exercise of its police power diminished but did not destroy property values. The court used these cases to support its contention that the application of estate assets to cleanup costs would not result in a taking.\textsuperscript{148} This analysis is persuasive if cleanup costs are charged to the estate as a general credit obligation.\textsuperscript{149} It is less persuasive if the costs are charged as an administrative expense which requires all cleanup costs to be paid before general creditors can recoup anything from the estate.

Because it provided for a hearing and for some balancing of the equities, the abandonment provision afforded the Third Circuit in \textit{Quanta} more flexibility than the automatic stay provision afforded the Sixth Circuit in \textit{Kovacs I}.\textsuperscript{150} The abandonment provision also provided the Third Circuit with a firmer basis upon which to favor the State's interest over the creditors' interest in the estate in \textit{Quanta} than the court had in \textit{Penn Terra} in finding an exception to the automatic stay provision.

\footnotesize
\textsuperscript{148} 739 F.2d at 922 n.11. \textit{See}, e.g., \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980); \textit{Penn Central Transp. Co. v. City of New York}, 438 U.S. 104 (1978); \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926). Each of these cases holds that land use regulations that reduce, but do not completely destroy, property values are exercises of the police power that do not constitute takings.

\textsuperscript{149} For a discussion of treating government claims for cleanup obligations as secured or priority obligations rather than as general obligations, see \textit{infra} notes 249-60 and accompanying text.

\textsuperscript{150} Although an interested party may request a hearing to obtain relief from an automatic stay, this hearing procedure does not afford the court as much discretion as is implicit in the hearing requirement of the abandonment provision. \textit{Compare} 11 U.S.C.A. § 362(d)-(e) (West Supp. 1985) \textit{with} 11 U.S.C.A. § 554(a)-(b) (West Supp. 1985).
NLRB v. Bildisco & Bildisco

The Opinion

Under the Third Circuit's analysis in Quanta, courts apparently may balance the rights of creditors against environmental concerns when the two conflict. The United States Supreme Court recently suggested in NLRB v. Bildisco & Bildisco, however, that bankruptcy concerns merit considerable weight in that balancing. In Bildisco, the Court faced a conflict between the Bankruptcy Code and federal labor laws, and the Code prevailed. The Court permitted the debtor in Chapter 11 reorganization to reject its collective bargaining agreements under Code section 365 as burdensome executory contracts.

Analysis of Bildisco

If a case similar to Quanta reaches the Supreme Court, the Bildisco decision portends a different result than the Third Circuit reached in Quanta. Indeed, in Ohio v. Kovacs, the Court recently indicated the strength of bankruptcy protections by striking the balance in favor of the Code rather than environmental statutes. The equities involved in Ohio v. Kovacs differed, however, from those involved in a corporate bankruptcy such as Quanta or Bildisco. Kovacs sought relief from state efforts to use his individual future earnings to satisfy environmental obligations incurred before bankruptcy. In this personal bankruptcy situation, the Court held that the environmental obligations were discharged under Code section 727. Section 727 cannot serve as the basis for discharge of a corporate debtor's obligations.

152. Id. at 1196, 1199. Code section 365 provides in part: "Except as provided [elsewhere], the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C.A. § 365 (West Supp. 1985).
154. See id. at 711.
155. Id. at 707.
156. Id. at 708-10.
Although *Bildisco* involved a conflict between the Code and labor, not environmental, laws, it provides a useful insight into how the Court would analyze a conflict between the Code and environmental laws in the case of a corporate bankrupt. Labor laws enjoy a favored status in the United States, and they have promoted the public interest longer than toxic waste laws have served the public. Despite the importance of federal labor laws, the Supreme Court indicated that those laws must give way to the Bankruptcy Code when the two conflict because a contrary result would frustrate the Code’s policy of giving breathing room to debtors. The Court obviously holds in high regard the policies underlying the Code.

Particularly troubling to the environmental cause is the parallel between the Court’s application of Code section 365 and the language of Code section 554. In *Bildisco*, the Court permitted rejection of executory contracts that it found burdensome under section 365, while section 554 explicitly permits the trustee to reject burdensome property. If the Court applied the *Bildisco* analysis to facts similar to those in *Quanta*, it might permit hazardous waste site owners to “dump” burdensome waste sites, just as unions now complain that some airlines and other struggling companies currently use the Bankruptcy Code to “dump” their collective bargaining agreements.

Because the *Bildisco* analysis balances competing concerns, however, application of the analysis could produce a different result in a toxic waste site bankruptcy than in a labor contract case. The Court allowed *Bildisco* to reject its collective bargaining agreements only because those contracts burdened the estate and the balance of the equities favored rejection. The Court balanced the company’s hardship in attempting to reorganize under its labor contract obligations with the hardship on the union which loss of its contract would entail. Perhaps weighing the burden of

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159. 104 S. Ct. at 1199.


161. See N.Y. Times, Jan. 18, 1984, at D1, col. 4.

162. 104 S. Ct. at 1196.

163. *Id.* at 1197.
cleanup costs on the bankrupt's creditors against the burden of health risks and cleanup costs on the public would tip the scales differently. Because Bildisco involved a reorganization rather than a liquidation as in Quanta,\textsuperscript{164} the policy of giving the debtor company a fresh start\textsuperscript{165} also may have swayed the Court in Bildisco to favor bankruptcy protections over labor laws. In any event, the Court's balancing of the equities indicates that the Bankruptcy Code is not invincible and that larger concerns might prevail over the Code under certain circumstances.

A Closer Look at the Statutes

Some Possible Shield Provisions of the Bankruptcy Code

The Automatic Stay

The purposes of the automatic stay in bankruptcy proceedings are to give immediate, though temporary,\textsuperscript{166} relief to the debtor and to prevent dissipation of the estate's assets before an orderly distribution can be made to creditors.\textsuperscript{167} Congress intended the automatic stay to limit state action to some extent,\textsuperscript{168} particularly by denying any preferential treatment to a government entity that also is a creditor of the bankrupt's estate.\textsuperscript{169} Whether the automatic stay halts environmental protection actions against a debtor depends on two factors. First, the environmental regulations must be characterized as exercises of the police or regulatory power.\textsuperscript{170}

\textsuperscript{164} The trustee's abandonment power may be exercised in reorganization as well as in the Quanta liquidation situation. Cf. 4 Collier on Bankruptcy, supra note 140, at \$5544.01 (old bankruptcy provision addressed abandonment in reorganization, but not in liquidation, inferring that new Code section 554 is meant to fill this gap by applying to both).

\textsuperscript{165} See supra notes 38-40 and accompanying text.

\textsuperscript{166} The Code permits the courts to lift the automatic stay under certain circumstances. 11 U.S.C.A. \$ 362(c)-(e) (West 1979 & Supp. 1985). Essentially, the courts may lift the stay when it is no longer necessary to the administration of the estate or when relief from the stay is requested and one of several limited criteria is met.

\textsuperscript{167} Penn Terra, 733 F.2d at 271.

\textsuperscript{168} Id.


Second, the goal of the particular environmental action must be to protect health and safety and not to protect the state's pecuniary interest in the debtor's assets.\textsuperscript{171}

Assuming that environmental laws generally fall within the scope of the police or regulatory power, a court must focus on the interest that the government agency wants to protect. How does Congress' comment that courts should construe section 362(b) narrowly\textsuperscript{172} affect this inquiry? One commentator has suggested that the determination of whether health and safety interests or pecuniary interests predominate is difficult when both are present and when section 362(b) is given a narrow construction.\textsuperscript{173} A close reading of the legislative history, however, leaves little doubt about how courts should construe this exception.\textsuperscript{174} Congress did not want government entities to protect their pecuniary interests by recovering assets from a debtor's estate ahead of other creditors. A broad interpretation of police power coupled with a narrow construction of a pecuniary interest, the interpretation advanced by the Third Circuit in \textit{Penn Terra},\textsuperscript{175} would subvert this congressional intent. Courts must be alert for government attempts to

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Although environmental protection generally is recognized as within the police power, situations can arise in which enforcement of a law passed under the police power is not concerned primarily with public health or safety. When this occurs, as evidenced by a delay in enforcement or by the existence of factors other than health and safety as motivations for the enforcement, a state's action may not fall within the police power exception to the automatic stay. \textit{See Note, When is a Governmental Unit's Action to Enforce its Police or Regulatory Power Exempt from the Automatic Stay Provision of Section 362}, 9 \textit{ Fla. St. U.L. Rev.} 369, 370-71 (1981).

\textsuperscript{171.} Aaron, \textit{supra} note 40, at 6.

\textsuperscript{172.} The legislative history of section 362(b) evidences Congress' intent that states not be permitted to extract funds from the debtor's estate under the guise of the police power when the state does not seek primarily to protect public health or safety. \textit{See supra} note 78 and accompanying text.

\textsuperscript{173.} Aaron, \textit{supra} note 40, at 6.

\textsuperscript{174.} The committee reports explain:

Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors. \textit{H.R. Rep. No. 595, supra} note 14, at 343, \textit{reprinted in 1978 U.S. Code Cong. & Ad. News} at 6299; \textit{S. Rep. No. 969, supra} note 14, at 52, \textit{reprinted in 1978 U.S. Code Cong. & Ad. News} at 5838. Congress' intent with regard to the scope of "money judgment" is not entirely clear. \textit{Cf. supra} note 112 and accompanying text.

\textsuperscript{175.} \textit{See Penn Terra}, 733 F.2d at 273; \textit{supra} notes 101-06 and accompanying text.
The United States Court of Appeals for the Eighth Circuit has developed a test to determine the limits of the Code’s deference to state police power. In Missouri v. United States Bankruptcy Court, the Eighth Circuit stated that “police or regulatory power” as used in section 362(b) refers to laws “affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court.” To fall within the narrow scope of the automatic stay exceptions, therefore, the purpose of injunctions to enforce environmental regulations must be to halt ongoing disposal violations, not to cure past disposal practices. For example, under this test a court could issue a cease and desist order to halt additional environmental damage, but not an order to extract money from the estate when the health threat had been insufficient to motivate the state to spend its own funds for the cleanup. When both a health threat and a pecuniary interest are involved in an enforcement action, courts could balance subjectively the strength of the two interests, yet no court has adopted this balancing approach.

The term “money judgment” also must be interpreted properly to apply section 362 correctly. Although section 362(b) does not bar a state from obtaining a money judgment under the authority of laws passed pursuant to its police power, the state cannot enforce the judgment while the automatic stay is in force. Because both an injunction requiring expenditure of funds and a money judgment deplete the assets of a bankrupt’s estate, a court may find it difficult to distinguish the two. An incisive inquiry should ask whether the government could accomplish the cleanup itself or

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176. If the state focuses its police or regulatory power on the debtor’s financial obligation rather than on health and safety concerns, the exception to the automatic stay of Code section 362(b)(4) does not apply. In re Sampson, 17 Bankr. 528, 530 (Bankr. D. Conn. 1982).
178. 647 F.2d at 776.
180. Id. at 20,312.
181. See Drebsky & Santoro, supra note 158, at 10,262.
183. Kovacs I, 681 F.2d at 456.
through contractors without seriously compromising the public health and safety, and obtain monetary reimbursement from the waste site owner after the cleanup. Under the traditional equity analysis, injunctive relief generally is not available when money damages would suffice. If the government can conduct the cleanup and then obtain reimbursement, the court should deny injunctive relief.184

**The Abandonment Provision**

Congress provided the courts with no discretion regarding application of the automatic stay provision. An explicit exception must apply to deny the debtor relief. In contrast, the trustee's power to abandon a bankrupt's burdensome property under section 554 arguably is subject to judicial discretion because the section requires a court hearing.185

Some judges have found that judicial discretion to deny abandonment is inappropriate for several reasons.186 The statutory language of section 554, unlike the language of section 362, provides no explicit exceptions to abandonment. In addition, analogy to Code section 1170(a), which deals with the abandonment of railroad lines by railroads, provides a fairly strong argument that Congress intended to permit abandonment under section 554 regardless of the public interests involved. To avoid erosion of a secured creditor's interest in the debtor's property, the legislative history of section 1170(a) indicates that the Constitution might require the courts to allow trustees of bankrupt railroads to abandon railroad lines even when abandonment is not in the public interest.187

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184. See Comment, supra note 6, at 10,100.
185. See supra notes 141-43 and accompanying text.
186. See, e.g., Quanta, 739 F.2d at 924 (Gibbons, J., dissenting).
187. See id. at 925 n.2. Specifically, the legislative history provides:

[Section 1170(a)] permits the court to authorize the abandonment of a railroad line if the abandonment is consistent with the public interest of the estate or essential to the formulation of a plan. This avoids the normal abandonment requirements of generally applicable railroad regulatory law. The authority to abandon or not to abandon lines of a railroad is, of course, subject to the fifth amendment of the Constitution, which may in particular cases require abandonment in order not to erode a secured creditor's interest in the debtor's property even though the public interest dictates otherwise.
The bankruptcy court in *In re Charles George Land Reclamation Trust* found a novel solution to the potential abandonment problem it confronted which did not involve interpreting section 554 to allow judicial discretion to deny abandonment. To prevent an abandonment under section 554, the court dismissed a hazardous waste site debtor’s request to convert its Chapter 11 reorganization into a Chapter 7 liquidation. The court recognized that under Chapter 11 the bankrupt would have to comply with state environmental laws because the trustee in reorganization is required to comply with state law. If the bankruptcy were converted to a Chapter 7 liquidation, however, the court interpreted section 554 to permit the trustee to abandon the site, which would hinder cleanup efforts. The court relied on the discretion it found in section 707 of the Code and denied the debtor’s request to convert the proceedings from reorganization to liquidation to compensate for a perceived lack of discretion to deny the abandonment under section 554.

Judicial contortions to circumvent a perceived lack of discretion to block an abandonment action under section 554 are unnecessary. The hearing requirement in the abandonment provision indicates that the bankruptcy courts retain some discretion when considering abandonment requests. Discretion to deny abandonment of a toxic waste site also is consistent with the policy that no creditor should enjoy preferential treatment over other creditors of the same class. Allowing abandonment prefers other creditors over the government to whom the debtor owes an obligation to clean up its site. If the debtor abandons the site, the government agency has no recourse against the estate and thus other unsecured creditors

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191. 30 Bankr. at 923-24.

192. See Drebsky & Santoro, supra note 158, at 10,263-64.
are preferred. Although the government's recovery as an unsecured creditor would be small if most of the debtor's property were subject to secured interests, the government, like any other creditor, deserves at least an opportunity to collect from the estate. Because the bankrupt hazardous waste site owner owes an outstanding environmental obligation to the government, the court need not permit abandonment if doing so would deny the government all opportunity to collect on the obligation.

The Power of the Court

If the automatic stay does not apply and the court denies abandonment, the debtor has another option. The debtor might avoid having cleanup costs levied against his estate by appealing to the bankruptcy court for an injunction pursuant to the court's general powers in equity. Code section 105 gives bankruptcy courts discretion to issue an injunction when the exercise of a state's power to protect public health and safety contravenes bankruptcy policies to an extent that justifies judicial intervention. Although government orders that do not seek to enforce money judgments are excepted from the automatic stay, Congress provided, in section 105, an alternate means by which debtors that truly need judicial protection may obtain a stay. In the legislative history of section 105, both houses of Congress noted that "[b]y excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action... [T]he court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed." Section 105 leaves open the possibility that the bankruptcy court may shield the estate from any orders to proceed with a hazardous

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193. Whether the government should be granted a status higher than unsecured creditors is treated infra at notes 254-60 and accompanying text.

194. Such an exercise of the police power arguably would bring the state's request for injunctive relief within the section 362(b) exception to the automatic stay. See supra note 87.

195. Penn Terra, 733 F.2d at 273.

waste site cleanup even when an environmental hazard is so immin-
ent and substantial that the government agency's overriding con-
cern is the public health or safety and not its own pecuniary inter-
est.\textsuperscript{197} Section 105 permits this action when the court perceives
that creditors' rights are sufficiently threatened. The balance of the
equities between the hazard to the public if a stay were granted
and the harm to creditors if a stay were denied would be critical to
a court's analysis. Under the proper circumstances, the court could
leave a government unable to enforce against a bankrupt laws en-
acted pursuant to its police power even if enforcement were ex-
cepted from the automatic stay provision.

\textit{Environmental Protection Law Requirements}

Both the federal and state governments have passed laws to pro-
tect the environment. Federal statutes generally provide guidelines
for both industry and state governments, and require direct federal
involvement only in cases of imminent and substantial endanger-
ment to public health or the environment.\textsuperscript{198} State laws tend to
implement the federal guidelines and to establish standards that
the individual state legislatures deem adequate to protect the gen-
eral health and welfare of the public.\textsuperscript{199} Although judicial attempts
to resolve conflicts between the Code and environmental laws gen-
erally have involved state statutes, these statutes may merit

\textsuperscript{197} See \textit{Penn Terra}, 733 F.2d at 273.

\textsuperscript{198} See, e.g., Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6973 (West 1983 & Supp. 1985) (imminent and substantial danger to health or the environment required before EPA Administrator can act); Comprehensive Environmental Response, Comp-
danger to public health or welfare caused by an actual or threatened release of a hazardous
substance from a waste facility required before the President or Attorney General can act);
Safe Water Drinking Act of 1974, 42 U.S.C. § 300i(a) (1982) (imminent and substantial dan-
ger to public health required before the EPA Administrator can act to stop contamination
of public water supplies); Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1364(a)
(1982) (imminent and substantial danger to public health or livelihood required before the
EPA Administrator can act to stop discharge of pollutants).

\textsuperscript{199} See, e.g., N.Y. ENVTL. CONSERV. LAw §§ 27-0900 to -0923 (McKinney 1984) (implement-
ing federal guidelines in a state program to control hazardous waste disposal); VA.
Code § 10-186.6(A)(2)(b) (Supp. 1984) (recognizing that the Virginia board overseeing haz-
ardous waste facilities must be guided by federal regulations); see also 42 U.S.C.A. §§ 6941-
6947 (West 1983 & Supp. 1985) (requiring development and federal approval of state or
regional solid waste disposal plans).
greater deference in the courts' preemption analyses than other state laws which arguably conflict with federal law because state environmental laws are enacted to further federal goals.

Federal Environmental Protection Laws

Congress drafted broad federal environmental laws to grant certain government officials the power to seek judicial relief and to take other action necessary to avert serious threats to public health or the environment. In provisions such as 42 U.S.C. § 6973, which is part of the Resource Conservation and Recovery Act, Congress gave the courts authority to grant affirmative equitable relief when necessary to eliminate a present threat to public health posed by toxic wastes. Congress intended to give the federal government the tools necessary to bring about critically needed cleanups, and Congress expected those who caused the toxic waste problems to bear the costs and responsibility for remedying the harm. Courts therefore should not frustrate Congress' intent by reading environmental statutes narrowly, thereby hampering the government's ability to respond promptly and effectively to environmental hazards. Nor should courts limit the liability of the responsible parties beyond the statutory limits set by Congress.

When a release of hazardous waste from a facility is imminent, Congress has empowered the federal district courts to grant "such relief as the public interest and the equities of the case require" to enforce environmental laws. Bankruptcy courts could use this power to enforce environmental laws against bankrupt waste site owners when the sites pose an imminent and substantial threat to

202. 688 F.2d at 214.
204. Id.
205. Id. For a list of these limits, see 42 U.S.C. § 9607(c) (1982).
public health. Under these conditions, bankruptcy courts must examine the desirability of enforcing federal environmental laws against the responsible parties, and must determine the extent to which a debtor deserves protection under bankruptcy law. Although Congress failed to provide specific guidance in any of the environmental statutes on how courts should weigh the equities, it did provide the courts with a basis for looking beyond the rigid confines of the Bankruptcy Code to the equities of the situation. Critics of the bankruptcy courts claim the courts have not taken full advantage of this congressional invitation to examine the equities when the Code and environmental laws conflict.

The existence or nonexistence of exceptions to Bankruptcy Code provisions has figured prominently in judicial analyses of whether the Code will preclude enforcement of certain environmental orders. The existence or nonexistence of exceptions to environmental laws should play an equally significant role when these laws conflict with the Code. For example, the environmental cleanup provision contained in 42 U.S.C. § 6973 authorizes federal authorities to obtain a court order compelling the owner to clean up his site when cleanup is necessary to abate a present threat to public health. The statute does not exempt a hazardous waste site owner who has filed for bankruptcy. The lack of an express exception may suggest that Congress simply failed to consider this possibility, but it also may indicate the strength of the congressional resolve to clean up dump sites that pose a health threat to the public.

207. Enforcement of environmental regulations by federal authorities when serious threats to public health arise from a bankrupt's waste sites would comport with the exception from the automatic stay permitting state enforcement of environmental laws. For example, when states act pursuant to proper exercise of the police power, and not in the furtherance of a pecuniary interest, an exception to the stay applies. See 11 U.S.C. § 362(b)(4)-(5) (1982).

208. See, e.g., Moore, supra note 4, at 1 (quoting E. Dennis Muchnicki, Ohio Asst. Att'y Gen.) ("The courts have shown greater concern for the pecuniary interests of financial institutions and the debtors who have acted in violation of state law than for the health and safety of the public."); see also id. at 1, 9 (quoting the Justice Department amicus brief filed with the Supreme Court on the appeal of the Kovacs I decision) ("Automatic application of the stay to enforcement of [environmental] orders . . . elevates the Bankruptcy Code over the federal and state health and safety laws, thus permitting and encouraging bankruptcy as an escape from the costs of environmental protection.")

State Environmental Protection Laws

Clashes between environmental protection laws and the Code that have reached the courts to date generally have involved state rather than federal environmental laws. Perhaps the courts would weigh Congress' resolve to clean up the environment more heavily if federal law were directly at issue. Because potential toxic waste problems usually are handled first under state laws, however, conflicts with the Code more often involve only state law.

The cleanup provisions of federal statutes such as the Resource Conservation and Recovery Act do not treat chronic and recurring problems that are better handled by state statutes. The states, therefore, supply much of the legislation necessary to implement comprehensive environmental cleanup. Compliance with this legislation may be sufficiently burdensome to force some waste site owners to consider bankruptcy as an alternative to compliance.

At least one court has stated that courts should hesitate to declare that the Code has preempted a state environmental statute when the state has enacted its statute pursuant to federal goals. This analysis is atypical. The courts generally consider the police or regulatory power the sole basis of state environmental statutes, and the courts usually give only incidental mention to the broader federal environmental programs. Although consideration of the federal backdrop might not alter judicial analysis in all state environmental law conflicts with the Code, perhaps the courts would balance the equities differently and uphold the environmental laws over the Code more often in close cases.

Whether a particular state environmental law violation constitutes a criminal offense as well as a basis for civil action also might influence the analysis of a given case. Judicial recognition of the state's concern in criminal matters might tip the scales of equity

210. Id. at 1110.
211. See supra note 63. In addition to state statutes, some cleanup efforts have been pursued using common law theories such as nuisance and strict liability. See supra note 65.
212. See In re Canarico Quarries, Inc., 466 F. Supp. 1333, 1336 (D.P.R. 1979) (Puerto Rico statute enforcing compliance with federal clean air requirements upheld over bankruptcy stay).
against protection of the bankrupt.\textsuperscript{214} State criminal sanctions do not conflict directly with the Code, unlike remedial civil sanctions having a substantial pecuniary impact. State officials, therefore, might persuade a court not to construe a Code conflict that would require federal preemption.\textsuperscript{215} Furthermore, despite the great public interest in protecting creditors,\textsuperscript{216} the criminal culpability of a waste site operator might influence a court to view the state environmental enforcement action not as an attempt to enforce a money judgment, but as an action in which monetary damages would afford inadequate relief, and thus not the type of action properly subject to bankruptcy stays.\textsuperscript{217}

\textbf{Summarizing the Policies}

\textit{Policies Favoring Protection of the Bankrupt Hazardous Waste Site Owner}

The supremacy clause of the United States Constitution\textsuperscript{218} provides the strongest argument for bankruptcy protection of hazardous waste site owners when the Code would shield the bankrupt from state environmental protection laws.\textsuperscript{219} The principle that federal law prevails over inconsistent state law is a fundamental feature of our constitutional system.\textsuperscript{220} Problems arise in applying this principle to specific cases, however, because courts have difficulty determining when federal and state laws are inconsistent.\textsuperscript{221}

The desire to provide creditors with the greatest possible protection in cases of debtor insolvency supplies a second policy argument favoring bankruptcy protection. This policy offers several

\begin{itemize}
  \item \textsuperscript{214} See Quanta, 739 F.2d at 921.
  \item \textsuperscript{215} See supra notes 47-49 and accompanying text.
  \item \textsuperscript{216} See Quanta, 739 F.2d at 921.
  \item \textsuperscript{217} Aaron, supra note 40, at 19-20. Subsection (b)(1) of the automatic stay provision specifically exempts criminal proceedings against the debtor from application of the stay. 11 U.S.C. § 362(b)(1) (1982).
  \item \textsuperscript{218} U.S. Const. art. VI, cl. 2.
  \item \textsuperscript{219} The concept of preemption is not a policy, strictly speaking, but because it is so central to the functioning of our federal system, it is treated here as a policy given constitutional sanction.
  \item \textsuperscript{220} Quanta, 739 F.2d at 917.
  \item \textsuperscript{221} Cf. id. at 923 (Gibbons, J., dissenting) (pointing out that environmental protection laws do not address the same interests as the bankruptcy laws).
\end{itemize}
benefits. First, it protects creditors who might lose a "race to judgment" if they are not protected from unfair treatment in the settlement of the debtor's estate. Second, the policy promotes commercial needs by assuring creditors that, even in insolvency, they will not be left completely in the cold. This assurance encourages creditors to extend the capital essential to the needs of the marketplace. Finally, creditor protections return capital from bankrupt, nonproductive entities to the successful, ongoing businesses of creditors, a monetary flow that promotes market efficiency.

A third policy argument favoring bankruptcy protection of creditors is prevention of the takings from creditors that could result if courts strictly enforced environmental protection laws against debtors. Given the expense of cleanup operations, strict enforcement of environmental laws easily could exhaust the equity interest of an estate, leaving nothing for liquidation. A cleanup injunction that consumes a bankrupt's estate may violate the fifth amendment prohibition against taking private property for public use without just compensation.

Finally, two doctrines of judicial construction also favor bankruptcy protection of hazardous waste site owners. First, courts avoid reaching constitutional questions in statutory interpretation cases when another ground for decision is possible. Courts would follow this doctrine and avoid any fifth amendment question by strictly applying Bankruptcy Code provisions to deny government enforcement of cleanup obligations against a debtor's estate. Second, full protection under the Bankruptcy Code avoids granting equitable relief when money damages would suffice. Only in rare
circumstances would money damages not accomplish the same environmental protection sought by a government cleanup order. The Code does not permit equity to intervene and favor the government or the public over other creditors when a cleanup order would protect primarily a pecuniary interest.\textsuperscript{228}

\textbf{Policies Favoring Imposition of Environmental Duties Upon a Bankrupt Hazardous Waste Site Operator}

Weighed against the policies favoring bankruptcy protection of hazardous waste site owners are some strong policies favoring environmental cleanup by the offender. First, the accepted Code interpretation disfavors preemption of a state law by the bankruptcy laws when the conflict is not direct.\textsuperscript{229} This interpretation upholds the tenth amendment to the United States Constitution, which reserves to the states the police power, thus preserving the states' right and duty to protect the public health, safety, and welfare.\textsuperscript{230} Because states enact environmental laws pursuant to this power, and Congress enacts bankruptcy laws pursuant to federal powers that serve entirely different interests, these laws do not conflict directly. Viewing these two statutory schemes as a whole, the lack of direct conflict implies that the Code does not preempt state environmental statutes.\textsuperscript{231} The existence of federal statutes requiring environmental cleanup also weakens the supremacy clause argument for bankruptcy protection. These laws, enacted pursuant to Congress' interstate commerce power,\textsuperscript{232} provide guidelines for implementing state statutes and stand on equal footing with federal

\textsuperscript{228} \textit{See supra} notes 171-84 and accompanying text.
\textsuperscript{229} \textit{Penn Terra}, 733 F.2d at 272-73; \textit{see also In re} Chicago Rapid Transit Co., 129 F.2d 1, 5 (7th Cir.), \textit{cert. denied}, 317 U.S. 683 (1942) (when the police power is deemed withdrawn, evidence of that withdrawal should be found within the act).
\textsuperscript{230} \textit{See U.S. Const. amend. X, see also} Brown \textit{v. Brannon}, 399 F. Supp. 133, 147 (M.D.N.C. 1975), \textit{aff'd}, 535 F.2d 1249 (4th Cir. 1976) (exercise of the police power is reserved to the states by the tenth amendment).
\textsuperscript{231} \textit{Cf. Florida Lime \& Avocado Growers, Inc. v. Paul}, 373 U.S. 132, 142 (1963) (when statutory schemes as a whole do not conflict, a conflict is not to be construed between particular provisions because preemption is disfavored unless that conclusion is unmistakable). Given the controversy in the courts and among legal scholars concerning whether the Bankruptcy Code conflicts with environmental laws, the conflict in this instance hardly appears unmistakable.
\textsuperscript{232} \textit{See Reilly Tar \& Chemical Corp.}, 546 F. Supp. at 1107-08.
laws enacted under the bankruptcy power. State laws enacted pursuant to federal guidelines perhaps should be accorded some of the force and effect of federal law.

A total failure to enforce environmental duties against bankruptcy estates also would contravene the bankruptcy policy of protecting all creditors. 233 "Creditor," as defined by the Code, encompasses any "entity that has a claim against the debtor." 234 "Claim" connotes any "right to payment . . . or right to an equitable remedy." 235 Because environmental statutes typically provide for injunctive enforcement or damages for failure to comply, a state government attempting to enforce environmental laws against a debtor's estate would have a "claim," qualifying it as a "creditor" under the Code. 236 Complete relief to the debtor from all environmental obligations through Code protection would unfairly favor other creditors over the state government creditor.

Potential tort claimants—persons who might suffer adverse effects from a nearby toxic waste dump—also are creditors of a bankrupt site owner. 237 These persons could suffer injury if a court does not permit the state to enforce its environmental laws against the bankrupt. Although a judicial decision precluding environmental law enforcement would protect the bankrupt's traditional creditors, the interests of the government and potential tort claimants as "creditors" would not be protected. 238 Filing for bankruptcy to escape obligations to state environmental agencies or potential tort

233. See supra note 32 and accompanying text.
236. See Ohio v. Kovacs, 105 S. Ct. at 709-10 (holding that state environmental cleanup obligations are a debt of the estate); see also Kovacs II, 717 F.2d at 988 (holding that environmental laws provided the State with a "claim" against the offender which could be characterized as a "debt").
238. Permitting state agencies to enforce cleanup obligations may do little to protect tort victims suffering from ills already inflicted by toxic wastes or to protect victims carrying latent, unmanifested injuries. Timely enforcement of cleanup obligations would reduce the
claimants also might constitute a type of fraud upon these creditors. Efforts to avoid these obligations in bankruptcy could amount to favoritism for some creditors over others, which is inconsistent with the asset distribution scheme of the Code. As a court of equity, a bankruptcy court should not permit improper favoritism.

Because states enact environmental laws pursuant to their police power, a taking from creditors through enforcement of these laws can be avoided as long as enforcement promotes the public good and merely reduces, but does not destroy, the value of creditors' interests. Relying on the principle that the public good demands toxic waste cleanup, the state may erode creditors' interests through enforcement of cleanup obligations against the debtor without violating any fifth amendment prohibitions.

Finally, equity provides good policy justifications for enforcement of environmental laws against a debtor's estate. Clear national goals favor the protection of the environment and public health and safety, and public policy strongly favors prosecution for violations of regulations issued pursuant to this goal. Courts should not permit a bankruptcy trustee to violate state law with impunity. Courts of equity should grant equitable relief to prevent this wrong, relief that should include affirmative injunctions when necessary to force hazardous waste site owners to comply with the law.

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length of the exposure, however, and could reduce the number of victims eventually affected. State enforcement of cleanup obligations, therefore, asserts to some extent the interests of potential tort claimants as well.

A further conflict arises in the tort claim situation, which requires consideration before a governmental entity is permitted to enforce environmental laws against a bankrupt. Despite the risk that misuse of bankruptcy law might permit a site owner to escape tort liability, a failure to permit some protection in bankruptcy could cripple a site owner, depleting his assets through the early settlement of tort claims and the fulfillment of cleanup obligations, leaving later victims with empty claims against a bare corporate charter. See Roe, Bankruptcy and Mass Tort, 84 Colum. L. Rev. 846, 847-48 (1984).


241. See id. (rehabilitation of a debtor must be done within the law); see also Quanta, 739 F.2d at 919 (Congress did not intend trustees to be able to contravene state law).
The courts face a difficult task in reconciling statutory directives to protect the environment and to protect the bankrupt and his creditors. Ultimately, the courts must determine who should bear the costs of hazardous waste cleanup. They must choose between the bankrupt's creditors, through the debtor's estate, and the taxpayer, through state and federal agencies. A fair resolution may be a compromise between these two extremes.

At least one commentator has suggested that courts and legislatures should not strive to resolve the conflict because the problem eventually will disappear. This commentator's rationale presumes that bankruptcy is a severe remedy, one providing no painless refuge. Admittedly, new environmental laws will force many small operators into bankruptcy, which will force the courts to struggle with conflicting policies for a few years. Larger corporations desiring to stay in business will cooperate with the various government trusts such as "Superfund," however, to eventually eliminate the toxic waste problem and associated court disputes. The "do nothing" theory probably has considerable long-term merit. In the short term, however, the many barely solvent "mom and pop" hazardous waste operations might clog the bankruptcy courts, compelling a more systematic approach to the problem than simply "waiting for it to go away."

One option is to totally favor the debtor and his creditors over government environmental agencies, but this option probably presents insurmountable difficulties. If a waste site operator could terminate his environmental duties simply by filing for reorganization, the Bankruptcy Code would afford the operator an automatic refuge whenever cleanup duties became otherwise unavoidable. This practice not only would undermine the sound policies underlying environmental laws, but also would frustrate the Code policy

242. Comment, supra note 6, at 10,099.
243. Moore, supra note 4, at 9 (quoting Mark Wine, attorney for Kirkland & Ellis, Chicago, Ill.).
244. Id.
246. Moore, supra note 4, at 9.
of fair and equal treatment for all creditors to whom the debtor owes similar obligations. Given the current national concern about toxic waste dumps, this option finds little support in the case law, and Congress certainly would eliminate it if the option ever found favor in the courts. The option at the other extreme also merits little serious consideration. Some would advocate vigorous enforcement of every environmental statute against bankrupt offenders, but the courts are unlikely to permit the obscure or marginally significant state environmental requirements to displace an entire title of the United States Code.

Where between these extremes are the courts to strike the proper balance? To develop alternative solutions to the dilemma requires consideration of the many potential conflicts between the operative Code provisions and the competing regulatory interests. A government agency may assert purely an environmental interest; it may assert purely a pecuniary interest; most frequently, it asserts both. A workable solution to the conflict must provide the courts with the flexibility to do justice in any factual setting.

Alternatives Under Existing Law

The Bankruptcy Code classifies a government agency seeking environmental cleanup through a claim against a bankruptcy estate as a general unsecured creditor. As an unsecured creditor, the government can recoup its cleanup costs only after satisfaction of the secured and priority claims. Making the state a general unsecured creditor effectively serves the policies of the Bankruptcy Code. The supremacy of federal law over state environmental laws is preserved, senior creditors are protected, and unconstitutional takings are prevented. On the other hand, this status restricts the

247. See Aaron, supra note 40, at 2.
248. Cf. id. at 26 ("distinction between those environmental restraints which serve only a pecuniary objective and those which serve an important environmental value is most unclear").
250. See generally Rendleman, supra note 147, at 654-72 (explaining the asset distribution scheme of the Code with regard to secured, priority, and general creditors).
power of state agencies to enforce cleanup laws against environmental offenders. Although state laws requiring cleanup are not superseded totally, the state can recover only a percentage of its claim. After the payment of priority claims, including administrative expenses,\textsuperscript{251} the state will recover from the remaining assets a portion of its claim based on the ratio of cleanup costs to total debts. The Code protects the waste site operator from liability beyond the value of unsecured assets.

Enforcement of cleanup injunctions against a bankrupt through an exception to the automatic stay improves the state’s status as a creditor because the state can compel performance of regulatory obligations before any distributions to other creditors. Conversely, a trustee’s successful abandonment of a waste site subordinates the state’s claim to the claims of other unsecured creditors because it completely severs the claim from the estate. How are courts to deal with these attempts to adjust claimant priorities? Is adjustment of claimant status the most appropriate way to treat policy conflicts between the Code and environmental laws?

Courts can achieve both flexibility and fairness only by examining the particular government interests asserted and by tailoring relief according to these interests. Specifically, courts must determine whether the government claim against the debtor primarily seeks to protect a pecuniary interest or a health and safety interest. This determination is consistent with the analysis Congress intended the courts to apply to the automatic stay and its exceptions.\textsuperscript{252} A state’s pecuniary interest in a debtor’s estate deserves no more protection than other monetary claims under the Code, but interests clearly related to protection of health and safety merit an exception to the Code’s rigidity.

In determining which is the state’s primary asserted interest, courts should consider such factors as:

1. the state’s ability to perform the cleanup itself and then seek reimbursement;
2. the magnitude and imminence of the health threat;
3. the length of time since the hazard was created;

\textsuperscript{252} See supra notes 171-84 and accompanying text.
4. any government laxity in failing to pursue cleanup before bankruptcy proceedings were initiated; and
5. the degree to which the cleanup would deplete the assets of the estate.

This analysis should provide a sufficient basis for determining whether the automatic stay or any other temporary stay should apply. If the state lacks capacity to perform the cleanup, the health threat is severe or imminent, the state has had little opportunity to correct the problem because of its recent inception, or the cleanup costs are minimal, then a stay of cleanup efforts might be inappropriate. A stay of the state’s cleanup efforts would be more appropriate if the state could perform the cleanup itself or obtain a liquidated estimate of the cleanup cost for a monetary claim. A stay also would be more appropriate if the cleanup would deplete the estate assets seriously, the site does not present a severe health threat, or the hazard is one of long standing and previously was ignored by the state. This analysis achieves fairness to the bankrupt, the creditors, the state, and the public. It also maintains the flexibility necessary to reach the proper result in a specific factual situation.

Proposals for Change

A Change in the State’s Status as a Creditor

The courts might achieve a better accommodation between the conflicting policies underlying the Bankruptcy Code and environmental protection laws if they applied a different status to a government agency trying to collect from a bankrupt estate. The Code now limits the flexibility of a court to dictate a status other than general unsecured creditor. The Code permits some maneuvering when a cleanup injunction is sought by allowing the courts to characterize the asserted right as one involving enforcement under the police power rather than the assertion of a pecuniary interest. This flexibility creates problems if courts resort to this characterization too freely because it erodes other creditors’ interests and implicates possible fifth amendment “taking” concerns.

The Code provides for secured and priority statuses in its current distribution scheme, but courts presently have only covert
means\textsuperscript{253} of assigning either of these statuses to state enforcement agencies. Congress, however, could legislate a status change. State agencies could attain secured status in the enforcement of environmental laws through a statutory lien.\textsuperscript{254} State legislatures could impose such a lien, but the lien would be more effective if it were federally enacted and explicitly recognized in the Code. The Code currently permits a bankruptcy trustee to avoid most state-imposed statutory liens unless the lienholder meets strict timing and filing requirements.\textsuperscript{255} Even if a state legislature allowed an environmental agency to gain secured status and the agency met the timing and filing requirements, the agency nevertheless might be restricted to a recovery from unsecured assets because any other secured creditor's previously perfected security interest would give that creditor priority with respect to the secured property.\textsuperscript{256}

Another status option is available. A court could assign an agency priority status by classifying cleanup costs as an administrative expense. For example, New York State sought to change cleanup costs as a priority expense in \textit{In re Quanta Resources Corp.}\textsuperscript{257} Because classifying cleanup costs as an administrative expense could consume nearly the entire value of the estate, however,

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\textsuperscript{253} Allowing states to enforce cleanup orders under the guise of the police power when a pecuniary interest actually is being asserted would have an effect similar to the granting of a security interest to the state. The state would be able to enforce cleanup obligations before other creditors would be paid. See \textit{Penn Terra}, 733 F.2d at 271-77; \textit{see also supra} notes 101-22 and accompanying text. Allowing enforcement of cleanup obligations as administrative expenses would provide a way to adjust the priority of the state as a creditor. Cf. \textit{Quanta}, 739 F.2d at 922-23 (remanding the case for a determination of whether cleanup expenses could be charged as an administrative expense).

\textsuperscript{254} A statutory lien is an encumbrance on property similar to a security interest, "arising solely by force of a statute on specified circumstances or conditions." 11 U.S.C.A. § 101(45) (West Supp. 1985).


\textsuperscript{256} Secured creditors perfect their security interests by taking all steps legally required to give them an interest in a debtor's property good against other creditors. \textit{Black's Law Dictionary} 1023 (5th ed. 1979). This process usually involves certain filings to meet notice requirements. If the security interest is perfected after another security interest in the same property, the earlier interest will take from the property first, with residual value available to the later perfected interest holder. See U.C.C. §§ 9-302 to -306 (1977).

A state could attempt to displace a creditor with an earlier perfected security interest in the same property by establishing a statutory lien providing for preference over the other lien holder. This action, however, undoubtedly would create fifth amendment taking problems. See \textit{Security Indus. Bank}, 459 U.S. at 73-82.

\textsuperscript{257} 739 F.2d at 922.
a court adopting this approach in a Quanta situation probably would be stretching the definition of "administrative expenses." Congress, of course, could confer priority status upon state environmental agencies explicitly, or it could indicate specifically that cleanup costs are an administrative expense under the Code.

The secured and priority statuses, as presently defined in the Code, present significant problems if applied in the context of a hazardous waste site bankruptcy. To avoid a "taking" from other creditors, both depend upon the availability of sufficient unsecured assets to meet cleanup costs. If administrative costs exceed the value of unsecured property, administration usually should end, leaving the secured creditors to foreclose on the secured property. When the waste site itself is subject to a security interest, the secured creditor will not foreclose on a site requiring more in cleanup expenditures than its market value. In this situation, a further dilemma arises. The debtor will retain title to the property, and the state will have no further recourse against the debtor after the unsecured assets are depleted. Secured status, if not perfected before other liens, also will permit recovery only from unsecured assets. Any attempt to recover on the assets ahead of more senior secured creditors would result in a serious "takings" problem. Secured and priority statuses also would erode the status of all junior creditors. These statuses would place the government ahead of tort claimants and other general creditors, possibly leaving them with no recovery against the estate.

Creation of a New Creditor Status for State Environmental Regulatory Agencies

Instead of adjusting the status of government claimants to further environmental policies within the existing Code scheme, other options exist which might accomplish the desired results more effectively, and without as many adverse side effects. One option

258. See supra notes 146-49 and accompanying text.
would be to confer a hybrid status upon state enforcement agencies. Under this hybrid status, environmental agencies would collect on a pro rata basis with all creditors whether secured, priority, or unsecured. For example, if a bankrupt had assets equal to its outstanding liabilities and it also owed cleanup obligations to the state equalling all estate assets, the bankruptcy court would divide the estate equally between the creditors and the state. Every creditor, regardless of status, would recover half of whatever he otherwise would have received.

If state environmental agencies collected from the estate in this way, all creditors would receive some recovery from the estate without being completely displaced by cleanup costs. Tort claimants would receive a pro rata share from the unsecured assets, and secured creditors would receive a pro rata share from the secured property. This status change might avoid an unconstitutional taking because no creditor would be deprived completely of his interest in the assets and because the law recognizes that property may be reduced in value through proper exercise of the police power when the public interest so requires.261 Placing secured creditors on notice that they may be forced to share in cleanup costs also may encourage creditors to police waste site operators in the performance of their cleanup duties and cause waste site owners to operate in a more fiscally and environmentally responsible manner.

Other Options

Another option for better enforcing cleanup duties would be to use criminal sanctions against violators of hazardous waste laws. Although some state statutes already provide for criminal sanctions under certain circumstances,262 additional criminal penalties vigorously enforced prior to direct enforcement of cleanup laws could discourage bankruptcy filings. The added incentive of criminal sanctions likely would compel compliance with environmental laws if at all possible, because the Code does not shelter debtors

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261. See supra note 148.
262. See, e.g., CAL. HEALTH & SAFETY CODE § 25191 (West 1984). Virginia provides for enforcement through civil penalties instead of criminal sanctions, but the deterrent effect may be nearly as great due to the severity of the penalty, which could be as much as $10,000 per day of violation. VA. CODE § 10-186.19(C) (Supp. 1984).
from criminal sanction. The Code also does not bar recovery of fines imposed upon a debtor for noncompliance with environmental laws. The Supreme Court suggested in Ohio v. Kovacs that states should seek recoupment of such fines, rather than damages, to avoid Code preclusion of states' claims.

An additional option for achieving cleanup despite bankruptcy would be to shift financial responsibility from any nominal corporation directly to the individuals operating the site. If a court found that the individuals breached their fiduciary duties by failing to perform the corporation's legal obligations, and that this failure led to the bankruptcy, the court could hold all owners, or directors and officers, personally liable. The threat of shiftable personal liability could force corporate officials to exercise extreme caution to avoid bankruptcy, or to obtain insurance covering any personal liability in the event of bankruptcy. This insurance could provide some of the necessary cleanup funds.

Other possible means of achieving waste cleanup without adjusting the Code status of state environmental agency creditors include a requirement to maintain financial responsibility insurance coverage, mandatory contributions to state and federal cleanup trusts such as "Superfund," and the imposition of financial responsibility standards for onshore waste sites similar to the standards for offshore waste carriers imposed by the Comprehensive Environmental Response, Compensation, and Liability Act. Any of these measures would carry the risk of actually causing waste site operators to declare bankruptcy because of added fiscal obligations, but this short-term risk certainly would minimize the problems of future waste site bankruptcies.

265. See Ohio v. Kovacs, 105 S. Ct. at 711.
266. Cf. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857, 868-76 (1984) (outlining the effects of shifting personal liability to managers and positing the development of insurance coverage to bridge the liability gap).
Recommmendations

General creditor status for state enforcement agencies probably presents a reasonable mix of flexibility and fairness to promote justice in the wide variety of possible bankruptcy situations. Too many problems arise with any attempt to elevate the state to a priority or secured claimant. The police power of the state should allow assertion of a higher priority when a situation actually threatens the public health and safety. Fairness to other creditors, however, requires that this power be exercised only when the threat is imminent and substantial, and when the remedy is not so costly that it could consume all the assets of the estate. Large expenditures by the estate to comply with cleanup injunctions should be forced only when the state itself could not protect the public, and even then only after due consideration of the overall impact on other creditors. To promote greater environmental responsibility, however, the treatment of state enforcement agencies as general creditors should be coupled with the imposition of personal liability on those who knowingly violate environmental laws through both criminal and civil sanctions.

Congressional restructuring of the bankruptcy creditor statuses to address specifically the unique problem of hazardous waste also would do much to alleviate the dilemma currently facing the courts. Rather than force the courts to choose between relegating the state to collection against the estate as a general creditor and expansively interpreting an injunction pursuant to the police power, enforceable against the estate before other creditors collect, a better solution would be to permit pro rata distribution from all estate assets to the government agency to accomplish any necessary cleanup. This solution would apportion costs between the estate and the taxpayers and would force all creditors to take an active interest in the debtor's fulfillment of his cleanup duties.

268. Because a state action is not barred by the automatic stay provision if the action is based upon the state's police power and if it truly protects the public health and safety, state environmental enforcement actions meeting these requirements can assume a higher priority than general creditors usually enjoy. See 11 U.S.C. § 362(b)(4)-(5) (1982).
Conclusion

Courts face a direct conflict of policies in any clash between the Bankruptcy Code and environmental statutes. Under present law, the courts can treat a state agency with a typical environmental cleanup claim against a debtor as only a general creditor. Courts should not interpret the "police power" expansively to permit the state to "collect" from the debtor ahead of other creditors through enforcement of mandatory injunctions unless the action is essential to prevent an immediate hazard to the public health or safety. States should seek compliance with environmental statutes that do not address a critical health threat, and therefore are not enforceable against a bankrupt, through direct sanctions against the individuals responsible for the environmental violations. Ultimately, Congress may be compelled to act. Perhaps a solution fair to all parties would be congressional adoption of a special status for state environmental agencies under the Bankruptcy Code. By making the state agencies hybrid or "pro rata" creditors, cleanup costs can be apportioned fairly between the innocent parties involved in a hazardous waste site bankruptcy—the taxpaying public and the bankrupt's creditors.

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