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BANKRUPTCY AND ENVIRONMENTAL OBLIGATIONS: THE CLASH BETWEEN PRIVATE RELIEF AND PUBLIC POLICY

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I. INTRODUCTION

Bankruptcy law and policy run counter to many established principles of law. Indeed, this is intentionally so. Whereas well-established rules support, for example, enforcement of promises and compensation of victims, bankruptcy may be used to avoid such legal obligations. Bankruptcy does not dispute the validity of these obligations. It may, however, excuse performance if a debtor under the Bankruptcy Code complies with applicable Code provisions.¹ In this sense, bankruptcy fulfills the traditional role of equity, which fashions exceptions to the general operation of the laws when just cause exists.

There is at least one important difference between the operation of the bankruptcy laws and the traditional role of equity. Equity usually involves a judicial proceeding where the judge acts in light of the particular circumstances of the situation presented.² Congress, on the other hand, has extended the protections and benefits of the Bankruptcy Code on a class basis and, with the enactment of the Bankruptcy Reform Act of 1978, this has been done without any threshold showing of financial distress.³ Thus, there is a real danger that the provisions of the Bankruptcy Code may be used to overturn the application or enforcement of strong public policy without an individualized examination of the circumstances or "equities" which would justify such a result. Congress has attempted to define those instances where debtors will be denied the protections and benefits of the Bankruptcy Code,⁴ but this is done

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1. See 11 U.S.C.A. §§ 727(a), 1141, 1228, 1328 (West Supp. 1989).

2. See, e.g., *Natural Harmony, Inc. v. Normand*, 558 A.2d 231, 233 (Conn. 1989) (quoting *Aetna Cas. & Surety Co. v. Jeppesen & Co.*, 440 F. Supp. 394, 403 (D. Nev. 1977)).

3. The debtor is not required to make any showing of financial distress in order to file a bankruptcy petition. See 11 U.S.C.A. § 109 (West Supp. 1989).

4. Eligibility for bankruptcy relief is restricted if, within the prior 180 days, the debtor willfully failed to abide by the orders of the bankruptcy court in a prior bankruptcy case or if the debtor in a prior bankruptcy requested and obtained a voluntary dismissal of the bankruptcy case following the filing of a motion for relief from the automatic stay. 11 U.S.C.A. § 109(g) (West Supp. 1989). The benefit of discharge of indebtedness may be denied for particular debts. These involve particularly needy creditors (§ 523(a)(5)—alimony, maintenance, or child support) or reprehensible conduct by the debtor (§ 523(a)(2)—fraud; § 523(a)(4)—fraud in a fiduciary capacity or embezzlement; § 523(a)(6)—willful and malicious injury; § 523(a)(9)—damages resulting from the operation of a

on a class basis as well, with the attendant possibility that the exceptions may be too broad or too narrow.⁵

Because bankruptcy deals with legal obligations which are included within a very broad definition of "claims,"⁶ its potential impact on other areas of the law is unavoidable. Whenever the law's purpose or policy is backed by legally enforceable obligations, bankruptcy may affect these obligations or, at the very least, change the relative negotiating postures of persons and entities.⁷ Even the threat of bankruptcy may have an impact on negotiations. Bankruptcy considerations are therefore now part of the basic analysis whether the problems involve personal injuries, real estate, contracts, commercial or business disputes, or family law. In light of this widespread influence, it is interesting to note that recognition of this influence is only relatively recent.⁸

Another area which has recently gained widespread influence is environmental law. Lawyers involved with real estate transactions, probate estates, industrial leases, commercial financing, and business acquisitions can no longer ignore environmental considerations in the course of their legal review.⁹ Valuation of assets, whether of business inventory or real property, must factor in the potential costs of environmental obligations. Lawyers must be sensitive to what has been the past use of property, how such property is presently being used, and whether there is any need to restrict the manner of future use. Such concerns are not likely to be temporary. Recognition of environmental obligations, although relatively recent, now represents well-established public policy.

motor vehicle when legally intoxicated), or the performance of important civic obligations (§ 523(a)(1)—taxes; § 523(a)(7)—criminal fines and penalties; § 523(a)(8)—educational loans). The debtor may be denied any discharge in a Chapter 7 case if it is shown that there has been material deception or dishonesty. 11 U.S.C. § 727(a) (1988). The reorganization chapters contain a requirement that the plan be proposed in "good faith." 11 U.S.C.A. §§ 1129(a)(3), 1225(a)(3), 1325(a)(3) (West Supp. 1989). There is now a similar requirement in Chapter 7 which allows the court to dismiss a case if it finds that "the granting of relief would be a substantial abuse" of the provisions of Chapter 7. 11 U.S.C.A. § 707(b) (West Supp. 1989).

5. See, e.g., *In re Ringale*, 669 F.2d 426 (7th Cir. 1982) (debtors who defrauded disabled widow out of her life savings were nevertheless entitled to a discharge of their indebtedness in a Chapter 13).

6. 11 U.S.C. § 101(4) (1988) provides:

"Claim" means —

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

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

7. See, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (rejection of collective bargaining agreement was authorized under the then existing provisions of the Bankruptcy Code); *In re A.H. Robins Co., Inc.*, 89 B.R. 555 (E.D. Va. 1988) (court had power to disallow punitive damage claims in bankruptcy in order to preserve the estate for future compensatory damage claims).

8. See, e.g., D. BAIRD & T. JACKSON, *CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY* xxv (1st ed. 1985).

9. See Schwenke, *Environmental Liabilities Imposed on Landowners, Tenants, and Lenders—How Far Can and Should They Extend? A. An Overview of Issues of Landowner and Lender Liabilities*, 18 ENVTL. L. REP. (Envtl. L. Inst.) 10361, 10363 (1988); Note, *Landowner Liability and Toxic Waste: Application of CERCLA in United States v. Monsanto*, 34 S.D.L. REV. 392 (1989); Collier, *Environmental Liabilities in Business Acquisitions*, 67 MICH. B.J. 58 (1988).

Environmental obligations, however, are subject to the operation of the bankruptcy laws. This was made clear by the United States Supreme Court in *Ohio v. Kovacs*.¹⁰ In this case, the state of Ohio sued Kovacs, the chief executive officer and stockholder of Chem-Dyne Corporation, and other business entities for violation of state environmental laws. The corporation, along with these other entities, operated an industrial and hazardous waste site which was responsible for water pollution and fish kills. The lawsuit was settled by a stipulation which enjoined further pollution, prohibited the transporting of additional industrial wastes to the site, required the removal of certain specific wastes, and ordered the payment of \$75,000 to compensate the state for injury to wildlife. The defendants thereafter failed to comply with the provisions of the stipulation and judgment. A receiver was appointed at the request of the state to take possession of the defendants' property and to clean up the site.¹¹

Kovacs then filed a petition for relief under Chapter 11 of the Bankruptcy Code.¹² The state sought to reach his post-petition income in order to satisfy the cleanup costs. Kovacs asserted that the state's action was barred by the automatic stay and that the obligation under the stipulation and judgment was subject to discharge in bankruptcy.¹³ The Supreme Court held that, insofar as the receiver sought payment of the cleanup costs, the obligation was a "claim" under the Bankruptcy Code and therefore subject to discharge.¹⁴

The *Kovacs* case underscores the pervasive nature of bankruptcy law. Legal obligations often take the form of money judgments. Kovacs failed to clean up the site; the receiver did so and sought reimbursement from Kovacs. Because the obligation to clean up had been reduced to a demand for money, the obligation came under the protection of the Bankruptcy Code. Like money, money judgments are virtually fungible from the point of view of bankruptcy. The Bankruptcy Code is remarkably nonjudgmental about the reasons why persons or entities have sought bankruptcy relief. The obligation to bear the financial responsibility for cleanup costs is treated like other financial obligations.

The filing of a bankruptcy case will affect environmental obligations in several important respects. A stay of most creditor actions to collect or otherwise enforce obligations goes into effect automatically.¹⁵ The stay may or may not be effective against certain governmental measures to enforce environmental obligations, depending on whether the action is viewed as an exercise of regulatory powers or as an attempt to create or enforce a money judgment.¹⁶ To the extent that the obligation is a personal obligation, it is subject to discharge¹⁷ (with some exceptions)¹⁸ and/or restructuring.¹⁹ To the

10. 469 U.S. 274 (1985).

11. *Id.* at 276.

12. *Id.* at 276 n.1. Kovacs later converted the case to a Chapter 7 liquidation.

13. *Id.* at 276.

14. *Id.* at 283.

15. 11 U.S.C. § 362(a) (1988).

16. 11 U.S.C. § 362(b)(4), (5) (1988).

17. 11 U.S.C.A. §§ 727(a), 1141(d), 1228, 1328 (West Supp. 1989).

extent that the obligation runs with the property, the Bankruptcy Code will govern the distribution or abandonment of such property.²⁰ This article will describe these bankruptcy provisions and how they have affected the enforcement of environmental obligations. Where appropriate, recommendations for reform will be suggested.

II. CREATION AND ENFORCEMENT OF ENVIRONMENTAL OBLIGATIONS: THE SOLID WASTE DISPOSAL ACT AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

In order to understand what is at stake when the Bankruptcy Code is invoked to modify or discharge environmental obligations, a brief survey of these obligations is necessary. The Solid Waste Disposal Act²¹ and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980²² (CERCLA) are useful for this purpose. While these acts by no means exhaust the scope of federal²³ or state²⁴ regulation of the environment, they articulate the public policy supporting the regulation of substances which may adversely affect public health or the environment and provide a broad range of remedies to deal with such problems.

In its enactment of the Solid Waste Disposal Act, Congress declared:

[It is] the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.²⁵

This objective is to be achieved through comprehensive regulation of the generation, collection, transportation, recovery, and disposal of hazardous waste.²⁶ The primary focus is on those who are in the business of dealing with

18. See 11 U.S.C. § 523(a)(6) (1988) (willful and malicious conduct); *In re Berry*, 84 B.R. 717 (Bky. W.D. Wash. 1987) (abandonment of dangerous chemicals in open and leaking vats and failure to maintain proper containment of the chemicals constitute willful and malicious conduct under § 523(a)(6)); 11 U.S.C. § 523(a)(7) (1988) (criminal fines and penalties); *In re Tinkham*, 59 B.R. 209 (Bky. D. N.H. 1986) (criminal fines and civil penalties imposed as a result of debtor's unlawful dumping of industrial wastes without permit are nondischargeable).

19. 11 U.S.C.A. §§ 1123(b)(1), 1222(b)(2), 1322(b)(2) (West Supp. 1989).

20. 11 U.S.C. § 554 (1988).

21. 42 U.S.C.A. §§ 6901-6991i (West Supp. 1989). The 1976 amendments to this Act are entitled "The Resource Conservation and Recovery Act" and usually referred to as "RCRA." See generally 1 J. DAVIDSON & O. DELOGU, *FEDERAL ENVIRONMENTAL REGULATION* ch.4 (1989).

22. 42 U.S.C.A. §§ 9601-9675 (West Supp. 1989). See generally 2 J. DAVIDSON & O. DELOGU ch.6 (cited in note 21).

23. See also Clean Air Act, 42 U.S.C.A. §§ 7401-7642 (West Supp. 1989); Clean Water Act, 33 U.S.C.A. §§ 1251-1376 (West Supp. 1989); Toxic Substances Control Act, 15 U.S.C.A. §§ 2601-2629 (West Supp. 1989).

24. See, e.g., California Hazardous Waste Control Act, CAL. HEALTH & SAFETY CODE §§ 25100 *et seq.* (West Supp. 1990); Minnesota Environmental Response and Liability Act, MINN. STAT. ANN. §§ 115B.01 *et seq.* (West 1990); Nebraska Environmental Protection Act, NEB. REV. STAT. § 81-1501 *et seq.* (1987); South Dakota Hazardous Waste Management, S.D.C.L. §§ 34A-11-1 *et seq.* (Supp. 1989).

25. 42 U.S.C.A. § 6902(b) (West Supp. 1989).

26. 42 U.S.C.A. § 6902(a) (West Supp. 1989). See, e.g., *United States v. Waste Industries*, 556

hazardous waste.²⁷

The Environmental Protection Agency (EPA) is authorized to exercise broad remedial powers. Section 7003 of the Solid Waste Disposal Act provides:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator [of the EPA] may bring suit on behalf of the United States in the appropriate district court against any person . . . who has contributed to or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation or disposal, to order such person to take such other action as may be necessary, or both. . . . The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.²⁸

Failure to comply with any such order of the Administrator could result in a fine of \$5,000 for each day of non-compliance.²⁹

In *United States v. Conservation Chemical Co.*,³⁰ the district court held that the United States was entitled to injunctive relief under RCRA. Conservation Chemical Co. was in the business of storing, treating, and disposing of chemical waste. These wastes, however, were leaking into the subsurface soil and were being discharged into the Missouri River at a rate of 22,000 pounds per year.³¹ The court granted the EPA's request for an injunction against the company to abate the danger to the public health and the environment.³²

In *United States v. Vertac Chemical Corp.*,³³ waste chemicals from the

F. Supp. 1301 (E.D.N.C. 1982): "RCRA employed a regulatory approach designed to manage the problem of hazardous waste disposal. By providing penalties against generators, transporters, and disposers of hazardous waste who violate standards or permit requirements, the statute oversees waste from 'cradle to grave.' 45 Fed. Reg. 33,066 (1980)." See also *United States v. Solvents Recovery Service of New England*, 496 F. Supp. 1127, 1133 (D. Conn. 1980).

27. There is some conflict among the courts as to whether RCRA amendments to the Solid Waste Disposal Act apply to sites that are not actively accepting waste materials. Compare *Waste Industries*, 556 F. Supp. at 1308 (RCRA does not apply to an abandoned waste site); *United States v. Wade*, 546 F. Supp. 785, 790 (E.D. Pa. 1982) (the liability provisions of RCRA do not apply to nonnegligent past off-site generators of hazardous wastes) with *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1436 (S.D. Ohio 1984) (rejecting the analysis of *Waste Industries* and *Wade* and holding that RCRA does apply to inactive or dormant waste sites).

28. 42 U.S.C.A. § 6973(a) (West Supp. 1989). See, e.g., *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 199-200 (W.D. Mo. 1985):

[T]he government must establish three elements: (1) that the conditions at [one] . . . site "may present an imminent and substantial endangerment"; (2) that the endangerment stems from "the handling, storage, treatment, transportation or disposal of any solid waste"; and (3) that the defendant "has contributed or is contributing to such handling, storage, treatment, transportation or disposal."

See also *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 888-89 (E.D. Ark. 1980).

29. 42 U.S.C. § 6973(b) (1982).

30. 619 F. Supp. 162, 199-201 (W.D. Mo. 1985).

31. *Id.* at 182-83.

32. *Id.* at 199-201.

33. 489 F. Supp. 870, 888-89 (E.D. Ark. 1980).

manufacture of herbicides had been stored near Vertac's Arkansas plant. The district court, after balancing the burden on Vertac against the anticipated harm, ordered the corporation to take action necessary to prevent dioxin and other chemicals from escaping from storage areas and to prevent surface and underground water from penetrating the storage areas.³⁴ Vertac was ordered to construct clay barriers to surround the disposal site.³⁵

In addition to owners and operators of hazardous waste sites, the Act also allows a court to impose an injunction upon the generators and transporters of hazardous waste to restrict or remedy violations.³⁶ The Eighth Circuit, in *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*,³⁷ held that the Act specifically applies to past generators and transporters.³⁸ The court also held that corporate officers could be held individually liable under RCRA.³⁹

Criminal penalties may attach as well for violations of the Act. 42 U.S.C. § 6928 provides that any person⁴⁰ who transports, treats, stores, or disposes of any hazardous waste without a permit, or violates the conditions of any permit shall be subject to a fine of \$50,000 for each day of the violation and imprisonment of up to five years.⁴¹ False statements made in the record keeping process or destruction or alteration of records may subject the person to similar penalties.⁴²

With the revelations of health problems arising from inactive and abandoned waste sites, Congress enacted CERCLA. The intention of this Act was to give the EPA and others the power to respond to the hazards of inactive waste sites such as Love Canal.⁴³ The Act established the "Superfund"⁴⁴ and provided "for liability of persons responsible for releases of hazardous waste"⁴⁵ The goals of CERCLA were restated by Congress in the House Re-

34. *Id.* at 874.

35. *Id.* at 887-89.

36. 42 U.S.C.A. § 6928 (West Supp. 1989).

37. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

38. *Id.* at 741.

39. *Id.* at 745. Of additional interest is the fact that the corporate officers held liable in this case later sought contribution, reimbursement, or indemnity from other responsible parties who had filed bankruptcy. These claims were denied in the bankruptcy proceeding. See *In re Charter Co.*, 862 F.2d 1500 (11th Cir. 1989).

40. 42 U.S.C. § 6903(15) (1982) provides: "The term 'person' means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." This definition of "person" will include employees who deal with the hazardous waste or with the record keeping responsibilities. In *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 670 (3d Cir. 1984), the court of appeals held that the government in a criminal case must show all of the elements of the offense to be within the knowledge of the employee. Specifically, the employee must know that the waste was disposed of without a permit.

41. 42 U.S.C.A. § 6928(d)(1) & (2) (West Supp. 1989). See *Johnson & Towers, Inc.*, 741 F.2d at 665-66.

42. 42 U.S.C.A. § 6928(d)(3), (4) (West Supp. 1989).

43. H.R. REP. NO. 96-1016(I) 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6121.

44. 42 U.S.C.A. § 9611 (West Supp. 1989).

45. H.R. REP. NO. 96-1016(I), 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6121.

port which accompanied a later act that strengthened CERCLA: "CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."⁴⁶ The EPA is authorized to take remedial action necessary to protect public health and the environment, including the removal of hazardous substances from any contaminated natural resource.⁴⁷

The district courts are authorized to grant injunctive relief upon request of the President acting through the Attorney General where there may be an imminent and substantial endangerment to public health or the environment because of an "actual or threatened release of a hazardous substance" from a hazardous waste site.⁴⁸ Failure to comply with such an injunction may result in a fine of "\$25,000 for each day in which such violation occurs or such failure to comply continues."⁴⁹

If the EPA uses "Superfund" money to clean up a hazardous waste site, it may hold the responsible parties⁵⁰ liable for cleanup costs.⁵¹ Liability extends to generators and transporters⁵² as well as to those who owned or operated a facility at the time the hazardous waste was disposed.⁵³ However, there can be no liability for cleanup costs until such cleanup has occurred.⁵⁴ When no

46. H.R. REP. NO. 99-253(III), 99th Cong., 2d Sess. 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038.

47. 42 U.S.C.A. § 9604(a)(1) (West Supp. 1989).

48. 42 U.S.C. § 9606(a) (1982). *See, e.g.,* State of New York v. Shore Realty Corp., 759 F.2d 1032, 1041 (2d Cir. 1985); *Conservation Chemical Co.*, 619 F. Supp. at 175.

49. 42 U.S.C.A. § 9606(b)(1) (West Supp. 1989).

50. The responsible parties include:

- (1) owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C.A. § 9607(a) (West Supp. 1989). 42 U.S.C.A. § 9601(21) (West Supp. 1989) defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."

51. *See Shore Realty Corp.*, 759 F.2d at 1041: "[The] EPA can sue for reimbursement of cleanup costs from any responsible parties it can locate. . . . [The] Superfund covers cleanup costs if the site has been abandoned, if the responsible parties elude detection, or if private resources are inadequate."

52. *Northeastern Pharmaceutical*, 810 F.2d 726, *cert. denied*, 484 U.S. 848 (1987) (generators and transporter); *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985) (generator); *United States v. Price*, 577 F. Supp. 1103 (D. N.J. 1983) (generator); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (generators and transporters). In *Chem-Dyne*, the United States brought suit against 24 defendants who generated or transported hazardous waste to the Chem-Dyne treatment facility. *Id.* at 804.

53. 42 U.S.C.A. § 9607(a)(2) (West Supp. 1989). *See Conservation Chemical Co.*, 619 F. Supp. at 253 (W.D. Mo. 1985); *Reilly Tar & Chemical Corp.*, 546 F. Supp. at 1113.

54. The liability is for "all costs of removal or remedial action *incurred* by the United States Government" 42 U.S.C.A. § 9607(a)(4)(A) (West Supp. 1989) (emphasis added). *See Price*, 577

funds have been expended, the EPA can seek an injunction which would order the responsible parties to expend their own funds for the cleanup.⁵⁵

In cases where the EPA expends funds to clean up a hazardous waste site, the federal government is granted a lien against the property when the potentially responsible person owns the property.⁵⁶ This lien attaches when the costs are incurred or when the owner is given notice of potential liability,⁵⁷ and continues until the "liability is satisfied" or the EPA fails to bring an action against the owner during the statute of limitations period.⁵⁸ There is a three-year period for a removal action and a six-year period for remedial actions.⁵⁹ Satisfaction of the liability would naturally include payment by the responsible person, but it is not clear whether satisfaction was intended to include discharge in bankruptcy.

Liability for cleanup costs does not depend upon a finding of fault or negligence. The defenses are limited to acts of God, acts of war, or unforeseeable acts or omissions of third parties beyond the control of the defendant.⁶⁰ In *United States v. Price*,⁶¹ for example, the court held that a past, non-negligent, off-site generator of hazardous waste could be held strictly liable. In *Price*, the Hoffman-LaRoche Corporation (Roche) generated hazardous wastes that were transported to Price's landfill in New Jersey. Roche claimed it had no knowledge that its wastes had been dumped at Price's landfill. It therefore argued in its motion for summary judgment that the standard of care for CERCLA was one of negligence, not strict liability.⁶² The court held that strict liability was the correct standard because it most closely fit with congressional intent and because the law would more likely be complied with under a strict liability standard.⁶³

Under CERCLA, individuals may be subject to criminal and civil sanctions. For example, any person in charge of a waste facility⁶⁴ must immediately notify the EPA of any release of a hazardous substance from that facility.⁶⁵ Failure to notify the government can result in criminal fines and imprisonment.⁶⁶ Civil penalties of up to \$25,000 per violator may also be imposed for failing to report releases.⁶⁷ Employees are subject to the same crimi-

F. Supp. at 1110. An action may be maintained, however, for reimbursement of a partial cleanup. See *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1259 (S.D. Ill. 1984).

55. 42 U.S.C. § 9606(a) (1982). See *Industrial Park Development Co. v. E.P.A.*, 604 F. Supp. 1136 (E.D. Pa. 1985).

56. 42 U.S.C.A. § 9607(l) (West Supp. 1989).

57. 42 U.S.C.A. § 9607(l), (2) (West Supp. 1989).

58. 42 U.S.C.A. § 9607(l), (3) (West Supp. 1989).

59. 42 U.S.C.A. § 9613(g)(2) (West Supp. 1989).

60. 42 U.S.C. § 9607(b) (1982).

61. 577 F. Supp. 1103, 1113-14 (D.N.J. 1983).

62. *Id.* at 1108.

63. *Id.* at 1114.

64. A facility is defined, in part, as "(A) any building . . . pit . . . landfill, storage container, motor vehicle . . . (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed. . . ." 42 U.S.C.A. § 9601(9) (West Supp. 1989).

65. 42 U.S.C. § 9603(a) (1982).

66. 42 U.S.C.A. § 9603(b) (West Supp. 1989).

67. 42 U.S.C.A. § 9609(a) (West Supp. 1989).

nal and civil liabilities as are other entities. In *City of Philadelphia v. Stephan Chemical Co.*,⁶⁸ the district court noted that criminal convictions were obtained against two city employees who accepted bribes and allowed hazardous waste to be dumped at a city landfill. In *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*,⁶⁹ the Eighth Circuit held the president and vice-president of the defendant corporation personally liable for cleanup costs. The court stated that "CERCLA . . . imposes strict liability upon 'any person' who arranged for the disposal or transportation for disposal of hazardous substances."⁷⁰ Liability has also been extended to major stockholders who take an active role in the corporate operation.⁷¹

RCRA and CERCLA provide a comprehensive statutory scheme designed to protect the environment through the cleanup of hazardous waste sites. The EPA may seek injunctive relief to compel responsible parties, individuals and business entities, to undertake removal and/or remedial actions. Under CERCLA, the EPA may also incur cleanup costs and seek to hold the responsible parties liable for these costs. Both RCRA and CERCLA also empower a court to impose civil and criminal penalties for noncompliance with the statutory requirements. The creation of these environmental obligations are intended to ensure compliance with the national policy of minimizing the threat which hazardous wastes present to public health and to the environment.

III. THE IMPACT OF THE BANKRUPTCY CODE ON ENVIRONMENTAL OBLIGATIONS

The filing of a petition under the Bankruptcy Code has many important consequences. Creditor actions to collect debts are automatically stayed.⁷² The assets of the debtor become part of an estate which is similarly protected from creditors.⁷³ Property which is burdensome or of little value may be abandoned.⁷⁴ The creditors' claims may be discharged, restructured, or affirmed through the bankruptcy. If claims are discharged, the creditor is thereafter barred from attempting to collect on such claim.⁷⁵ Restructuring of claims allows the debtor to modify loans and other financial obligations in order to accommodate a feasible repayment schedule. The debtor does retain the option to leave certain obligations unaffected by the bankruptcy.⁷⁶ The specific rights and obligations will depend to a considerable extent upon which chapter the debtor files. Chapter 7 is for liquidation and/or discharge of in-

68. 544 F. Supp. 1135, 1139 (E.D. Pa. 1982).

69. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

70. *Id.* at 743.

71. *Shore Realty*, 759 F.2d at 1052.

72. 11 U.S.C. § 362(a) (1988).

73. 11 U.S.C. § 541 (1988).

74. 11 U.S.C. § 554 (1988).

75. 11 U.S.C. § 524(a) (1988). However, the debtor may not modify the claim of a secured creditor who holds a mortgage on the debtor's principal residence. 11 U.S.C. § 1322(b)(2) (1988).

76. 11 U.S.C. § 524(c) (1988).

debtedness.⁷⁷ Chapters 11, 12, and 13 are the reorganization chapters where the debts are restructured and a portion of same may be discharged.⁷⁸

With respect to environmental obligations, the starting point is the recognition that many of the obligations are viewed by the Bankruptcy Code as "claims."⁷⁹ *Kovacs* teaches that governmental officials charged with the enforcement of laws protecting the public health and environment need to think through their strategy in light of bankruptcy as a potential course of action by the defendants. The time to do this thinking is before the defendant becomes a debtor under the Bankruptcy Code. Once a bankruptcy petition is filed, it may be too late to improve the government's position. The date of the bankruptcy filing serves as an important benchmark for the determination of the debtor's and the creditors' rights⁸⁰ as well as possibly limiting the creditors'

77. The primary function of Chapter 7 is to give the debtor a fresh start by providing a discharge of indebtedness (with several important exceptions) in exchange for the distribution to the creditors of the nonexempt property owned by the debtor at the time of the bankruptcy filing. Because post-petition earnings of the debtor are free from claims asserted by the creditors, the debtor is able to escape the burdens of past debt and begin anew. This, of course, leaves some potential for abuse, but the bankruptcy court has the power to deal with instances of clear abuse by undeserving dishonest debtors. See, e.g., 11 U.S.C. § 523(a) (1988) (nondischargeable debts); 11 U.S.C. § 727(a) (1988) (exceptions to discharge in Chapter 7); 11 U.S.C.A. § 707(b) (West Supp. 1989) (dismissal of Chapter 7 case when there is evidence of substantial abuse of the chapter). In its intended function, Chapter 7 allows the debtor to file for protection from creditors and require them to seek payment, if any, from the nonexempt assets of the estate.

In most jurisdictions, Chapter 7 filings make up at least one-half of all bankruptcy filings. Most Chapter 7 cases involve individual debtors, although it is also used by some businesses as a convenient way of winding up operations. With individual debtors in Chapter 7, it is not uncommon for the case to be a "no asset" case. This means that there are no assets available for distribution to the unsecured creditors. The debtor may own a house, car, and other property, but the assets are either "spoken for" (secured) or exempt under state or federal law. The "no asset" case is usually quite painless for the debtor and quite frustrating for the creditors because the debtor does not give up any property or post-petition earnings, but does receive a discharge from most (and potentially all) past indebtedness.

78. Chapter 11 cases are usually for business reorganizations. In fact, the Eighth Circuit has held that persons who are not engaged in business are ineligible for relief under Chapter 11. See *Wamsganz v. Boatman's Bank of De Soto*, 804 F.2d 503 (8th Cir. 1986). Under Chapter 11, the debtor is allowed to reorganize by restructuring existing debt and using the continued operation of the business to fund the repayment of debt under a plan of reorganization. Reorganization will be dependent upon obtaining significant creditor consent to the plan. 11 U.S.C. § 1129(a)(8), (10) (1988). The plan must pay the secured claims in full, with interest, and the unsecured creditors at least as much as would be distributed to them if the estate were to be liquidated under Chapter 7. 11 U.S.C. § 1129(a)(7) (1988).

Chapter 12 is a special reorganization chapter for family farmers, passed at the height of the farm crisis in October of 1986. Pub. L. No. 99-554, 100 Stat. 3105 *et seq.* (1986). Like Chapter 11, it allows the debtor to reorganize by restructuring debt and funding the repayment out of future income from the farming operation. It is modeled after Chapter 13, but has higher debt limitations (11 U.S.C.A. §§ 109(f), 101(17) (West Supp. 1989)), allows the debtor to restructure all secured debt (11 U.S.C.A. § 1222(b)(2) (West Supp. 1989)), allows repayment of secured debt over a longer period of time (11 U.S.C.A. § 1222(b)(9) (West Supp. 1989)), and allows for certain direct payments to creditors (11 U.S.C. § 1225(a)(5) (West Supp. 1989); *In re Erickson Partnership*, 83 B.R. 725 (D. S.D. 1988)).

Chapter 13 reorganizations are for individuals with regular income and whose debts do not exceed certain specified maximums. Chapter 13 provides an alternative to Chapter 7 liquidations by allowing debtors to retain all of their property, including encumbered and nonexempt property, in exchange for payments over a three to five year period. 11 U.S.C. § 1325 (1988). This makes it possible for debtors to deal with financial problems without losing any existing property. Future income is used to pay past debt. Chapter 13 also helps the debtor to deal with debts which would otherwise be nondischargeable under 11 U.S.C. § 523(a). See 11 U.S.C. § 1328(a) (1988).

79. See 11 U.S.C. § 101(4) (1988) and text accompanying notes 10-14, *supra*.

80. In bankruptcy, the filing of the petition creates an estate consisting of "all legal or equitable

strategic options. The first impact of the bankruptcy filing, of course, is the imposition of the automatic stay.

A. The Automatic Stay and the Regulatory Power to Enforce Environmental Obligations⁸¹

The automatic stay is fundamental to the bankruptcy process. Congress has stated the following with respect to the automatic stay:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him to bankruptcy.

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.⁸²

The protection afforded by the stay is intended to be quite broad.⁸³ "The stay of section 362 is extremely broad in scope and, aside from the limited excep-

interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1988). The principle that the rights of the parties are determined as of the date of the filing is reflected in many Bankruptcy Code provisions. See, e.g., 11 U.S.C. § 362(a) (1988) (automatic stay prevents further creditor actions against the debtor and the debtor's estate); 11 U.S.C. § 522(a)(2) (1988) (the value of the debtor's exemptions are to be determined as of the date of filing); 11 U.S.C. § 544(a) (1988) (the trustee may assert the rights of various hypothetical creditors, as of the date of filing, to void certain unperfected security interests); 11 U.S.C. § 545(2) (1988) (the trustee may void certain statutory liens which are unperfected on the date of filing); 11 U.S.C. § 547(b) (1988) (the trustee may avoid preferences paid to creditors within 90 days of the filing or to insiders within one year of the filing); 11 U.S.C. § 548(a) (1988) (the trustee may avoid fraudulent conveyances made within one year of the date of filing); 11 U.S.C. § 549(a) (1988) (the trustee may avoid unauthorized post-petition transactions); 11 U.S.C. § 552 (1988) (the filing of the petition may cut off the attachment of a security interest in post-petition property acquired by the debtor); 11 U.S.C. § 553 (1988) (the trustee may avoid setoffs made within 90 days of the date of filing if there is an improvement in position by the offsetting creditor).

The courts have emphasized the importance of the filing date for the fixing of rights in the bankruptcy. In *Franklin v. State of New Mexico ex rel Dept. of Human Services*, 730 F.2d 86, 87 (10th Cir. 1984), the court of appeals quoted with approval the following conclusion of the district court: "The time of the filing of the petition in bankruptcy is so dominant in creating and preserving rights under the Code that, in order to be consistent with the legislative scheme, a court should apply the law in effect at the time of the filing of the petition." See also *Koch v. Myrvold*, 784 F.2d 862, 863 (8th Cir. 1986) (property of the estate in a Chapter 11 case is determined on the date of filing and is not affected by conversion to Chapter 7); *Heldt v. State of South Dakota—Brookings County*, 17 B.R. 519, 521 (Bky. D.S.D. 1982) ("A fundamental principle of bankruptcy law is the filing of a bankruptcy petition triggers the automatic stay which fixes a creditor's rights in the debtor's property.").

81. See generally Klein, *Hazardous Waste Liability and the Bankruptcy Code*, 10 HARV. ENVTL. L. REV. 533 (1986); Note, *Clean-Up Orders and the Bankruptcy Code: An Exception to the Automatic Stay*, 59 ST. JOHN'S L. REV. 292 (1985); Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 VAND. L. REV. 1037 (1985).

82. H.R. REP. NO. 595, 95th Cong., 1st Sess., at 340, reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6296-97.

83. See, e.g., *United States on Behalf of IRS v. Norton*, 717 F.2d 767, 771 (3d Cir. 1983); *In re*

tions of subsection (b), should apply to almost any type of formal or informal action against the debtor or the property of the state.”⁸⁴ This includes commencement or continuation of an action to collect a pre-petition claim, enforcement of a pre-petition judgment, obtaining possession of the debtor’s property, creating or enforcing liens, setoffs against claims owing to the debtor, and any informal methods to collect a claim.⁸⁵

The effect of the stay is to void all creditor actions taken in violation of the stay.⁸⁶ This applies whether or not the creditor has actual notice of the bankruptcy filing.⁸⁷ Thus, a foreclosure sale which occurs after the petition has been filed with the bankruptcy court clerk is void, even though none of the participants at the sale are aware of the filing. Willful violation of the stay may give rise to an adversary proceeding by the debtor for damages, including costs and attorneys’ fees, and, in appropriate circumstances, punitive damages.⁸⁸

The exceptions listed in section 362(b), although limited, have specific impact on the enforcement of environmental obligations. Section 362(b)(4) provides an exception for “the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power.” Section 362(b)(5) provides an exception for “the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power.” Taken together, these two exceptions to the automatic stay give the government significant enforcement powers in the environmental area.

The leading case on these exceptions is *Penn Terra Ltd. v. Dept. of Environmental Resources*.⁸⁹ Penn Terra Limited was a Pennsylvania corporation which operated coal surface mines in western Pennsylvania. The state Department of Environmental Resources (DER) served Penn Terra and its president with thirty-six citations for violation of environmental protection statutes. Penn Terra did not contest the citations and, through its president, entered into a consent order and agreement to correct the situation. The company, however, did not comply with the schedule for corrective measures. Instead, it filed a Chapter 7 petition.⁹⁰

Approximately one month after the bankruptcy filing, the DER brought an action in the Commonwealth Court of Pennsylvania seeking injunctive re-

Wallingford’s Fruit House, 30 B.R. 654, 659 (Bky. D. Maine 1983); *In re Pinellas Motel Partnership*, 2 B.R. 113, 117-18 (Bky. M.D. Fla. 1979).

84. 2 COLLIER ON BANKRUPTCY ¶ 362.04, at 362-31 (15th ed. 1989).

85. 11 U.S.C. § 362(a) (1988).

86. See, e.g., *Small Business Administration v. Rinehart*, 887 F.2d 165 (8th Cir. 1989) (offset of farm program payments by SBA was voided by the automatic stay).

87. See, e.g., *In re Elder*, 12 B.R. 491 (Bky. M.D. Ga. 1981) (garnishment occurring after bankruptcy filing but before notice was received was void).

88. 11 U.S.C.A. § 362(h) (West Supp. 1989). See, e.g., *Rinehart*, 887 F.2d 165.

89. 733 F.2d 267 (3d Cir. 1984).

90. *Id.* at 269-70. The bankruptcy schedules of assets showed property with a total value of \$14,000. This included \$13,500 in certificates of deposit which had been given to the DER as bonds for the backfilling operation. *Id.* at 270.

lief against Penn Terra and its president for enforcement of the terms of the consent order and correction of the violations. After hearing testimony, the court granted the requested injunctive relief.⁹¹ Penn Terra responded with a motion in the bankruptcy court to hold the DER and two of its attorneys in contempt of the stay. The bankruptcy court rejected the DER's contention that its actions fell within the exception for exercise of police powers and enjoined DER from enforcing the state court's injunction. The district court affirmed the bankruptcy court's decision.⁹²

On appeal to the Third Circuit, the injunction against the DER was reversed. The court held that the DER's action fell well within the state's police and regulatory powers.⁹³ The principal issue was whether the action also fell within the exception to the exception — that is, whether the enforcement of a judgment pursuant to the police powers was actually an attempt to enforce a money judgment. The court noted that the request for an injunction to compel the performance of certain remedial *acts* did not, as a matter of form, constitute enforcement of a money judgment.⁹⁴ It took the analysis further, however, to whether the requested relief would achieve in actuality what a money judgment was intended to achieve. The court concluded that it did not.⁹⁵

The determination turned on whether the remedy sought was prospective or retrospective:

[A]n important factor in identifying a proceeding as one to enforce a money judgment is whether the remedy would compensate for past wrongful acts resulting in injuries already suffered, or protect against potential *future* harm. Thus, it is unlikely that any action which seeks to prevent culpable conduct *in futuro* will, in normal course, manifest itself as an action for a money judgment, or one to enforce a money judgment. This is consistent with our earlier observations, since a traditional money judgment requires *liquidated* damages, i.e. a sum certain, and one cannot liquidate damages which have not yet been suffered due to conduct not yet committed. Nor can one calculate such a sum with any certainty. Indeed, the very nature of injunctive relief is that it addresses injuries which may not be compensated by money.⁹⁶

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91. The commonwealth court ordered Penn Terra to undertake the following remedial action:
1. complete all backfilling and final grading at the Hilty Surface Mine by October 15, 1982;
 2. submit updated erosion and sedimentation plans for the Hilty and Crawford Surface Mines within fifteen days;
 3. seal the deep mine opening on the Hilty Surface Mine within fifteen days;
 4. submit for approval by DER a plan for the removal of all top strata stored over the gas line at the Hilty Surface Mine within fifteen days;
 5. effectuate the plans for erosion and sedimentation control and removal of top strata stored over the gas line within fifteen days of approval of the plan by DER;
 6. complete top soil spreading, mulching, and seeding of the Hilty Surface Mine by October 15, 1982.

Id. at 270 n.3.

92. *Id.* at 270.

93. *Id.* at 274.

94. *Id.* at 275.

95. *Id.* at 278.

96. *Id.* at 276-77 (emphasis in original).

The court expressly rejected the approach of the bankruptcy court which was, in effect, anything that costs money to enforce is a money judgment.⁹⁷ The bankruptcy court had noted that the requested actions would require the expenditure of funds. Because the assets available to all creditors in the Chapter 7 would be exhausted by the expenditure, the bankruptcy court had concluded that such a result would be the equivalent of enforcing a money judgment in favor of the government.⁹⁸

Following the distinction between past injury and future harm, the Third Circuit concluded that the injunction in this case was not an equivalent of a money judgment:

It was not intended to provide compensation for past injuries. It was not reduceable to a sum certain. No monies were sought by the Commonwealth as a creditor or obligee. The Commonwealth was not seeking a traditional form of damages in tort or contract, and the mere payment of money, without more, even if it could be estimated, could not satisfy the Commonwealth Court's direction to complete the backfilling, to update erosion plans, to seal mine openings, to spread topsoil, and to implement plans for erosion and sedimentation control. Rather, the Commonwealth Court's injunction was meant to prevent future harm to, and to restore, the environment.⁹⁹

The analysis in this case suggests that some care is necessary in the framing of the request for remedial action under the environmental protection laws. The distinction between past and future harm is not self-evident. Indeed, it is subject to characterization by both sides. Looking at the corrective measures in the *Penn Terra* case, is it clear that they were not for the purpose of remedying past damage to the mining sites? It certainly could be argued that the measures were intended to put the property back in the condition that it would have been in had the violations of the environmental laws not occurred. It would also be fair to argue that past injury is in fact the predicate for a showing of future harm. The failure to remedy the problem in the past presents a problem for the future. The two concepts are not easily distinguished and may, in the environmental context, be inseparable.

This does suggest, however, that the outcome might turn on whether the debtor intends to cease operations or to reorganize and continue operations. If the debtor files for liquidation under Chapter 7 or submits a liquidating plan under Chapter 11, then the argument for future violations may be weakened. If the debtor intends to reorganize, however, the ongoing operation should be viewed in terms of the potential future harm. Debtors ought not to be able to preserve their own economic viability through continuing noncompliance with state and federal environmental laws.¹⁰⁰

97. *Id.* at 277.

98. *Id.*

99. *Id.* at 278.

100. See *In re Thomas Solvent Co.*, 44 B.R. 83, 88 (Bky. W.D. Mich. 1984) (enforcement action stayed on the condition that the Chapter 11 debtor move to convert the case to Chapter 7 or file a liquidating plan within 90 days).

The distinction between past damages and future harm was followed by the Fifth Circuit in *Matter of Commonwealth Oil Refining Co.*¹⁰¹ In this case, Commonwealth Oil Refining Co. (CORCO) had operated an oil refinery plant in Puerto Rico until 1982 when it ceased operations. It then leased its storage tanks to various companies for storage of fuel oil, gas, and liquified natural gas. The plant had been operated on an approved interim status as a hazardous waste facility in accordance with the provisions of RCRA. In April of 1984, the EPA requested that CORCO submit a secondary application by October in order to complete the permit process. CORCO, however, filed a Chapter 11 petition in July and thereafter notified the EPA that it would not submit the requested application nor any plan for closure of the facility.¹⁰² CORCO filed a motion in the bankruptcy court for an order determining the applicability of the automatic stay provision and for an order staying the EPA's enforcement action. The bankruptcy court denied CORCO's motion, and the district court affirmed.¹⁰³

The Fifth Circuit affirmed, holding that the EPA's actions were an exercise of its police and regulatory powers and thus within the section 362(b)(4) exception to the automatic stay and not within the proscription against enforcement of a money judgment.¹⁰⁴ The court rejected CORCO's argument that the police and regulatory exception only applied when there was evidence of "imminent and identifiable harm."¹⁰⁵ Applying the plain language of the statute, the attempt to bring the debtor into compliance with federal environmental laws could only be characterized as an exercise of the police and regulatory powers.

The more difficult question was whether the EPA enforcement action fell within the money judgment exception. The court acknowledged that filing the requested application or filing a closure plan and commencement of closure activities would require the debtor to spend money.¹⁰⁶ This could not be the test, however.¹⁰⁷ The Third Circuit chose to follow the *Penn Terra* test of

101. 805 F.2d 1175 (5th Cir. 1986).

102. *Id.* at 1179.

103. *Id.* at 1179-80.

104. *Id.* at 1183-84.

105. *Id.* at 1184.

106. *Id.* at 1186.

107. The court cited with approval the following language in *United States v. ILCO, Inc.*, 48 B.R. 1016, 1023 (N.D. Ala. 1985):

ILCO, as well as other defendants, will be forced to spend money to clean up the hazardous waste sites. Obviously, this will deplete ILCO's assets to the detriment of other creditors. Congress indicated in § 362(b), however, that preserving the debtor's estate was not always the dominant goal. The legislative history . . . indicates that the enforcement of an injunction ordering compliance with environmental laws is more important than the debtor's right to have a breathing spell from its creditors or than the creditors' rights to an orderly administration of the estate. Furthermore, if courts were to find, as ILCO contends, that an order which requires the expenditure of money is a "money judgment," then "the exception to section 362 for government police [and regulatory] action, which should be construed broadly, would instead be narrowed into virtual nonexistence [A]lmost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity."

Id. at 1187 n.13.

whether the remedy sought was intended to provide compensation for past injuries or to prevent future harm. CORCO's costs in this case would be the cost of completing an application and bringing the facility into compliance as a hazardous waste facility or the cost of submitting a plan of closure and closing the facility. None of this dealt with the damages, if any, from the debtor's prior operation of the oil refinery. The compliance was prospective in nature. Moreover, the EPA had not requested money nor had it even suggested that payment of money by the debtor would satisfy its obligation to perform. The court therefore held that the money judgment exception was not applicable.¹⁰⁸

Application of sections 362(b)(4) and 362(b)(5) was further elaborated by the Third Circuit in *United States v. Nicolet, Inc.*¹⁰⁹ The United States filed suit in 1985 against Nicolet under the provisions of CERCLA. The action sought reimbursement of response costs incurred and to be incurred in the cleanup of an asbestos site in eastern Pennsylvania. The expenditures at the time of the lawsuit amounted to \$1 million and it was estimated that an additional \$300,000 would be needed for future remedial work. Before payment of the response costs could be collected, Nicolet filed for relief under Chapter 11 of the Bankruptcy Code.¹¹⁰

The question before the Third Circuit was whether the CERCLA lawsuit could proceed to trial. The government argued that it could obtain a verdict and entry of judgment, consistent with section 362(b)(4), and not run afoul of the money judgment exception so long as it did not seek execution on the judgment.¹¹¹ Because the action sought reimbursement for funds already expended, the government could not argue the past damages/future harm distinction which had been successful in *Penn Terra* and *Commonwealth Oil*. In fact, even though at least a portion of the requested relief was arguably prospective in nature, the court assumed that all expenses of the cleanup related to past activities.¹¹² The court looked to the legislative history and concluded that the attempt to fix the amount of damages was consistent with the exercise of regulatory powers.¹¹³ The entry of judgment may not have an immediate economic effect, but it will aid the governmental effort to identify the responsible parties and to adjudicate their responsibility, if any, for cleanup costs.¹¹⁴

In cases where the government seeks reimbursement for costs expended,

108. *Id.* at 1187-88. For a case where the money judgment exception was found to be applicable, see *In re Thomas Solvent Co.*, 44 B.R. 83, 84 (Bky. W.D. Mich. 1984) (court enjoined state action to require debtor to purify and protect groundwater at an estimated cost of \$2 to \$2.5 million).

109. 857 F.2d 202 (3d Cir. 1988).

110. *Id.* at 203.

111. *Id.*

112. *Id.* at 207.

113. *Id.* at 208. The Senate and House Committee Reports used identical language on this point: "[W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." S. REP. NO. 95-989, at 52, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 5838; H.R. REP. NO. 595, at 343, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6299 (emphasis added by court).

114. See also *United States v. Standard Metals Corp.*, 49 B.R. 623, 625 (D.C. D. Colo. 1985) (court allowed an action to fix the damages and enter a money judgment against the debtor).

it is sometimes contended that the government's action is not regulatory, but pecuniary, and thus not within the section 362(b)(4) exception. There is some evidence in the legislative history to lend credence to this argument. The reported remarks of Senator DeConcini and Representative Edwards on the purpose of the regulatory exception to the stay include the following:

[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.¹¹⁵

This would appear to suggest that courts should view the government's assertion of the regulatory exception with some skepticism whenever it is seeking monetary damages from a debtor. The *Nicolet* court, however, held that the government's interest in the enforcement of environmental statutes, even where it seeks money damages, is a regulatory obligation and not the enforcement of a pecuniary interest of government.¹¹⁶

The "pecuniary interest" exception to the section 362(b)(4) regulatory exception was analyzed by the United States District Court in *United States v. Mattiace Industries, Inc.*¹¹⁷ In this case, the defendant was engaged in the business of packaging and selling chemicals. It contracted to ship 8,000 gallons of methyl ethyl ketone (MEK) from New York to Virginia. MEK is a flammable and toxic solvent often used in the manufacture of paint. The tanker trailer used to haul the solvent overturned at a point en route and spilled approximately 4,800 gallons of MEK. Much of the solvent seeped into the soil and groundwater. The EPA notified Mattiace of its responsibility and ordered it to cleanup the site. Mattiace initially agreed to assume responsibility and began preliminary work at the site. Shortly thereafter, it ceased work at the site. The EPA expended approximately \$1 million of Superfund money in removing the MEK from the soil and testing and treating the groundwater.¹¹⁸

Before the EPA could recover these response costs, Mattiace filed for protection under Chapter 11 of the Bankruptcy Code. The EPA then filed an action against Mattiace and other responsible parties in the district court to recover the response costs incurred in the cleanup of the hazardous waste site, to impose civil fines and punitive damages for the failure to comply with the EPA administrative cleanup orders, and to obtain injunctive relief to require the defendants to monitor the groundwater at the site.¹¹⁹ Mattiace asserted the protection of the automatic stay against the continuation of the action.

The seeking of injunctive relief and the fines were well within the scope of

115. 124 Cong. Rec. S17, 409, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6505, 6513 (statement of Sen. DeConcini); 124 Cong. Rec. H11,089, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6436, 6444-45 (statement of Rep. Edwards).

116. *Nicolet*, 857 F.2d at 209-10.

117. 73 B.R. 816 (E.D.N.Y. 1987).

118. *Id.* at 817.

119. *Id.* at 816.

section (b)(4), as conceded by Mattiace. It asserted, however, that the attempt to recover response costs and punitive damages were stayed under the pecuniary interests rule.¹²⁰ The court acknowledged that several cases had applied the pecuniary interests rule to stay governmental enforcement actions, but concluded that those cases involved statutes enacted primarily for financial reasons, not primarily for public health and welfare.¹²¹ By contrast, the clearly expressed intention of CERCLA is to provide "for appropriate environmental response action to protect public health and the environment from the dangers posed by [hazardous waste] sites."¹²² The fact that the EPA seeks reimbursement for expenditure of Superfund moneys is not, in and of itself, conclusive as to the pecuniary or regulatory purpose of its actions. The potential for monetary recovery or for the imposition of punitive damages may serve to underscore the deterrence function of CERCLA and thereby protect the public health and welfare.¹²³ The court concluded that the CERCLA action initiated by the EPA was, in all respects, within the regulatory exception of section 362(b)(4).

There is another exception to the automatic stay which is potentially applicable to enforcement proceedings. If the government chooses to bring a criminal prosecution, the filing of a bankruptcy petition will normally not stay the commencement or continuation of the criminal case.¹²⁴ In *United States v. Troxler Hosiery Co., Inc.*,¹²⁵ criminal contempt proceedings were brought against the company as a result of an unlawful sale of garments which had been treated with a hazardous substance. Judgment was entered for a fine and costs totalling \$82,733.48. The company later filed a Chapter 11 petition.¹²⁶ The bankruptcy court denied the government's request for relief from the stay, but the district court reversed. Criminal proceedings are clearly excepted from the stay, and the district court held that enforcement of the judgment obtained in the criminal proceeding was likewise excepted from the stay, even though the government was seeking collection of money.¹²⁷

120. *Id.* at 818.

121. *Id.* at 819. The cases considered by the court included *Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *In re Charter First Mortgage, Inc.*, 42 B.R. 380, 385 (Bky. D. Ore. 1984); *In re Sampson*, 17 B.R. 528, 530 (Bky. D. Conn. 1982); *In re Pizza of Hawaii, Inc.*, 12 B.R. 796, 799 (Bky. D. Hawaii 1981); *In re Joe Delisi Fruit Co.*, 11 B.R. 694, 696-97 (Bky. D. Minn. 1981); *In re King Memorial Hosp., Inc.*, 4 B.R. 704, 707 (Bky. S.D. Fla. 1980).

122. H.R. REP. NO. 1016, 96th Cong., 2d Sess., 1, 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119.

123. *Mattiace*, 73 B.R. at 819. *See also* *United States v. Standards Metals Corp.*, 49 B.R. 623, 625 (D. Colo. 1985) (the deterrence function of potential fines will serve to protect public health and safety).

124. 11 U.S.C. § 362(b)(1). *See* H.R. REP. NO. 95-595, 95th Cong., 1st Sess., 342, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6299: "[T]he bankruptcy laws are not a haven for criminal offenders but are designed to give relief from financial over extension. Thus, criminal actions may proceed in spite of bankruptcy." *See also* *United States v. Troxler Hosiery Co., Inc.*, 41 B.R. 457 (D. N.C. 1984) (government enforcement of a criminal fine and costs imposed in criminal contempt proceeding was excepted from the automatic stay).

125. 41 B.R. 457 (D.N.C. 1984).

126. *Id.* at 458-59.

127. *Id.* at 462-63.

As with the regulatory enforcement exception, however, the form of the proceeding will not be conclusive. If the criminal proceeding is actually an attempt to collect a pre-petition claim unrelated to criminal penalties, then the bankruptcy court may enjoin the action or the creditors from participating in the action.¹²⁸ These instances have arisen most often in bad check prosecutions where the state will dismiss the criminal prosecution upon payment of the check.¹²⁹ It is not very likely that such a contention will be available when criminal fines or penalties are sought for violation of environmental statutes. Even if reimbursement for response costs is viewed as a form of restitution, the breach of the public order by the responsible parties is a matter which is independent of such restitution and will probably not be stayed by a bankruptcy filing.

The automatic stay therefore will not halt most administrative proceedings and actions when the government keeps within its regulatory powers or exercises its criminal enforcement powers.¹³⁰ This does not end the matter, however. Because enforcement may sometimes require the seeking of money from the defendant, there are some significant rights offered to the defendant who seeks the protection of the bankruptcy laws.

B. Bankruptcy Treatment of the Environmental Obligation as a Claim¹³¹

When an environmental obligation has been reduced to a money obligation, the Bankruptcy Code allows the debtor to treat it like other claims, that is, subject to either restructuring or discharge. Restructuring allows a debtor to rewrite the indebtedness either as to amount, interest rate, or time of repay-

128. See, e.g., *In re Van Riper*, 25 B.R. 972 (Bky. W.D. Wis. 1982); *In re Alan I. W. Frank Corp.*, 19 B.R. 41 (Bky. E.D. Pa. 1982); *Johnson v. Lindsey*, 16 B.R. 211 (Bky. M.D. Fla. 1981).

129. See, e.g., *In re Butler*, 74 B.R. 106, 107 (W.D. Mo. 1985); *In re Ohio Waste Services, Inc.*, 23 B.R. 59, 60 (Bky. S.D. Ohio 1982); *In re Caldwell*, 5 B.R. 740, 742 (Bky. W.D. Va. 1980).

130. See, e.g., *United States v. F.E. Gregory & Sons, Inc.*, 58 B.R. 590 (W.D. Pa. 1986) (proceeding which sought to order the debtor to perform reclamation work at an abandoned mine site was excepted from the automatic stay); *In re Professional Sales Corp.*, 56 B.R. 753 (N.D. Ill. 1985) (EPA had authority to terminate the "interim status" of a hazardous waste facility operated by a Chapter 11 debtor); *Ilco*, 48 B.R. 1016 (action for injunctive relief for violations of federal environmental statutes was excepted from the automatic stay); *Illinois v. Electrical Utilities*, 41 B.R. 874 (N.D. Ill. 1984) (suit by state for violation of federal Toxic Substances Control Act was excepted from the automatic stay); *United States v. Energy International, Inc.*, 19 B.R. 1020 (S.D. Ohio 1981) (action to enforce violations of surface laws not stayed by the automatic stay); *In re Security Gas & Oil, Inc.*, 70 B.R. 786 (Bky. N.D. Cal. 1987) (state's action to terminate the debtor's operations or to force the debtor to reclaim abandoned wells was excepted from the automatic stay); *In re Norwesco Development Corp.*, 68 B.R. 123 (Bky. W.D. Pa. 1986) (order requiring the debtor to provide a temporary and permanent water supply to homeowners damaged by the debtor's drilling activity was excepted from the stay); *In re Lenz Oil Service, Inc.*, 65 B.R. 292 (Bky. N.D. Ill. 1986) (automatic stay did not apply to state's environmental protection suit for fixing of fines and penalties and implementation of cleanup orders); *In re Laurinberg Oil Co., Inc.*, 49 B.R. 652 (Bky. M.D. N.C. 1984) (injunction action against debtor to abate violations of state water pollution laws was excepted from the automatic stay). There is even one case where the bankruptcy court judge dismissed the case, rather than lift the stay, because of the ongoing violation of state law and the serious and immediate danger to the citizenry in the surrounding area. *In re Charles George Land Reclamation Trust*, 30 B.R. 918, 923 (Bky. D. Mass. 1983).

131. See generally Baird and Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199 (1984).

ment.¹³² Discharge excuses performance of the obligation.¹³³

With respect to restructuring, the initial question will be whether the claim is secured or unsecured. A creditor who seeks to have a claim treated as secured must first have a security interest that was perfected as of the date of filing of the bankruptcy petition.¹³⁴ Second, the amount of the secured claim will be equal to the value of the collateral.¹³⁵ As so determined, the secured portion of the claim must be paid in full, with interest.¹³⁶ If the obligation is unsecured, the claim may be paid over time in an amount equal at least to what would be received in a Chapter 7 liquidation.¹³⁷ There is an additional requirement in Chapters 12 and 13 that the debtor commit to payment of net disposable income to the Trustee during the period of the plan.¹³⁸

In the reorganization chapters, it should be noted that to the extent the cleanup occurs after the filing of the bankruptcy petition, it may be treated as an administrative expense and thus be required to be paid in the plan.¹³⁹ The debtor in a reorganization cannot discharge administrative priority debts and the time for repayment is relatively short.¹⁴⁰ Thus, treatment of cleanup costs as administrative claims may help to ensure their eventual payment. In *In re Pierce Coal and Construction, Inc.*,¹⁴¹ the bankruptcy court found that the cleanup costs which arose while the debtor in possession was operating its business were "actual and necessary costs and expenses of preserving the estate."¹⁴² It found, however, that costs incurred pre-petition could not be given an administrative priority.¹⁴³ The bankruptcy court in *In re Hemingway Transport, Inc.*¹⁴⁴ allowed a purchaser of property from a Chapter 11 debtor a priority administrative claim for past and future response costs incurred.

Even if the debtor files a Chapter 7 case, it may be useful to classify the cleanup costs as administrative expenses entitled to priority, in the event there are unencumbered assets to be distributed. The district court in *In re Stevens*¹⁴⁵ held that cleanup costs incurred by the state Department of Environmental Protection subsequent to the filing of a Chapter 7 petition would be entitled to priority as an administrative expense. Likewise, in *In re Peerless*

132. See 11 U.S.C.A. §§ 1123(b)(1), 1222(b)(2), 1322(b)(2) (West Supp. 1989).

133. 11 U.S.C. § 524(a) (1988).

134. 11 U.S.C. § 544(a) (1988).

135. 11 U.S.C. § 506(a) (1988).

136. 11 U.S.C.A. §§ 1129(a)(7)(A)(ii), 1225(a)(5), 1325(a)(5) (West Supp. 1989).

137. 11 U.S.C.A. §§ 1129(a)(7)(A)(ii), 1225(a)(4), 1325(a)(4) (West Supp. 1989).

138. 11 U.S.C.A. §§ 1225(b)(1)(B), 1325(b)(1)(B) (West Supp. 1989).

139. 11 U.S.C.A. §§ 1129(a)(9)(A), 1222(a)(2), 1322(a)(2) (West Supp. 1989).

140. In Chapter 11, the administrative claims must be paid, in cash, on the effective date of the plan, unless the administrative claimant agrees to a different treatment under the plan. 11 U.S.C. § 1129(a)(9)(A). In Chapters 12 and 13, the administrative claims must be paid, with interest, over the period of the plan, unless the administrative claimant agrees to a different treatment under the plan. 11 U.S.C.A. §§ 1222(a)(2), 1322(a)(2) (West Supp. 1989).

141. 65 B.R. 521 (Bky. N.D. W.Va. 1986).

142. *Id.* at 530 (quoting 11 U.S.C. § 503(b)(1)(A) 1988).

143. *Id.* at 531.

144. 73 B.R. 494 (Bky. D. Mass. 1987).

145. 68 B.R. 774 (D. Maine 1987).

Plating Co.,¹⁴⁶ the EPA incurred cleanup costs of over \$130,000 and was entitled to an administrative priority to the assets of the estate which totalled approximately \$110,000. The bankruptcy court in *In re T.P. Long Chemical, Inc.*¹⁴⁷ held that cleanup costs would be treated as an administrative expense of the estate, but they could not be assessed against funds in which another creditor had a prior perfected security interest.

With respect to discharge of obligations, it is important to look at each Chapter separately. In Chapter 7, corporate debtors do not receive any discharge, although individual debtors may.¹⁴⁸ Discharge in Chapter 7 is therefore a concern for individual debtors. In *United States v. Whizco, Inc.*,¹⁴⁹ the federal government sought injunctive relief ordering the corporate debtor and the individual sole shareholder to comply with environmental obligations to reclaim their abandoned coal mine. The corporation and Lueking, its sole shareholder, had not complied with their statutory obligation to reclaim surface area which had been disturbed by the mining operation. After the Secretary of the Interior brought suit in district court for injunctive relief, the corporation and Lueking filed petitions under Chapter 11 and later converted to Chapter 7.¹⁵⁰ The district court granted the requested injunctive relief against the corporation, but denied it with respect to Lueking on the ground that his obligation to reclaim the sites would be discharged in the Chapter 7 case.¹⁵¹ On appeal, the Sixth Circuit held that the obligation would be discharged to the extent that it would require Lueking to spend money, but would not to the extent that Lueking could comply without spending money.¹⁵² The court stated in its conclusion:

It is clear . . . that [Lueking] does not have the physical capacity to reclaim the mine site himself, and that he would have to hire others to perform the work for him. This would require the expenditure of money. Thus, although the terms of the injunction would not require the payment of money, to the extent that the injunction were to be effective, it would. The injunction could only be enforced by contempt and then only if Lueking sometime in the future has funds either from future earnings, inheritance or gifts, etc. To hold him in contempt a court would have to find that he had the ability to pay others to perform the reclamation work. To the extent, therefore, that the injunction would have purpose or value it would require the payment of money. Thus, when we look at the substance of what the plaintiff seeks, rather than the form of the relief sought, we see that the plaintiff is really seeking payment. We hold that to the extent that fulfilling his obligation to reclaim

146. 70 B.R. 943 (Bky. W.D. Mich. 1987).

147. 45 B.R. 278 (Bky. N.D. Ohio 1985).

148. 11 U.S.C. § 727(a) (1988). This is because the liquidating corporation does not normally need a discharge of indebtedness. It simply winds up and dissolves pursuant to state law. See, e.g., S.D.C.L. § 47-7-45 (1983) (time for filing proof of claim); S.D.C.L. § 47-7-50 (1983) (time for bringing action against the corporation, its officers, directors, or shareholders).

149. 841 F.2d 147 (6th Cir. 1988).

150. *Id.* at 148.

151. *Id.*

152. *Id.* at 151.

the site would force the defendant to spend money, the obligation was a liability on a claim as defined by the Bankruptcy Code.¹⁵³

This is where the Bankruptcy Code will have its strongest impact upon the enforcement of environmental obligations. The ability of individuals to seek relief from valid indebtedness in Chapter 7 is fundamental to the bankruptcy laws. If environmental obligations are treated just like other debts, then the prospect of discharge is very attractive.¹⁵⁴

Individual debtors in Chapter 7 cases ordinarily receive a discharge in Chapter 7, but they will remain liable for certain debts classified as nondischargeable under section 523(a). There are potentially two sections applicable here. The first is section 523(a)(6) — willful and malicious injury to the property of another. When the violation of the environmental laws has been willful, there is a chance that the environmental obligation will be held nondischargeable. The main difficulty will be showing that the injury resulting from the violation was also malicious. The courts that have found nondischargeability under section 523(a)(6) have usually done so on the basis of constructive or implied malice.¹⁵⁵

The bankruptcy court in *In re Berry*,¹⁵⁶ for example, held that abandonment of property which required cleanup of chemical wastes was “willful and malicious” within the meaning of section 523(a)(6). The debtor in this case operated an auto restoration and chrome plating business which generated a substantial amount of hazardous chemical waste. The waste was stored in drums on the business premises. After falling behind on rent, the debtor filed a Chapter 11 petition. The bankruptcy court lifted the automatic stay and ordered the debtor to abandon the premises. The debtor did not surrender possession until a state court ordered restitution pursuant to an unlawful detainer action. The debtor then vacated the premises, leaving behind several thousand gallons of hazardous waste. The next day, the debtor converted his case to Chapter 7. An inspection of the property revealed that several of the chemical containers were open and unmarked. It was later found that many of the abandoned chemicals were flammable, toxic, and highly dangerous to public health and safety. There was also a leak in one of the storage tanks, resulting in a spill of toxic chemicals. The total cost for cleanup of the site

153. *Id.* at 150-51.

154. See also *Matter of Carracino*, 53 B.R. 513 (Bky. D. N.J. 1985) (liability under New Jersey environmental protection statute for spill of hazardous waste into river was dischargeable); *In re Robinson*, 46 B.R. 136 (Bky. M.D. Fla. 1985), *rev'd on other grounds*, 55 B.R. 355 (M.D. Fla. 1985) (debtor's pre-petition duty to restore marshland to condition existing before debtor unlawfully excavated and filled the land was dischargeable).

155. See, e.g., *In re Mills*, 73 B.R. 638 (Bankr. 9th Cir. 1987) (intentional refusal to maintain premises with knowledge that harm would necessarily result from such action would support a finding of willful and malicious); *In re Clayburn*, 67 B.R. 522 (Bky. N.D. Ohio 1986) (the debtor need not harbor ill will toward the victim—only knowledge that the acts are wrongful—to support a finding of malice). But see *In re Tinkham*, 59 B.R. 209 (Bky. D. N.H. 1986) (intentional and unlawful disposal of chemicals wastes was not willful and malicious because it was not certain that injury to property would result); *Carracino*, 53 B.R. 513 (hazardous waste which spilled into river as a result of a fire was not a willful and malicious injury because the injury was separate from the intentional accumulation of waste adjacent to the river).

156. 84 B.R. 717 (Bky. W.D. Wash. 1987).

exceeded \$48,000.¹⁵⁷

The debtor argued that he left the premises involuntarily, as a result of the eviction order, and that he had been financially unable to remove the chemicals. The court, however, followed the standard articulated by the Ninth Circuit in *In re Cecchini*,¹⁵⁸ which interpreted "willful and malicious" to mean that "[w]hen a wrongful act . . . done intentionally, necessarily produces harm and is without just cause or excuse, it is 'willful and malicious' even absent proof of specific intent to injure." In applying this standard, the court found that the debtor's acts were willful in that he had full knowledge of the environmental and safety hazards when he abandoned the premises.¹⁵⁹ His defense that he was forced to abandon the premises was not sufficient in light of the imminent and identifiable danger. An actual finding of malice was not required under these circumstances. The cleanup costs were therefore held to be nondischargeable.¹⁶⁰

The second area of nondischargeability is section 523(a)(7) — fines and penalties.¹⁶¹ The leading case in this area is *Kelly v. Robinson*,¹⁶² where the United States Supreme Court held that a restitution order imposed as a condition of probation in a welfare fraud case was nondischargeable. Because the amount ordered as restitution was equivalent to the amount wrongfully taken, it was argued that the restitution was compensation for pecuniary loss. The Court rejected this argument. It found that the order of restitution served important penal and rehabilitative goals which were independent of pecuniary interests.¹⁶³

Fines and penalties arising as a result of environmental violations present a clearer case of nondischargeability under section 523(a)(7). That is, they are usually labelled as such and, when imposed, are in addition to cleanup costs.¹⁶⁴ Thus, a criminal fine in the amount of \$40,000 and a civil penalty in

157. *Id.* at 718-19.

158. 780 F.2d 1440, 1443 (9th Cir. 1986).

159. *Cecchini*, 84 B.R. at 720-21.

160. *Id.* at 721.

161. 11 U.S.C. § 523(a)(7) (1988) provides, in part, that the debt will not be dischargeable "to the extent that such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss"

162. 479 U.S. 36 (1986). A broad reading of this section (consistent with *Kelly*) may be found in *In re Wright*, 87 B.R. 1011, 1013-16 (Bky. D.S.D. 1988) where it was held that a criminal restitution order to pay the victim (the FDIC) was punishment, not compensation, and therefore within section 523(a)(7).

163. The Supreme Court stated:

In our view, neither of the qualifying clauses of § 523(a)(7) allows the discharge of a criminal judgment that takes the form of restitution. The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.

Kelly, 479 U.S. at 52.

164. See *supra* text accompanying notes 29, 40-42, 64-67.

the amount of \$670,000 was held to be nondischargeable.¹⁶⁵ In another case, the bankruptcy court held that the three year limitation period is only for tax penalties and the civil penalty of \$60,000 for violations of state surface mining laws would be nondischargeable.¹⁶⁶

It is appropriate to note, however, that the section 523(a) nondischargeability provisions do not apply to partnerships or corporations. By its own terms, section 523(a) affects only the discharge of "individual" debtors.¹⁶⁷ An individual, under the Bankruptcy Code usage, is distinct from a partnership or corporation.¹⁶⁸ Therefore, although it would probably be difficult to conclude that a corporation acted in a willful and malicious manner, the fines and penalties incurred by business entities are potentially dischargeable, if not in bankruptcy, by operation of state law.

The issue of dischargeability in Chapter 11 is more complex. The individual debtor in Chapter 11 remains subject to the section 523(a) nondischargeable debts.¹⁶⁹ Chapter 11 is consistent with section 523(a) in that the restrictions on dischargeability apply only to "individual" debtors.¹⁷⁰ The corporate or partnership debtor will be able to discharge the portion of the unsecured claim over the amount to be paid in the plan, unless it liquidates, ceases doing business, and would have been denied a discharge under Chapter 7.¹⁷¹ The limitations of section 523(a) do not apply. The restructuring which occurs within the Chapter 11 Plan will be binding on the creditors.¹⁷² This will include treatment of debts which would otherwise be nondischargeable under section 523(a). It is also important to remember that the power to restructure extends to pre-petition claims. Expenses of administration are treated differently than other unsecured pre-petition claims.¹⁷³ Moreover, the question of when a liability becomes a claim may be affected by nonbankruptcy law.¹⁷⁴

The ability of the Chapter 11 business entity debtor to restructure any debt is dependent upon meeting the other requirements for confirmation. Like the other reorganization chapters, the plan must pay the creditors at least as much as they would receive if the estate were to be liquidated under Chapter 7.¹⁷⁵ In addition, the debtor must obtain, at a minimum, the consent of at

165. *Tinkham*, 59 B.R. 209. The fine and the civil penalty were in addition to the monetary damages in excess of \$11 million. See also *Carracino*, 53 B.R. 513 (criminal fines excepted from discharge).

166. *In re Daugherty*, 25 B.R. 158 (Bky. E.D. Tenn. 1982).

167. 11 U.S.C. § 523(a) (1988).

168. See 11 U.S.C.A. § 101(35) (West Supp. 1989).

169. 11 U.S.C. § 1141(d)(2) (1988).

170. Both § 523(a) and § 1141(d)(2) specifically refer to "individual" debtors, not corporate or partnership debtors. See also 11 U.S.C. § 727(a)(1) (1988).

171. 11 U.S.C. § 1141(d)(3) (1988).

172. 11 U.S.C. § 1141(a) (1988).

173. 11 U.S.C. § 1129(a)(9)(A) (1988).

174. See, e.g., *In re Combustion Equipment Associates, Inc.*, 838 F.2d 35 (2d Cir. 1988) (declaratory relief action to determine whether potential liability of debtor had been discharged in bankruptcy was premature because the EPA had not decided whether to act, if at all, against the debtor by ordering it to clean up landfills); *In re Johns-Manville Corp.*, 63 B.R. 600 (S.D. N.Y. 1986).

175. 11 U.S.C. § 1129(a)(7) (1988).

least one class of impaired claims.¹⁷⁶ Ideally, the debtor should attempt to gain the consent of all impaired classes because confirmation under section 1129(a) is usually easier than confirmation under the "cram-down" provisions of section 1129(b).¹⁷⁷ In any event, reorganization under Chapter 11 requires substantial negotiation with creditors and so it is not possible to make generalizations about what will be discharged and what will not. It is fair to say, however, that discharge of fines and penalties is a distinct possibility in a Chapter 11 confirmed plan of reorganization.

Dischargeability in Chapter 12 for family farmers is similar to Chapter 11 for individuals.¹⁷⁸ There is no discharge for section 523(a) debts.¹⁷⁹ The farm reorganization must work with these debts although it is not required that they be paid in full during the period of the plan. All other unsecured claims are subject to discharge if the plan is successfully completed by the farmer.¹⁸⁰

If an individual debtor seeks relief under Chapter 13, the debts which would otherwise be nondischargeable under sections 523(a)(6) or (a)(7) may be discharged.¹⁸¹ This is, for good or ill, one of the primary features of Chapter 13.¹⁸² There are, for example, many cases which hold that criminal restitution payments, fines, or penalties are "debts" within the meaning of the Bankruptcy Code and thus subject to discharge in Chapter 13.¹⁸³ The same is true for willful and malicious injury debts.¹⁸⁴

176. 11 U.S.C. § 1129(a)(10) (1988). A class of claims is impaired unless (1) the plan makes no change in the legal, equitable, and contractual rights of the creditor; (2) cures and compensates the creditor on account of any pre-petition default and makes no other change in the legal, equitable, and contractual rights; or (3) cashes out the claim in full. 11 U.S.C. § 1124 (1988).

177. See Klee, *All You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979). The absolute priority rule of § 1129(b)(2)(B)(ii) may be an insurmountable hurdle to reorganization in some cases. See, e.g., *Norwest Bank of Worthington v. Ahlers*, 485 U.S. 197 (1988).

178. The principal difference between the two Chapters with respect to discharge is that the discharge in Chapter 11 occurs when the plan is confirmed (§ 1141(d)) and the discharge in Chapter 12 occurs after the plan has been successfully completed (§ 1228(a)).

179. 11 U.S.C.A. § 1228(a)(2) (West Supp. 1989).

180. 11 U.S.C.A. § 1228(a) (West Supp. 1989).

181. 11 U.S.C. § 1328(a) (1988).

182. See, e.g., *Rimgale*, 669 F.2d 426 (debtors who defrauded disabled widow out of her life savings were nevertheless entitled to a discharge of their indebtedness in Chapter 13); *In re DeSimone*, 25 B.R. 728 (E.D. Pa. 1982) (debt owed as a result of an assault was dischargeable in Chapter 13); *In re Rudy*, 92 B.R. 478 (Bky. D. Ore. 1988) (restitution payments imposed as a condition of probation were dischargeable in Chapter 13); *In re Riggleman*, 76 B.R. 111 (Bky. S.D. Ohio 1987) (judgment based on willful and malicious injury was dischargeable in Chapter 13); *In re Chase*, 28 B.R. 814 (Bky. D. Md. 1983) (consent judgment based on a sexual assault was dischargeable in Chapter 13).

183. See, e.g., *In re Johnson-Allen*, 871 F.2d 421 (3d Cir. 1989), cert. granted sub. nom. *Pennsylvania Dept. of Public Welfare v. Davenport*, No. 89-156, 110 S. Ct. 49 (1989); *In re Cancel*, 85 B.R. 677 (N.D.N.Y. 1988); *In re Erickson*, 104 B.R. 364 (Bky. D. Colo. 1989); *In re Christensen*, 95 B.R. 886 (Bky. D.N.J. 1988); *In re Heincy*, 78 B.R. 246 (Bankr. 9th Cir. 1987); *In re Vohs*, 58 B.R. 323 (Bky. D. Mont. 1986). Because the Supreme Court has granted certiorari in the *Davenport* case, there may be some change in this rule but for the moment the trend of authority strongly favors treating such obligations within the Bankruptcy Code. But see *In re Ferris*, 93 B.R. 729 (Bky. D. Colo. 1988) (filing of Chapter 13 petition did not convert criminal fine, restitution, imprisonment, or community service obligation into "debt" that could be discharged in a Chapter 13 case).

184. See, e.g., *Handeen v. LeMaire*, No. 88-5275, at 4 (8th Cir. Mar. 26, 1990) (1990 WL 32239) (debtor who shot the creditor-victim five times at point-blank range could discharge a portion of the civil judgment against him in a Chapter 13 case if the other requirements of Chapter 13 could be met).

The only issue remaining for the objecting creditor is whether the Chapter 13 Plan has been filed in good faith.¹⁸⁵ The attempt to discharge debts in Chapter 13 which are otherwise nondischargeable under section 523(a) does not *per se* constitute a lack of good faith.¹⁸⁶ However, the most recent case from the Eighth Circuit on dischargeability in Chapter 13 may provide grounds for reassessment of this statement. The Eighth Circuit, *en banc*, in *Handeen v. LeMaire*,¹⁸⁷ reversed the bankruptcy court's finding of good faith where the debtor's pre-petition conduct was so egregious that discharge would violate public policy.

In this case, LeMaire shot at Handeen nine times with a bolt action rifle and hit him five times. Several of the shots were fired at point blank range. Handeen somehow survived the attack and later obtained a judgment in the amount of \$50,362.50. LeMaire filed a Chapter 13 petition. His first plan proposed to pay the unsecured claims approximately 10 cents on the dollar over a period of 36 months. Before confirmation, LeMaire increased the dividend to 13.75%. Handeen objected and the bankruptcy court denied confirmation, expressing some concern over the debtor's budget and his failure to propose a plan for the maximum period of five years. LeMaire submitted a new plan which called for increased monthly payments over a period of five years. The proposed dividend on the unsecured claims was 42.3%. Under these circumstances the bankruptcy court confirmed the plan over Handeen's objection. The district court affirmed, as did a panel of the Eighth Circuit.¹⁸⁸ After rehearing *en banc*, the decision of the bankruptcy court was reversed.¹⁸⁹

The Eighth Circuit reiterated its earlier holding that nondischargeability under section 523(a) is a factor relevant to good faith.¹⁹⁰ The specific nature of the pre-petition conduct will also be relevant to the issue of the debtor's motivation in seeking bankruptcy relief. Undoubtedly foremost in the minds

185. 11 U.S.C. § 1325(a)(3) (1988).

186. See, e.g., *Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987); *In re Estus*, 695 F.2d 311 (8th Cir. 1982).

187. No. 88-5275 (8th Cir. Mar. 26, 1990) (1990 WL 32239).

188. *Handeen v. LeMaire*, 883 F.2d 1373, 1381 (8th Cir. 1989).

189. *LeMaire*, 1990 WL 32239.

190. *Id.* at 6. See *In re Estus*, 695 F.2d at 317. The factors listed by the court in *Estus* to be considered in the determination of good faith are:

- (1) the amount of the proposed payments and the amount of the debtor's surplus;
- (2) the debtor's employment history, ability to earn and likelihood of future increases in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and
- (11) the burden which the plan's administration would place upon the trustee.

See also *Zellner*, 827 F.2d at 1227.

of the majority was the fact that the debtor was attempting to discharge a debt resulting from an attempted murder. The court stated:

We are convinced that the [bankruptcy] court's analysis here fails to properly consider strong public policy factors, inherent in the Bankruptcy Code, which are implicated in discharging this debt and give undue emphasis to the fact that the statutory terms governing Chapter 13 petitions do not expressly make a debt resulting from a willful and malicious injury nondischargeable. In light of the court's clear errors both in according insufficient weight to the nondischargeability of this debt in Chapter 7, and in finding that LeMaire's motivation and sincerity in seeking Chapter 13 relief were proper, we do not believe that LeMaire has fulfilled the good faith requirement of Chapter 13.¹⁹¹

The court was careful to limit its holding to the specific and unusual facts of this case.¹⁹² It does serve as a warning to others whose debts carry similar public policy dimensions. The potential to affect dischargeability of environmental obligations therefore is now a consideration. The nature of the violation of the environmental laws will be a very significant factor in this determination. The more egregious the violation, the greater likelihood that good faith will become an issue. Even if the environmental obligation is not egregious and does not carry strong public policy implications, the burden will remain on the debtor to show that the proposed plan is the best effort and has been proposed in good faith.¹⁹³ The discharge of section 523(a) debts with a minimal payment can no longer be counted on.

If environmental obligations do not fall within any category of nondischargeable debt, then individuals may receive a discharge, either in Chapter 7 or Chapter 13. Corporations may also receive a discharge through the negotiation and restructuring process in Chapter 11 or by operation of state law if they wind up and dissolve. The dischargeability of environmental obligations is troubling in light of the strong public policy which supports their creation.

One potential solution is to add another subsection to 523(a) which would make environmental obligations specifically nondischargeable. This would cover individual debtors in Chapter 7. There is no guarantee that the obligation would ever be paid, but it would be consistent with the statutory scheme which looks to the responsible parties as the primary sources of remedy and reimbursement.¹⁹⁴ The relative ease of discharge of indebtedness in a Chapter 7 case seriously undermines this policy. The prospect that environmental obligations will not be dischargeable in bankruptcy may also have a salutary effect on the identification and correction of environmental problems.

It is not enough, however, to simply add another nondischargeability provision. It does not solve the problem of dischargeability for corporate entities in Chapter 11 and for individual debtors in Chapter 13. Discharge of indebtedness in reorganization must be handled in a different manner. If the envi-

191. No. 88-5275, at 9-10 (8th Cir. Mar. 26, 1990) (1990 WL 32239).

192. *Id.* at 14.

193. See *Zellner* 827 F.2d 1222.

194. See, e.g., 42 U.S.C.A. § 6928 (West Supp. 1989); 42 U.S.C.A. § 9607 (West Supp. 1989).

ronmental obligations are given the status of priority claims under section 507, then they must be paid in the plan of reorganization and cannot be discharged. Priority claims in a Chapter 11 plan must be paid in full — either in cash on the effective date of the plan or, in the case of taxes, within six years from the date of assessment.¹⁹⁵ Given the sizeable amount of some environmental obligations, it would probably be best to give the debtor the same length of time as the tax priority claims.¹⁹⁶ For Chapter 13 individuals, all priority claims must be paid off in full during the course of the plan.¹⁹⁷ Creation of an additional priority claim category for environmental obligations would make compliance a condition for reorganization.¹⁹⁸

C. Abandonment of Assets Which Are Burdened by Environmental Obligations¹⁹⁹

Dischargeability concerns the personal obligations of debtors. Environmental obligations may attach as well to property.²⁰⁰ Property with environmental obligations cannot be treated like other property in bankruptcy. As discussed above, expenses incurred in connection with the cleanup or restoration of property may be treated as an administrative priority claim.²⁰¹ In addition, although the trustee in bankruptcy (and the debtor-in-possession)²⁰² normally has the power to abandon property which has little value or is burdensome to the estate,²⁰³ there are restrictions if there are environmental problems with the property. The property may have no value, possibly even negative value, but it cannot be abandoned under section 554 if it poses an immediate threat of a serious public health or safety risk, according to the United States Supreme Court in *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*.²⁰⁴

In *Midlantic*, the debtor, Quanta Resources Corporation, operated two waste oil processing facilities in New Jersey and New York. The New Jersey Department of Environmental Protection discovered that Quanta was in violation of a condition in its operating permit because it had accepted more than 400,000 gallons of PCB-contaminated oil. Quanta was ordered to cease operations and begin cleanup. Before an agreement on how the cleanup would pro-

195. 11 U.S.C. § 1129(a)(9) (1988).

196. 11 U.S.C. § 1129(a)(9)(C) (1988).

197. 11 U.S.C. § 1322(a)(2) (1988).

198. It would also obviate the need to distinguish between pre-petition and post-petition expenses as is presently the case. See, e.g., *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988); *In re Mowbray Engineering Co., Inc.*, 67 B.R. 34 (Bky. M.D. Ala. 1986).

199. See generally Cosetti and Friedman, *Midlantic National Bank, Kovacs, and Penn Terra: The Bankruptcy Code and State Environmental Law — Perceived Conflicts and Options for the Trustee and State Environmental Agencies*, 7 J. L. & COM. 65 (1987).

200. See *supra* text accompanying notes 56-59. See generally Epling, *Environmental Liens in Bankruptcy*, 44 BUS. LAW. 85 (1988).

201. See *supra* text accompanying notes 139-47.

202. 11 U.S.C. § 1107(a) (1988).

203. 11 U.S.C. § 554 (1988). The purpose of abandonment is to enable the trustee to be efficient in the liquidation of the debtor's property for distribution to the creditors. 4 COLLIER ON BANKRUPTCY ¶ 554.01 (15th ed. 1989).

204. 474 U.S. 494 (1986).

ceed was reached, Quanta filed a Chapter 11 petition. Within a month, the case was converted to Chapter 7. After the bankruptcy filing, an inspection of the New York facility revealed that Quanta had accepted and stored over 70,000 gallons of PCB-contaminated oil in deteriorating and leaking containers.²⁰⁵ The Chapter 7 trustee sought to abandon the New York facility and the contaminated oil at the New Jersey facility under the authority of section 554.²⁰⁶ It was clear that both assets had no value and were burdensome to the estate. The bankruptcy court granted the motions to abandon the assets, but these decisions were reversed by the Third Circuit.²⁰⁷

The Supreme Court affirmed the Third Circuit, stating that the trustee did not have "*carte blanche* to ignore nonbankruptcy law."²⁰⁸ The Court could not attribute to Congress the intention of overturning its own explicit policy of protecting the environment against toxic pollution.²⁰⁹ It held therefore that before a trustee may abandon property in contravention of a state statute or regulation, there must be provision for adequate protection of the public's health and safety.²¹⁰ The Court cautioned that the threat to public health or safety must be "imminent and identifiable." Speculative or indeterminate future violation of laws resulting from the abandonment will not be sufficient to prevent the trustee from exercising the abandonment power.²¹¹

The cases after *Midlantic Bank* reinforce the caution that the threat must be imminent and serious, not speculative. In *In re Smith-Douglass, Inc.*,²¹² the Fourth Circuit approved the abandonment of a fertilizer plant even though the property had remaining unremedied violations of state environmental laws. The bankruptcy court found, and the Court of Appeals agreed, that there was no threat of immediate harm. The lack of any pending enforcement action by the state environmental protection agency served as a basis for this finding.²¹³ Similarly, in *Franklin Signal Corp.*,²¹⁴ the bankruptcy court permitted abandonment of fourteen barrels of contaminated waste because there

205. *Id.* at 496-97. The eventual cost to clean up the New York property was \$2.5 million. *Id.* at 498.

206. Although what happens after there has been an abandonment by the trustee is not always clear, it is likely that the property in this case would go to the secured creditors. See Drabkin, Moorman and Kirsch, *Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor*, 15 ENV'T L. REP. 10168, 10181 (1985). The court in *In re Franklin Signal Corp.*, 65 B.R. 268, 274 (Bky. D. Minn. 1986) made the following observation:

Under 11 U.S.C. § 554, abandonment divests the property from the estate. Ownership and control of the asset is reinstated in the debtor with all rights and obligations as before filing of a petition in bankruptcy. See, e.g., *Bennett v. Commercial Credit Plan*, 13 B.R. 643 (Bkcty. D. Mich. 1981); *Riggs National Bank v. Perry*, 29 B.R. 787 (Bkcty. D. Md. 1983); *In re Cruseturner*, 8 B.R. 581 (Bkcty. D. Utah 1981). As a result, the fourteen barrels of waste become [the debtor's] property, subject to the security interest held by the Bank of Clear Lake.

207. *In re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984); *In re Quanta Resources Corp.*, 739 F.2d 927 (3d Cir. 1984).

208. *Midlantic*, 474 U.S. at 502.

209. *Id.* at 505-06.

210. *Id.* at 506-07.

211. *Id.* at 507 n.9.

212. 856 F.2d 12 (4th Cir. 1988).

213. *Id.* at 16.

214. 65 B.R. 268 (Bky. D. Minn. 1986).

was no threat to public safety. Again, the lack of a pending enforcement action was relevant to this finding.²¹⁵ Finally, in *In re Brio Refining, Inc.*,²¹⁶ the environmental harm at the time of the abandonment was not even known by any of the parties and thus a later motion for reimbursement of response costs as administrative expenses was denied. If the hazard was unknown, it could not be deemed to be "imminent and identifiable."²¹⁷

Abandonment was subjected to financial conditions in *In re FCX, Inc.*²¹⁸ In that case, the debtor's burial of five tons of pesticide in an uncontrolled condition was an immediate threat to the health of those living in the area, even though the harm might not be manifested for several years. "[T]he danger is immediate in the sense that there is a *present* and real possibility of public exposure to those deadly substances if they are not removed."²¹⁹ The court therefore allowed abandonment on the condition that the debtor set aside \$250,000 for the payment of clean up costs.

One unresolved problem with the restrictions on abandonment set forth in the *Midlantic* case concerns the position of the trustee. First, why would anyone assume employment as trustee in a case where there are environmental obligations? This was the case, for example, in *In re Charles George Land Reclamation Trust*,²²⁰ where the private trustee declined to serve because of the potential liability. If the trustee cannot abandon the property, the trustee may incur liability as an owner/operator.²²¹ Second, how does the trustee remedy environmental problems in the absence of funds in the estate? If the trustee has no funds with which to cure the imminent and identifiable harm, the trustee is in a position of responsibility without means or, possibly, the expertise to correct the problem. If the answer is that it helps to have someone charged with responsibility for the cleanup so that maximum cooperation with state or federal agencies is fostered, then it would make sense to absolve the trustee from personal liability as an owner/operator during the period of appointment. This would require an amendment to the definition of responsible parties in the environmental statutes.

215. The court articulated five factors to be considered:

- (1) the imminence of danger to the public health and safety,
- (2) the extent of probable harm,
- (3) the amount and type of hazardous waste,
- (4) the cost to bring the property into compliance with environmental laws, and
- (5) the amount and type of funds available for cleanup.

Id. at 272.

216. 86 B.R. 487 (N.D. Tex. 1988).

217. *Id.* at 489.

218. 96 B.R. 49 (Bky. E.D. N.C. 1989).

219. *Id.* at 55 (emphasis in original).

220. 30 B.R. 918, 923 (Bky. D. Mass. 1983). The court dismissed the case because of the immediate need to turn over responsibility for remedial measures to state and federal environmental agencies. It did note, however, that if the case had not been dismissed, it would have ordered the U.S. Trustee to serve as the Chapter 7 Trustee. *Id.*

221. See *supra* text accompanying notes 28-34, 52-55.

IV. CONCLUSION

The primary intention of bankruptcy law is to give the honest debtor relief from financial distress. By providing either a fresh start or an opportunity to reorganize, bankruptcy law serves an important role in the attempt to achieve a productive economy with a modicum of compassion. Because this humane purpose may conflict with other important public policy, it is always necessary to evaluate whether the bankruptcy laws have overreached in a particular area. It would appear that this may be the case with respect to environmental obligations. Congress should conduct a review of what it intends to achieve by protecting the public health and the environment and whether this is being undermined by the bankruptcy laws as presently constituted. Legislating equity, as the bankruptcy laws attempt to do, is a difficult task. Fine tuning of equitable rules, in light of what has been learned from experience, will help to serve both the purposes of bankruptcy law as well as the purposes of environmental law.