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Bankruptcy's Effect on Environmental Claims: Should Involuntary Environmental Creditors be Entitled to Non-dischargeable Super-priority Creditor Status?

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**BANKRUPTCY'S EFFECT ON ENVIRONMENTAL CLAIMS:
SHOULD INVOLUNTARY ENVIRONMENTAL CREDITORS
BE ENTITLED TO NON-DISCHARGEABLE
SUPER-PRIORITY CREDITOR STATUS?**

by
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I. INTRODUCTION

There is an inherent tension between environmental legislation which seeks to impose financial liability on polluters, and the Bankruptcy Code ("Code")² which seeks to limit financial liability. The most important goals underlying the Code are to afford the debtor a fresh start, rehabilitate financially distressed businesses, and

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² The United State Constitution confers upon Congress the power to establish laws regarding bankruptcy. U.S. CONST. art. I, § 8, cl. 4. In 1978 Congress recodified the Bankruptcy Act as the Bankruptcy Code, 11 U.S.C. §§ 101 - 1330 (1979 & Supp. 1992).

provide equitable distribution of available funds amongst creditors.³ These objectives become feasible by limiting liability or maximizing the scope of a discharge of debt.⁴

The recognition of environmental obligations, although relatively recent, now represents a well established national public policy of protecting the public health and safety from past, present, and future conduct that tends to pollute the environment.⁵ In addition to protecting the public from danger, environmental legislation also seeks to institute remedial measures, including reimbursement of the full value costs of clean-up, from those responsible for the pollution.

Therefore, when a debtor attempts to use the Code to dodge liability for environmental clean-up costs, a court is faced with a decision, political in nature, which requires a choice between two important competing concerns: the financial health of a debtor, and assigning the costs of cleanup to the public, an involuntary creditor of the debtor, in order to protect the public and environment from pollution. As political questions are generally considered non-justiciable,⁶ Congress must enact legislation which apportions financial responsibility among all entities responsible for environmental pollution, whether or not such entities are seeking relief under the Code.

This Article will address the judiciary's struggle to balance the competing values between the protection afforded to a debtor under the Code and the protection that environmental legislation is intended to afford the general public. Specifically addressed will be the present status of case law and its impact upon environmental law enforcement as applied to the right of a trustee⁷ or debtor in

³ Richard E. Epling, *Impact of Environmental Law on Bankruptcy Cases*, 26 WAKE FOREST L. REV. 69 (1991).

⁴ *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991).

⁵ Jonathan K. Van Patten & Richard D. Puetz, *Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy*, 35 S.D. L. REV. 220, 221 (1990).

⁶ *Baker v. Carr*, 369 U.S. 186 (1962); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-13, at 96 (2d ed. 1988).

⁷ See 11 U.S.C. §§ 704, 1106, 1302 (1992), which generally describe the duties of a bankruptcy trustee for a debtor seeking protection under Ch. 7, 11, or 13. Trustees are appointed for Chapter 7 and Chapter 13 cases. Trustees are generally not appointed for reorganization cases since the debtor is considered best suited for running its operations. In general, the trustee's duties are to gather all the debtor's property, to protect and maintain

possession⁸ to abandon contaminated property, the granting of administrative expense priority to environmental claimants, and dischargeability of environmental cleanup claims. This Article proposes a solution to the often confusing and inconsistent case law by concluding that Congress should affix financial responsibility on the debtor by amending the relevant statutory provisions to the Code so as to prevent abandonment of contaminated property and grant non-dischargeable super-priority status to environmental claims of governmental entities.

II. COMPETING GOALS OF BANKRUPTCY AND ENVIRONMENTAL LAW

The stigma of filing a bankruptcy petition seems to have disappeared.⁹ In fact, filing a Chapter 11 bankruptcy petition¹⁰ for reorganization has become a corporate planning device with tremendous legal and financial versatility.¹¹ Furthermore, neither insolvency¹² nor a showing of financial distress is required in order to seek protection under the Code.¹³ Thus, in addition to the

it, to sell the property for the highest possible price, and to distribute the proceeds among creditors according to the Code's statutory priorities.

⁸ See 11 U.S.C. § 1107 (1992). When a debtor seeks reorganization and files a Chapter 11 petition, the business continues to operate under the control of the debtor-in-possession ("DIP"). The DIP controls a new legal entity - the estate - and has most rights and duties of a trustee.

⁹ Peter Blackman, *Bankruptcies in a Box*, 10 CAL. LAW. 19 (Dec. 1990).

¹⁰ Chapter 11, entitled "Reorganization", is the primary rehabilitation proceeding. In general, it applies to debtors engaged in business. The goal of Chapter 11 cases is to rehabilitate a business as a going concern rather than to liquidate it. Analogous to Chapter 11 are Chapters 9, 12, and 13 which respectively set forth the statutory framework for reorganizing a municipality, a family farmer, or an individual. Although relevant to all such proceedings, this Article focuses primarily on corporate reorganization and Chapter 7 liquidation.

¹¹ Robert E. Kroll, *Strategic Bankruptcy*, 8 CAL. LAW. 50 (Sept. 1988).

¹² *Id.* See also Van Patten & Puetz, *supra* note 4; Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988). With the debtor facing mass tort liability for asbestos exposure, Chapter 11 filing permitted debtor to protect its substantial revenues even though it had assets far in excess of its liabilities at the time of filing its petition for relief.

¹³ 11 U.S.C. § 109 (1992). As to who may be a debtor, this section is devoid of any requirement that a debtor (other than a municipality filing for protection under Chapter 9) be insolvent. See also, Kroll, *supra* note 11.

debtor's primary tools of negotiation and litigation for dealing with an environmental claim, the plausible alternative of bankruptcy also lurks in the background.¹⁴

In fact, corporate reorganization is widely viewed as a method of reducing or discharging liability¹⁵ for companies subject to regulatory actions such as environmental clean-up claims.¹⁶ This ability to escape from environmental liability is significant given the relatively recent Environmental Protection Agency ("EPA") study which concluded that over the next fifty years, nearly thirty percent of the companies owning waste disposal facilities will petition for bankruptcy.¹⁷

III. ENVIRONMENTAL POLICY

While the Code seeks to limit financial liability, statutes such as the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA")¹⁸ force polluters to reimburse¹⁹ the full value of costs expended for cleaning-up despoiled land, air, or water. CERCLA is primarily a remedial statute designed to address the

¹⁴ Elizabeth Warren & Jay Westbrook, *THE LAW OF DEBTORS AND CREDITORS*, Ch. 9 at 746 (2d ed. 1991).

¹⁵ Massive non-dischargeable environmental claims may preclude successful rehabilitation of a corporate debtor seeking reorganization with liquidation of the assets becoming the only feasible alternative. Chapter 7 of the Code relates to liquidation proceedings. Its purpose is to achieve a fair and equitable distribution to creditors of whatever non-exempt property the debtor has and to give the debtor a fresh start.

¹⁶ See also James N. Cahan, *Business Transactions: A Guide through the Wilderness*, 5 NAT. RESOURCES & ENV'T 25, 27 (Summer 1990). The average federal Superfund site cleanup costs \$10 - \$30 million, and some are expected to exceed \$100 million.

¹⁷ U.S. General Accounting Office, *Hazardous Waste, Environmental Safeguards Jeopardized When Facilities Cease Operating*, at 18 (1986).

¹⁸ 42 U.S.C. §§ 9600 - 9675 (1983 & Supp. 1992).

¹⁹ In addition to CERCLA, numerous federal environmental statutes force polluters to reimburse the government for costs of remediation. See, e.g., Surface Mining Control & Reclamation Act, 30 U.S.C. § 1201, et seq. (1986 & Supp 1991); Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq. (1986 & Supp 1991); Marine Protection, Research & Sanctuaries Act, 33 U.S.C. §1401, et seq. (1986 & Supp 1991); Deepwater Port Act, 33 U.S.C. § 1501, et seq. (1986 & Supp 1991); Safe Drinking Water Act, 42 U.S.C. § 201, et seq. (1986 & Supp 1991); The Clean Air Act, 42 U.S.C. § 7401, et seq. (1983 & Supp 1991).

environmental problems caused by the past disposal of hazardous waste.²⁰ Congress, under CERCLA, gave the federal government the authority to clean-up hazardous waste sites and an \$8.5 billion Superfund to finance that effort.²¹ The EPA spends approximately \$1.5 billion a year in taxpayer dollars on Superfund cleanups.²²

Upon identification of a release or threatened release of hazardous waste, the EPA conducts an investigation to determine if the environmental risk is of sufficient severity to warrant inclusion of the site on the National Priorities List.²³ Thereafter, the EPA selects an appropriate remedy²⁴ and can either order the potentially responsible parties ("PRPs") to take remedial action,²⁵ or take the remedial action itself, using Superfund monies and seek reimbursement for the eventual full value cost of remediation²⁶ from the broadly defined PRPs²⁷ after the costs have been incurred.

²⁰ See Cahan, *supra* note 16, at 26.

²¹ *Id.*

²² Michael Parrish, *The Real Cleanup - Insurers Superfund Focus: Hiring Lawyers*, L.A. TIMES, April 24, 1992, at D1, D2. The EPA has only recovered \$295 million from responsible parties since 1987 and is seeking \$1 billion more.

²³ Kyle E. McSlarrow, David E. Jones & Eric J. Murdock, *A Decade of Superfund Litigation: CERCLA Case Law From 1981-1991*, 21 ENVTL. L. REP. 10367, 10377 (1991).

²⁴ 42 U.S.C. § 9604(a) (1988). CERCLA authorizes the EPA to take "any . . . response measure consistent with the national contingency plan which [EPA] deems necessary to protect the public health or welfare of the environment [whenever] any hazardous substance is released or there is a substantial threat of such release into the environment . . ." *Id.*

²⁵ 42 U.S.C. § 9606(a) (1988).

²⁶ 42 U.S.C. § 9607(a) (1988).

²⁷ Potentially 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

Liability is joint and several²⁸ and the broadly defined PRPs are strictly liable for the cleanup costs. CERCLA's expansive definition of liability:

[R]eflects a social decision that those who have profited from the generation of the wastes, those who may or will have a windfall profit from the cleanup, and those who are in a position to prevent such problems in the future should bear some of the clean-up costs along with those whose actions actually caused the problem.²⁹

While Congress has enacted broad sweeping environmental legislation to protect the public and environment from pollution, the national environmental policy of cleaning up contaminated property will be better served if Congress deems it equally important for governmental agencies to be reimbursed at full value for response costs based on pollution caused by a bankrupt entity. Essentially, to label an entity as responsible for cleanup costs does not fully effectuate the spirit of environmental legislation unless responsibility includes full value cost replacement by all PRPs.

IV. COMMENCEMENT OF A BANKRUPTCY CASE

Under the Code a bankruptcy case is commenced by the filing of a petition with the bankruptcy court.³⁰ The date of filing the petition serves as an important benchmark for the determination of the debtor's and creditor's rights.³¹ At the moment a petition is

substance. 42 U.S.C. § 9607(a) (1988).

Person is defined 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. 42 U.S.C. § 9601(21) (1988).

²⁸ See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), whereby the court fashioned a judicially created component of CERCLA by relying principally on the Restatement (Second) of Torts § 433B while establishing a presumption of joint and several liability.

²⁹ See Cahan, *supra* note 16.

³⁰ 11 U.S.C. §§ 301-03 (1988).

³¹ See Van Patten and Puetz, *supra* note 5.

filed an "estate" is created by operation of law just as if a new corporation had been established.³² The estate is comprised of all the debtor's legal and equitable interests in its property.³³ Also, the filing of a petition triggers an "automatic stay" that prohibits any creditor attempts to commence or continue collection from the debtor or the debtor's property.³⁴

There are several statutory exceptions to the automatic stay.³⁵ One significant exception is that the automatic stay does not apply to the "commencement or the continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."³⁶ Furthermore, the automatic stay does not stop 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.³⁷ Thus, environmental laws may be enforced against the debtor without violating the automatic stay so long as the government entity does not seek enforcement of any money judgment obtained.³⁸

V. RIGHT TO ABANDONMENT OF ESTATE PROPERTY UNDER THE BANKRUPTCY CODE

Under the Code a trustee is permitted to abandon property that is

³² 11 U.S.C. § 541 (1988).

³³ *Id.* Subsection (b) provides exceptions to this general rule by excluding any power that the debtor may exercise solely for another entity, any interest in a nonresidential property lease that has terminated prior to filing a petition, and the debtor's eligibility to participate in programs authorized by the Higher Education Act of 1965.

³⁴ 11 U.S.C. § 362 (1988).

³⁵ 11 U.S.C. § 362(b) (1988).

³⁶ 11 U.S.C. § 362(b)(4) (1988).

³⁷ 11 U.S.C. § 362(b)(5) (1988).

³⁸ *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988) (holding that damages for CERCLA violation may be fixed but not enforced); *Penn Terra, Ltd. v. The Dept. of Envtl. Resources*, 733 F.2d 267 (3d Cir. 1984) (noting an exception to stay whereby state brought suit to compel debtor to comply with a pre-petition consent decree to remedy environmental pollution despite the fact that compliance required the debtor to expend estate funds in order to comply).

"burdensome" or of "inconsequential value" to the estate.³⁹ Abandonment operates to divest the estate of control of the property and revest the debtor with the property interest as of the date of the petition.⁴⁰ Abandonment serves the overriding purpose of bankruptcy liquidation; the expeditious reduction of the debtor's money for equitable distribution to creditors.⁴¹ Forcing a trustee to administer burdensome property contradicts this purpose by stalling the administration of the estate and draining its assets.

A. The Source of Confusion: Midlantic National Bank v. New Jersey Department of Environmental Protection

Although § 554 appears broad, the power to abandon burdensome assets under § 554 is not unlimited. In a 5-4 landmark decision, the United States Supreme Court in *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*,⁴² held that a trustee may not abandon a hazardous waste facility "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."⁴³ As the Code does not provide such an exception to abandonment⁴⁴ the court qualified the power to abandon which Congress saw as unconditional.⁴⁵

³⁹ 11 U.S.C. § 554 (1988) provides in pertinent part:

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. *Id.*

⁴⁰ H.R. REP. NO. 595, 95th Cong., 1st Sess. 377 (1977); S. REP. NO. 989, 95th Cong., 2d Sess. 92 (1978); 4 Lawrence P. King, *COLLIER ON BANKRUPTCY* ¶ 554.02 at 554-7 (15th ed. 1992).

⁴¹ See *COLLIER*, *supra* note 40 at ¶ 554.01 at 554-2,3.

⁴² 474 U.S. 494 (1986).

⁴³ *Id.*

⁴⁴ See 11 U.S.C. § 554 (1988), *supra* note 39 and accompanying text. This section provides the substantive requirements for abandoning estate property. Both this section and its legislative history are wholly devoid of any exception to abandonment.

⁴⁵ Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 12 (1988).

The *Midlantic* majority essentially relied on two specious arguments in denying the trustee's right to abandon contaminated property. The Court found that under the Bankruptcy Act⁴⁶ case law had developed restricting the trustee's abandonment power when necessary to protect state and federal interests.⁴⁷ The majority reasoned that "[i]n codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws."⁴⁸ Thus, the majority concluded that had Congress intended for the legislature to change the interpretation of the judicially developed concept Congress would have specifically made that intent clear.⁴⁹

Specifically rejected was the argument that if Congress intended to narrow the scope of § 554, Congress would have expressly provided an exception.⁵⁰ If Congress had intended to change the interpretation of a judicially created exception to abandonment, it needed to make that intent specific.⁵¹ Silence in the legislative history was construed as Congress' intent to continue the pre-Code limitation under § 554.

In reaching its decision, the majority also relied upon 28 U.S.C. § 959(b) (1979)⁵², which although not directly applying to § 554, supported its contention that property may not be abandoned in violation of state laws designed to protect the public health or safety.⁵³ Congressional intent, the majority reasoned, was not

⁴⁶ In 1978, the Bankruptcy Act of 1898 underwent major revisions and was recodified as the Bankruptcy Code.

⁴⁷ *Midlantic*, 474 U.S. at 500-01.

⁴⁸ *Id.* at 501.

⁴⁹ *Id.*

⁵⁰ *Id.* at 515. Then Justice Rehnquist, in a dissenting opinion, sought a strict constructionist approach to § 554, which does not provide any exceptions to abandonment. *Supra* note 39 and accompanying text.

⁵¹ *Id.* at 502.

⁵² This section provides in pertinent part: "[A] trustee . . . shall manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated. . . ."

⁵³ *Midlantic*, 474 U.S. at 501.

preemption of all state laws⁵⁴ that otherwise constrains the exercise of a trustee's powers.⁵⁵

Both arguments relied upon by the majority are problematic as each violates rudimentary principles of statutory interpretation. When the Supreme Court is to interpret a statute enacted by Congress, the Court's mandate is clearly to determine Congressional intent and give effect to that intent.⁵⁶ Reference to a statute's legislative history is the best method by which a court can ascertain legislative intent.⁵⁷

Since the legislative history of § 554(a) is silent with respect to restricting the power to abandon,⁵⁸ any judicially developed limitation on a trustee's abandonment power is clearly contrary to the legislative intent on the right to abandon.⁵⁹ Had Congress intended to limit the trustee's abandonment powers it would have done so when codifying the pre-Code judicially created power to abandon in 1978, or at anytime thereafter.⁶⁰ However, the "plain meaning" and the legislative history place no limits on abandonment under § 554.⁶¹

Also, the Court's reliance on 28 U.S.C. § 959(b) violated principles of statutory construction since a statutory exception is considered as a limitation only on the matter which directly precedes

⁵⁴ While this may be true, the effect of the state law was inconsistent with the aim of the Code. When a state law conflicts with federal law, the Supremacy Clause, art. IV, § 2, dictates that federal law will govern. See *McCulloch v. Maryland*, 14 U.S. (4 Wheat) 316 (1819).

⁵⁵ *Midlantic*, 474 U.S. at 501.

⁵⁶ *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962).

⁵⁷ See *Klee & Merola*, *supra* note 45, at 3.

⁵⁸ "This section authorizes the court to authorize the trustee to abandon *any* property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. Abandonment may be to any party with a possessory interest in the property abandoned." H.R. REP. NO. 595, 95th Cong., 1st Sess. 377 (1977); S. REP. NO. 989, 95th Cong., 2d Sess. 92 (1978) (emphasis added).

⁵⁹ *Midlantic*, 474 U.S. at 509-10 (Rehnquist, J., dissenting); see *Klee & Merola*, *supra* note 45, at 8.

⁶⁰ Joseph L. Cosetti & Jeffrey M. 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, 78 (1987). "The Bankruptcy Reform Act of 1978 was a complete recodification of bankruptcy law. If Congress desired to place limitations on abandonment . . . it knew how to do so." *Id.*

⁶¹ *Id.* at 67. See also *supra* note 57.

it.⁶² While the intent of Congress regarding those businesses which continue to operate *may be inferred* from § 959(b), there is nothing sufficiently conclusive about that statute as it applies to the scope of a trustee's right to abandon property from an estate liquidating its assets. In fact, § 959(b) does not even indirectly apply to abandonment since a trustee does not manage or operate property he intends to abandon.⁶³

Strictly construed, *Midlantic* imposes an affirmative duty upon trustees to cleanup contaminated property regardless of the availability of estate funds.⁶⁴ This effectively creates a judicially prescribed priority for state authorities over other creditor classes by converting cleanup costs into administrative expenses payable before final distribution of assets to creditors.⁶⁵ Such a measure is unsupported by any bankruptcy statute.⁶⁶

B. The State of Confusion: *Midlantic* and Its Aftermath

Extensive case law has developed with a split of authority as to what is required under *Midlantic*. Some courts have interpreted *Midlantic* to require strict compliance with applicable environmental laws prior to abandonment.⁶⁷ Other courts have relied on the more

⁶² 2A SUTHERLAND STAT. CONST. § 47.11 (5th ed. 1992). Only if clearly indicated will an exception operate as a limitation on an entire act. In essence, exceptions are not to be implied unless an absurd result is reached by a literal construction of the statute.

⁶³ See Laura Jacobs Margulies, Note, *Bankruptcy - Trustee May Not Abandon Property in Contravention of a State Statute or Regulation That is Designed to Protect the Public from Identified Hazards*, 17 U. BALT. L. REV. 558, 563 (1988). Traditionally, §959(b) applied only to Chapter 11 reorganization proceedings and not to Chapter 7 liquidation proceedings.

⁶⁴ See Cosetti & Friedman, *supra* note 60, at 67.

⁶⁵ *Midlantic*, 474 U.S. at 516-17 (Rehnquist, J., dissenting).

⁶⁶ 11 U.S.C. § 726 (1979) which prescribes the order of payment of estate funds for Chapter 7 liquidation is wholly devoid of any contaminated cleanup priority. See Richard Marshack, *The Toxic Claim: Using Bankruptcy Law to Limit Environmental Liabilities*, 19 CAL. BANKR. J. NO. 3, 193, 204 (1991).

⁶⁷ See, e.g., *In re Anthony Ferrante & Sons, Inc.*, 119 B.R. 45 (D. N.M. 1990) (holding that trustee may not abandon property in contravention of state law unless the state law is not reasonably designed to protect the public health or safety, the state law is so onerous as to interfere with the bankruptcy adjudication itself or the violation caused by abandonment would merely be speculative or indeterminate or would not create a risk of imminent and identifiable harm); *In re Stevens*, 68 B.R. 774 (D. Me. 1987) (noting that PCB-contaminated waste oil could not be abandoned by trustee where abandonment of

restrictive language set forth in footnote 9⁶⁸ of the opinion and narrowly interpret *Midlantic* such that the exception to abandonment applies only where there is imminent and identifiable harm to the public health and safety and the estate has unencumbered assets with which to finance a cleanup effort.⁶⁹ Therefore, a trustee may abandon property even if there is an imminent and identified risk of harm to the public health and safety when there are insufficient estate assets to remediate contamination.⁷⁰

In *Microfab*, the court found that the State of Massachusetts failed to demonstrate that the Chapter 7 trustee would achieve "appreciable results" with the available estate assets.⁷¹ The court held that a "... trustee need not expend estate assets on a remediation effort where he does not have sufficient resources to achieve

drums would threaten public safety and contravene state laws reasonably designed to protect public).

⁶⁸ *Midlantic*, 474 U.S. at 507, n.9. The Court stated:

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

⁶⁹ *See, e.g.*, *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988) Chapter 11 debtor allowed to abandon a contaminated fertilizer plant since the violations of state and federal environmental regulations did not pose an imminent threat of harm to the public, the estate had no unencumbered assets with which to finance a cleanup and the first priority lienholder on the property consented to the abandonment; *In re Oklahoma Refining Co.*, 63 B.R. 562 (Bankr. W.D. Okla. 1986) Trustee was allowed to abandon contaminated property since the estate lacked funds to pay for the cleanup and there was no imminent danger to the public or the environment; *In re Better-Brite Plating, Inc.*, 105 B.R. 912 (Bankr. E.D. Wisc. 1989) Abandonment was allowed where the estate had few unencumbered assets and there was no imminent danger to the public; *In re FCX, Inc.*, 96 B.R. 49 (Bankr. E.D.N.C. 1989) The court disallowed abandonment because there existed danger to the public and there was evidence of available funds to pay for cleanup costs. *Cf. In re Franklin Signal Corp.*, 65 B.R. 268 (Bankr. D. Minn. 1986) (holding where the total cost to eliminate the immediate danger was \$500, the trustee was permitted to abandon fourteen drums of hazardous material which posed no imminent or serious danger to the public after the trustee reported to the Wisconsin Department of Natural Resources his intention of abandoning the property).

⁷⁰ *In re Microfab*, 105 B.R. 161 (Bankr. D. Mass. 1989).

⁷¹ *Id.* at 166.

appreciable results."⁷² In support of its determination, the court relied upon then Justice Rehnquist's dissenting opinion in *Midlantic*⁷³ and said that "no court of equity can require a trustee simply to throw away money even in the name of a worthy cause."⁷⁴

One could hardly disagree with this sweeping statement when upholding the often cited goal of bankruptcy law; to afford the debtor a fresh start.⁷⁵ Yet, while the *Microfab* court's decision affords the debtor a fresh start, this decision is at odds with the national environmental policy enunciated by Congress to expeditiously cleanup polluted property and force polluters to reimburse the full value of costs expended in cleaning-up despoiled land, air or water.⁷⁶

C. *Eliminating the Source of Confusion*

Since *Midlantic* was decided by an equally divided court, similar facts before today's Supreme Court would probably render a different result.⁷⁷ Furthermore, recent case law supports the contention that the Supreme Court, in interpreting the "plain meaning" of the Code, will look no further than the actual Code and any accompanying legislative history.

In the recent case of *Union Bank v. Wolas*,⁷⁸ the court was faced with the issue of whether long and short term debt payments may qualify for the ordinary course of business exception to the trustee's power to avoid preferential transfers.⁷⁹ Justice Stevens, writing for

⁷² *Id.*

⁷³ *Midlantic*, 474 U.S. at 514. "The Bankruptcy Court may not, in the exercise of its equitable powers enforce its view of sound public policy at the expense of the interests the Code it is designed to protect." *Id.*

⁷⁴ *In re Microfab*, 105 B.R. at 169.

⁷⁵ See *supra* note 2.

⁷⁶ See *supra* notes 18-29 and accompanying text.

⁷⁷ Three of the five justices accounting for the *Midlantic* majority, Justices Powell, Brennan and Marshall, have since retired and have been replaced by Justices Kennedy, Souter and Thomas.

⁷⁸ ___ U.S. ___, 112 S. Ct. 527 (1991).

⁷⁹ 11 U.S.C. § 547 (1979). A trustee or DIP has the avoiding power to dismantle certain transactions between the debtor and creditors that took place within the 90 days (1 year for insiders as defined by 11 U.S.C. § 101(31) (1979)) of filing a bankruptcy petition.

a unanimous Court held that since § 547(c)(2)⁸⁰ contains no language distinguishing between long and short term debt, payments on long-term debt, as well as those on short term debt, may qualify for the ordinary course of business exception to the trustee's power to avoid preferential transfers.⁸¹

The Court explicitly rejected the respondent's argument that the transfer was preferential since there is *no evidence in the legislative history* that Congress did not intend to make the ordinary course of business exception not available to conventional long term lenders.⁸²

Crucial to the Court's holding was the "plain language concept."⁸³ The Court reasoned that "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning."⁸⁴ In fact, during oral argument before the Supreme Court, one of the justices commented that the "only way Congress could have made the language of § 547 any clearer would have been to add the words 'and we really mean it' to the end of the statute."⁸⁵

The "plain meaning" rationale of *Union Bank* is wholly

The purpose of avoiding such transactions is to achieve the policy of equality of distribution among the debtor's creditors. Although *Union Bank* dealt with preferential transfers, both it and *Midlantic* were decided based upon statutory interpretation of the Code.

⁸⁰ Under 11 U.S.C. § 547(c) (1979) the trustee may not avoid a transfer -

(2) to the extent that such transfer was

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to the ordinary business terms. *Id.*

⁸¹ *Union Bank*, ___ U.S. ___, 112 S. Ct. at 533.

⁸² *Id.* at 531-32.

⁸³ *High Court "Preference" For Plain Language Focus of February Forum*, ORANGE COUNTY BANKR. F. NEWS, Vol. 2, Feb. 1992, at 3.

⁸⁴ *Union Bank*, ___ U.S. ___, 112 S. Ct. at 531 (citing *Toibb v. Radloff*, ___ U.S. ___, 111 S. Ct. 2197 (1991) (the Bankruptcy Code's *plain language* permits individual debtors not engaged in business to file for relief under Chapter 11) (emphasis added).

⁸⁵ See *supra* note 83 and accompanying text. Recount of oral argument by John A. Graham, Esq. of Frandzel & Share, attorneys for petitioner *Union Bank*, at February 11, 1992 Orange County Bankruptcy Forum meeting.

inconsistent with the underlying rationale of the *Midlantic* majority⁸⁶ and could very well be considered the modern Court's statutory analysis of the Code.⁸⁷ In fact, one could hardly argue that when the Supreme Court eventually grants certiorari⁸⁸ for a suit regarding abandonment of a bankrupt's contaminated estate property, either *Midlantic* will be limited to its facts⁸⁹ or then Justice Rehnquist's dissenting opinion in *Midlantic* will be adopted by a majority of the Court.⁹⁰ Overruling *Midlantic* would be consistent

⁸⁶ ___ U.S. ___, 112 S. Ct. at 534. In a scathing concurring opinion, Justice Scalia sharply rebuked the Ninth Circuit Court of Appeals and said:

It is regrettable that we have a legal culture in which such arguments have to be addressed (and indeed credited by a Court of Appeals), with respect to a statute utterly devoid of language that could remotely be thought to distinguish between long-term and short-term debt. Since there was no "scrivener's error" producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable. *Id.*

⁸⁷ See *Patterson v. Shumate*, ___ U.S. ___, 112 S. Ct. 2242 (1992) The Court held that "applicable nonbankruptcy law" for purposes of Code § 541(c)(2) excluding from the estate debtor's interest in property subject to restriction on transfer enforceable under nonbankruptcy law, was not limited to state law, and it included ERISA and other federal law. The Court looked to the "plain language" of the Code and reasoned that "[t]he text [of the Code] contains no limitation on 'applicable nonbankruptcy law' relating to the source of the law." *Id.* at 2246.

⁸⁸ 28 U.S.C. § 1254(1) (1988) grants the Supreme Court the authority to hear cases by writ of certiorari. See Erwin Chemerinsky, FEDERAL JURISDICTION § 10.3.2, at 504 (1989) The writ of certiorari is issued in order that the Court may inspect the lower court's proceedings and determine whether there have been any irregularities. The writ is most commonly used as a discretionary device to choose the cases it wishes to hear. The process of appeals to the Supreme Court were largely eliminated in 1988 by Pub. L. No. 100-352, 102 Stat. 662 (1988).

⁸⁹ *Midlantic*, 474 U.S. at 499, n.3. Justice Powell chastised the lower courts' failure "to take even relatively minor steps to require the trustee to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents . . . [and implementing] security measures that prevent public entry, vandalism, and fire." See also, Morris G. Shanker, *A Bankruptcy Superfund for Some Super Creditors*, 61 AM. BANKR. L.J. 185, 187 (1987) in which the author contends that requiring the debtor to pay the cost of only those "relatively minor steps" may be all that Justice Powell had in mind.

⁹⁰ Justice Rehnquist recognized that in an egregious situation some limits could be placed on the trustee's abandonment power. One scenario, would be where a particular situation "might create a genuine emergency that the trustee would be uniquely able to guard against . . . [such as] dynamite sitting on the furnace in the basement of a schoolhouse." *Midlantic*, 474 U.S. at 515.

with the Court's relatively low regard for upholding prior case law simply based upon principles of stare decisis.⁹¹

D. Proposed Statutory Amendment

While *Midlantic* may eventually be overruled, it is still the leading case as to the legality of a bankruptcy trustee's right to abandon contaminated estate property. *Midlantic*, however, failed to address the source of cleanup costs.⁹² Generally, costs to cleanup an abandoned hazardous waste facility are borne by a government agency.⁹³ More accurately, these costs are borne by the taxpayer - the involuntary creditor - whose dollars are used to fund the governmental agencies.

Essentially, the lower courts have been faced with the public policy choice of whether the general population should become the involuntary creditor of a debtor who has failed to abide by environmental legislation or whether the involuntary creditor should be entitled to priority over the claims of the voluntary business creditors.⁹⁴ Unlike the voluntary creditor, the involuntary creditor:

- (1) Did not choose to deal with or extend credit to the bankrupt,
- (2) did not intend to take the risk of his insolvency,
- (3) had no advantage or profit to gain from becoming a creditor of the bankrupt, and
- (4) had no way of insisting upon cash or security before the debt was incurred.⁹⁵

However, if a trustee's right to abandonment under the Code is

⁹¹ In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court in a 5-4 decision overruled *National League of Cities v. Usery*, 426 U.S. 833, (1976) and held that in affording SAMTA employees the protection of the wage and hour provisions of the Fair Labor Standards Act, Congress contravened no affirmative limit on its power under the Commerce Clause. Several justices warned explicitly that they expected *National League of Cities* would rise again. Specifically, then Justice Rehnquist contended that he thought "it incumbent on those of us in the dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." *Id.* at 580.

⁹² See Marshack, *supra* note 66, at 202.

⁹³ *Id.* at 198.

⁹⁴ See Shanker, *supra* note 89, at 193.

⁹⁵ *Id.*

construed so as to create limits to its full force and effect when faced with environmental legislation and cleanup efforts, the remedy is for Congress, and not the courts, to make exceptions to the Code to achieve the national objectives that Congress chooses to reach.

Therefore, interpreting the Code to permit restrictions on a trustee's right to abandon property is insufficient because the Code does not provide for any exception.⁹⁶ The solution proposed is amendment of § 554(a) so that Congress explicitly prohibits abandonment of property of an estate which is subject to a state *or* federal environmental claim.⁹⁷

To allow abandonment of contaminated estate property *disproportionately* imposes the burden of cleanup on the involuntary creditors of the estate.⁹⁸ In essence, the voluntary creditors benefitted from its business dealings with the debtor as the true cost to produce a given product based upon the resulting hazardous waste which was never factored into the cost equation. The result was reduced costs of production which, if the debtor had been environmentally responsible, would have been attributed to remediate the pollution. Thus, to allow the voluntary creditors the use of such monies is to give those creditors a windfall profit at the expense of the involuntary creditors.

⁹⁶ See *supra* note 39.

⁹⁷ 11 U.S.C. § 554 as proposed would read (with the new language emphasized):

(a) After notice and a hearing, the trustee may abandon any property of the estate, *not subject to a state or federal environmental claim*, that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate, *not subject to a state or federal environmental claim*, that is burdensome to the estate or that is of inconsequential value and benefit to the estate. *Id.*

⁹⁸ But see Grace C. Yeh, Note, *Midlantic National Bank v. New Jersey Department of Environmental Protection: Has the Supreme Court "Abandoned" Section 554 of the Bankruptcy Code?* 6 UCLA J. ENVTL. L. & POL'Y 205, 222 (1987). The author contends that although both the creditors and the government are innocent parties, disallowing abandonment disproportionately imposes the burden on the creditors who are not directly benefitted by the cleanup. The residents of a state, however, receive a direct benefit because they now have a cleaner state.

VI. DEFINING AN ENVIRONMENTAL CLEANUP CLAIM: A MATTER OF PRIORITY

Only those who hold "claims" against the debtor or the estate can share in the distribution of the estate as creditors.⁹⁹ The Code defines a claim as "a right to payment" or "a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."¹⁰⁰

When a right or potential right becomes a claim is an important and difficult question. If the claim arose before the debtor filed its petition, the claim is considered to have arisen pre-petition. An environmental pre-petition claim is generally unsecured, paid pro-rata with all other pre-petition unsecured claims, and subject to discharge.¹⁰¹

If the claim arose after the petition was filed, it is considered post-petition and afforded administrative expense priority, not subject to discharge,¹⁰² since such claims would be for "actual and

⁹⁹ George M. Treister, Et. al. FUNDAMENTALS OF BANKRUPTCY LAW, § 6.01 at 267 (2d ed. 1988 & Supp. 1990).

¹⁰⁰ 11 U.S.C. § 101 (1979). In this title -

(5) "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, disputed, undisputed, secured, or unsecured. *Id.*

¹⁰¹ See, e.g., *Ohio v. Kovacs*, 469 U.S. 274 (1985) (holding that environmental agency is a general unsecured claimant as it sought an order compelling the debtor to cleanup pre-petition pollution); *Southern Railway Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3d. Cir. 1985) (explaining that pollution caused by debtor renders creditor asserting claim for cleanup an unsecured claimant); *In re Pierce Coal and Constr., Inc.*, 65 B.R. 521 (Bankr. N.D. W. Va. 1986) (noting that claim for damages which occurred prior to filing petition are pre-petition unsecured claims). *But see* *In re Better-Brite Plating, Inc.*, 105 B.R. 912 (Bankr. E.D. Wisc. 1989) (holding that since the court could not accurately determine which environmental releases occurred pre-petition and which occurred post-petition, the EPA was afforded administrative priority for all response costs incurred).

¹⁰² See 11 U.S.C. § 1129(a)(9) (1979), which provides that as a precondition to a Chapter 11 plan confirmation, all administrative claims must be paid in full.

necessary costs and expenses of preserving the estate."¹⁰³ Numerous cases have afforded private citizens¹⁰⁴ and governmental agencies¹⁰⁵ administrative expense priority for their environmental claims against bankrupt estates.

Neatly categorizing when the act of pollution actually occurred has been troublesome for many courts and has led to inconsistent results.¹⁰⁶ As a result, there is a split of authority as to defining when a cleanup claim arises.

¹⁰³ 11 U.S.C.A. § 507 (1979) in pertinent part provides: "(a) The following expenses and claims have priority in the following order: (1) First, administrative expenses allowed under Section 503(b) of this title. . . ." *Id.*

11 U.S.C. § 503(b) (1979) in pertinent part provides: "(b) After notice and a hearing, there shall be allowed administrative expenses . . . including - (1)(A) the actual, necessary costs and expenses of preserving the estate. . . ." *Id.*

¹⁰⁴ *See, e.g.,* In re Hemingway Transp., Inc., 126 B.R. 656 (D. Mass. 1991) *modifying* 108 B.R. 378 (Bankr. D. Mass. 1989) (holding that post-petition purchaser of contaminated estate property was entitled to reimbursement of cleanup costs as an administrative expense priority); In re Kent Holland Die Casting and Plating, Inc., 126 B.R. 733 (W.D. Mich. 1991) (explaining that a lessor has administrative priority for costs incurred in disposing of hazardous waste arising from post-petition breach of an assumed contract but lessor had only an unsecured claim for pre-petition costs of remediation). *But see* In re Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988), where conduct giving rise to cleanup costs occurred pre-petition, lessor was not entitled to administrative expense priority.

¹⁰⁵ *See, e.g.,* In re Vernon Sand & Gravel, Inc., 93 B.R. 580 (Bankr. N.D. Ohio 1988), where administrative priority for cleanup costs would benefit the estate based upon compliance with state environmental law and protect the public from identified harm; In re Stevens, 68 B.R. 774 (D. Me. 1987), where costs of protecting the public from the danger of hazardous waste entitled creditors to administrative priority. *See also* In re Bill's Coal Co., Inc., 124 B.R. 827 (D. Kan. 1991) (holding state agency afforded administrative expense priority for \$560,580 in civil penalties against debtor based upon court's determination that the payment of civil penalties is a cost of compliance and there is no compelling reason to distinguish between compensatory and non-compensatory penalties when determining whether or not a claim should be allowed as an administrative expense).

¹⁰⁶ *See* Marshack, *supra* note 66, at 205; Epling, *supra* note 2.

A. When Response Costs Have Been Incurred

Some courts do not look to the debtor's underlying conduct as sufficient to create a contingent "right to payment".¹⁰⁷ Courts following this approach recognize that there can be no "claim" until response costs have been incurred.¹⁰⁸ This approach presumes that there is no claim until all conditions have occurred that are necessary to impose legal liability upon the debtor.¹⁰⁹ This interpretation, however, conflicts with the Code's definition which includes those claims that are contingent¹¹⁰ since, by definition, contingent claims involve a condition precedent to liability that has not yet occurred.¹¹¹ Courts following this approach have been criticized for their failure to effectuate the legislative intent of broadly defining a claim under the Code.¹¹² Additionally, this methodology has been rejected by numerous courts for its failure to distinguish between when a cause of action arises as opposed to when a claim arises under the Code.¹¹³

Courts that treat environmental claims as arising when response

¹⁰⁷ See *supra* note 100 and accompanying text.

¹⁰⁸ See, e.g., *In re Wall Tube and Metal Products Co.*, 831 F.2d 118 (6th Cir. 1987), where post-petition costs incurred by a state environmental protection agency were recoverable as administrative expense claims, even though the waste was generated pre-petition; *United States v. Union Scrap Iron & Metal*, 123 B.R. 831 (Bankr. D. Minn. 1990) (holding that a claim arises when the EPA spends money to cleanup a site).

¹⁰⁹ See Treister, et al, *supra* note 99, at 269. In the controversial case of *Matter of M. Frenville*, 744 F.2d 332 (3d Cir. 1984), the court held that an accountant's post-petition cross-complaint against the debtor for contribution and indemnity based upon pre-petition negligence in preparing financial statements was a post-petition claim since the indemnity claim did not arise under state law until after the accountants were sued.

¹¹⁰ See *supra* note 100 and accompanying text.

¹¹¹ See Treister, et. al., *supra* note 99, at 269.

¹¹² The legislative history provides: "By the broadest possible definition [of a claim] the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent [will] be able to be dealt with in the bankruptcy case." H.R. REP. NO. 595, 95th Cong., 2d Sess. 309 reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6266.

¹¹³ See, e.g., *In re Johnson*, 127 B.R. 27, 32-3 (Bankr. 9th Cir. 1991), (noting that a California Department of Health Services' "claim" arose upon conduct which gave rise to a cause of action and not when the actual funds were expended); *In re A.H. Robins Co., Inc.*, 839 F.2d 198, 203 (4th Cir. 1988) (holding that a user of Dalkon Shield had "claim" although injury not apparent from use of shield); *In re Johns-Manville Corp.*, 57 B.R. 680, 686-88 (Bankr. S.D.N.Y. 1986) (explaining that those exposed to asbestos have "claims" despite the absence of manifest injury).

costs are incurred place the EPA in the precarious position of waiting to expend funds for remediation. The EPA is aware that if it expends funds pre-petition its claim may be subject to discharge. However, if the EPA waits until the petition is filed before it expends the cleanup costs, it will be entitled to administrative expense priority. Although such a tactical strategy conflicts with the national policy of swift remediation of environmental pollution,¹¹⁴ this strategy promotes the national environmental policy of holding those potentially responsible parties liable for full value cleanup costs. This approach, however, undermines the Code's goal of affording the debtor a fresh start since the debtor, despite filing for protection under the Code, will invariably be saddled with what could be a massive environmental claim.

B. Release or Threatened Release of Hazardous Substances

Alternatively, some courts' inquiry is directed at when the release or threatened release of hazardous substances actually occurred.¹¹⁵ The reach of this inquiry is broad and includes liabilities arising from pre-petition acts or omissions of the debtor, regardless of when the harm actually manifests itself.¹¹⁶

The leading case to determine that an environmental claim arises when the release or threatened release of hazardous substances has occurred is *In re Chateaugay Corp.*¹¹⁷ In *Chateaugay*, the EPA and New York State sought declaratory judgments as to the dischargeability of environmental claims in the reorganization proceeding of LTV Steel Co., Inc.

Although the EPA did not yet know the full extent of costs that it might one day incur and seek to impose upon the debtor, nor did the EPA even know the location of all sites at which hazardous wastes might be found, the Second Circuit Court of Appeals held that response costs incurred by the EPA under CERCLA were pre-petition "claims" dischargeable in bankruptcy, regardless of when such costs

¹¹⁴ See *supra* notes 18-29 and accompanying text.

¹¹⁵ *In re Chateaugay*, 944 F.2d 997 (2d Cir. 1991); *In re Jensen*, 127 B.R. 27 (Bankr. 9th Cir. 1991).

¹¹⁶ *Ohio v. Kovacs*, 469 U.S. 274 (1985).

¹¹⁷ 944 F.2d 997 (2d Cir. 1991).

were incurred, so long as such costs concerned a release or threatened release of hazardous waste that occurred before the debtor filed its Chapter 11 petition.¹¹⁸ However, the court also held that an injunction that imposes obligations having to do with stopping or limiting ongoing pollution is not dischargeable.

The court based its opinion on the evident intent of Congress¹¹⁹ "to apply broadly the definition of 'claim'."¹²⁰ Although the EPA's claim was not liquidated, the court recognized that contingent claims may be estimated if their liquidation "would unduly delay the administration of the case."¹²¹ Nothing, the court said, prevents the speedy and rough estimation of CERCLA claims for purposes of determining the EPA's voice in the Chapter 11 proceeding.¹²²

The *Chateaugay* decision is problematic in that the court attempts to neatly delineate when and to what extent pollution has occurred pre as opposed to post-petition. This task is, at best, a difficult one as the same source of pollution which may have occurred years ago continues to seep into and pollute the same soil and water.

Courts following *Chateaugay* will encourage potential debtors to notify the EPA and all applicable state environmental agencies of any potential pollution.¹²³ The effect being that such claims would be considered unsecured, pre-petition and subject to discharge. Prior to notifying the applicable governmental agencies, the debtor could

¹¹⁸ *Id.* at 1005-06.

¹¹⁹ *See supra* notes 100, 112 and accompanying text.

¹²⁰ *Chateaugay*, 944 F.2d at 1005-06.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Although the *Chateaugay* decision seems to also encourage a debtor to do nothing and simply claim that any pollution that it has emitted was generated pre-petition, the prudent debtor is advised to list all of the environmental agencies as creditors when it files its "list of creditors" as required by 11 U.S.C. §§ 521(1), 1111 (1988). This would avoid any possible due process concerns based upon the EPA (or any state agencies) not being aware of its status as a creditor of the estate. *See, e.g., Sylvester Bros. Dev. v. Burlington N. R.R.*, 133 B.R. 648 (D. Minn. 1991), where the Chapter 11 debtor failed to disclose its potential state or federal environmental law liability and the enforcement agency did not obtain actual knowledge of the potential claim in time to file a proof of claim, the liability was not discharged by confirmation of the plan of reorganization even though the agency was aware of the bankruptcy proceeding. *See also Reliable Electric Co., Inc. v. Olson Constr. Co.*, 726 F.2d 620 (10th Cir. 1984) (holding that the due process clause prevented discharging a claim when the creditor, who was aware of the bankruptcy case, failed to receive notice of the hearing on confirmation).

institute measures necessary to stop future pollution, and subsequently file for bankruptcy thereby relieving itself from the risk of being subjected to pre-petition costs or post-petition administrative expense priority costs for remediation.

C. Actual and Necessary Costs and Expenses of Preserving the Estate

While the first two approaches to defining when a claim arises focuses on the timing of the claim, a third approach has developed whereby many courts tend to give pre-petition claims for cleanup an administrative expense priority if doing so would protect the public from imminent and identifiable harm.¹²⁴ A determination that post-petition clean-up costs incurred by a state agency for waste generated pre-petition draws support from the Supreme Court's decision in *Midlantic*. It has been reasoned that according to *Midlantic*, since a trustee cannot abandon property in contravention of a state law designed to protect the public health and safety, it must then follow that expenses to remove the threat posed by such substances are necessary to preserve the estate. The effect of this is to afford administrative expense priority for environmental claims which occur pre or post-petition so long as response costs were incurred after the debtor filed its petition.¹²⁵

VII. DISCHARGEABILITY OF AN ENVIRONMENTAL CLAIM

Closely related to the concept of when an environmental claim arises in bankruptcy is whether an environmental claim may be discharged. The Code's goal of affording the debtor a fresh start is embodied in the discharge provisions of the Code.¹²⁶

¹²⁴ See, e.g., *In re Chateaugay Corp.*, 944 F.2d 997, 1010 (2d Cir. 1991); *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988); *In re Wall Tube & Metal Prod. Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987); *In re Peerless Plating Co.*, 70 B.R. 943, 948-49 (Bankr. W.D. Mich. 1987); *In re Stevens*, 68 B.R. 774, 783 (D. Me. 1987).

¹²⁵ See *supra* note 124.

¹²⁶ See *Epling*, *supra* note 3; 11 U.S.C. §§ 727, 1141 (1988).

A. Chapter 7

Under Chapter 7 of the Code a pre-petition order requiring cleanup which may be reduced to a monetary judgment is a claim subject to discharge.¹²⁷ An environmental claim, however, may be declared nondischargeable if the debtor was engaged in conduct or actions which satisfy the grounds for nondischargeability as set forth in § 523(a).¹²⁸

One example of nondischargeability is found in *In re Berry*.¹²⁹ The court held that the debtor's abandonment of dangerous chemicals in uncovered vats, and its failure to properly contain the chemicals constituted willful and malicious conduct, rendering the debt nondischargeable.¹³⁰ However, the case is limited to facts which the court characterized as egregious conduct. While the Code appears to provide a discharge in a broad range of circumstances, there are no Code provisions which specifically make an environmental claim nondischargeable.¹³¹

B. Chapter 11

A significant effect of confirmation of a plan of reorganization in a Chapter 11 case is that the debtor is discharged from debts that

¹²⁷ *Ohio v. Kovacs*, 469 U.S. 274 (1985), where injunction ordering estate to cleanup hazardous waste is a dischargeable claim since the only performance sought from the debtor was the payment of money; *United States v. Whizco*, 841 F.2d 147 (6th Cir. 1988), where mandatory injunctive relief requires a debtor to spend money, a dischargeable claim exists; *In re Robinson*, 46 B.R. 136 (Bankr. N.D. Fla. 1985) (holding that a debtor is permitted to discharge duty to restore certain marshlands since performance is based upon an expenditure of money); *In re Jensen*, 127 B.R. 27 (Bankr. 9th Cir. 1991), where debtor caused or threatened to cause pre-petition contamination, the state environmental agency's claim for response costs was subject to discharge even if the agency had not discovered the pollution and had not incurred response costs pre-petition.

¹²⁸ 11 U.S.C. § 523(a) (1988). Grounds for nondischargeability include obligations arising for certain taxes owed, fraudulently incurred obligations, debts not timely scheduled, fiduciary fraud, larceny, embezzlement, spousal and child support, willful and malicious injuries, governmental fines and penalties, certain educational loans, drunk driving judgments, and debts involved in a prior bankruptcy case. *Id.*

¹²⁹ 84 B.R. 717 (Bankr. W.D. Wash. 1987).

¹³⁰ *Id.* at 721.

¹³¹ See *supra* note 127 and accompanying text.

arose prior to confirmation.¹³² A discharge voids judgments with respect to any debt discharged and enjoins all actions to collect a discharged debt from the debtor.¹³³ Courts are split as to whether a corporate debtor seeking reorganization may discharge an environmental cleanup claim. The courts' analysis is primarily based upon the timing of a claim and whether or not they believe that a cleanup claim is an actual and necessary expense of the estate.¹³⁴

Courts which define a claim as arising when response costs have been incurred will bifurcate those claims for which response costs have been incurred from those claims for which response costs have yet to be incurred.¹³⁵ Alternatively, courts which define a claim as arising when there is a release or threatened release of hazardous waste will generally provide that a pre-petition release may be discharged.¹³⁶ Lastly, pre and post-petition releases will, in general, be construed according to *Midlantic* such that where there is imminent and identifiable harm, remediation costs will be afforded administrative priority as necessary expenses to preserve the estate.¹³⁷

¹³² 11 U.S.C. § 1141(d)(1) (1988) provides:

Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not -

- (i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;
- (ii) such claim is allowed under section 502 of this title; or
- (iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan. *Id.*

¹³³ 11 U.S.C. § 524 (1988).

¹³⁴ See *supra* notes 108 -114 and accompanying text.

¹³⁵ See *supra* notes 115-123 and accompanying text.

¹³⁶ *Id.*

¹³⁷ See *supra* note 125.

C. Proposed Statutory Amendment

Congress should not reward polluters who improperly dispose of waste by allowing them to seek protection under the Code. Congress must implement national public environmental policy and promote companies that are fiscally and environmentally sound. This may be achieved by using the private sector to enforce the public policy of a clean and safe environment.

To "socialize" the cost of cleanup is a quick-fix solution since it is very easy to place the financial burdens on all. Although the end result may be to force certain companies out of business, in the long run, their elimination would reduce the costs to society for environmental cleanup efforts by more accurately reflecting the true cost of pollution.¹³⁸

Therefore, Congress may put an end to this confusing and often inconsistent case law by amending the Code such that pre and post-petition state or federal environmental claims are non-dischargeable.¹³⁹ Although the Code and environmental legislation are sometimes at odds, this solution would help effectuate the national environmental policy of holding *all* potentially responsible parties liable for clean-up costs.

VIII. FEDERAL SUPERLIENS FOR ENVIRONMENTAL CLAIMS

By statute, each state and the United States Government may protect their interest in the enforcement of environmental protection

¹³⁸ Charles Openchowski, *Bankruptcy Is Not An Answer: A Rebuttal*, 15 ENVTL. L. REP. 10314 (1985).

¹³⁹ 11 U.S.C. §523(a) as proposed would read (with inserted new language emphasized):

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(13) for any pre or post-petition state or federal environmental claim whether or not such right is reduced to judgment, liquidated, unliquidated, matured, unmatured, contingent, secured or unsecured. *Id.*

laws by providing clean-up expenses with super-priority status.¹⁴⁰ In order to give priority to environmental concerns, superlien legislation has been enacted in several states.¹⁴¹ A superlien accords a state priority over previously recorded interests to secure all costs expended to clean up a contaminated site. Also, a superlien may encumber all property owned by the entity from whom collection is sought, not just the property on which the cleanup was performed.¹⁴²

Under CERCLA, the federal government is afforded a lien in favor of the United States for "all costs of removal or remedial action incurred by the United States" on all affected real property that belongs to the liable party.¹⁴³ However, these liens are of rather dubious value since they are subject to the rights of any prior purchaser, holder of a security interest, or judgment lien creditor, as perfected under state law.¹⁴⁴

Therefore, Congress must, as a matter of public policy, initiate legislation which integrates environmental issues into all levels of business negotiations. Instead of placing the responsibility on governmental agencies to police businesses which pollute the environment¹⁴⁵ the most potent way to enforce environmental legislation is to implement a broad sweeping federal super-priority

¹⁴⁰ See Cosetti & Friedman, *supra* note 60, at 68.

¹⁴¹ See, e.g., Arkansas Emergency Response Fund Act and Remedial Trust Fund Act, ARK. STAT. ANN. § 8-7-415 et seq. (1991 & Supp. 1991); Connecticut Hazardous Waste Act, CONN. GEN. STAT. ANN. §§ 22a-452a (West 1985 & Supp. 1992); Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, MASS. GEN. LAWS ANN. ch. 21E, § 13 (West 1981 & Supp. 1992); New Hampshire Solid and Hazardous Waste Management Act, N.H. REV. STAT. ANN. § 147B:10-6 (1990 & Supp. 1991); New Jersey's Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11f(f) (West 1982 & Supp. 1992); Tennessee Hazardous Waste Management Act, TENN. CODE ANN. § 68-46-209 (1987 & Supp. 1991).

¹⁴² Ronald G. Todd, *Handling Environmental Law Concerns in Real Estate Transactions*, 19 REAL EST. REV. 76, 85 (Spring 1988).

¹⁴³ 42 U.S.C. §9607(1) (1988).

¹⁴⁴ See Todd, *supra* note 141.

¹⁴⁵ See Cosetti & Friedman, *supra* note 60, at 68. The authors suggest that government can achieve the same results that statutory judgments provide by strengthening their licensing, bonding, and policing of businesses which pollute the environment. See also, S. Scott Massin, *Recent Developments in Bankruptcy and the Cleanup of Hazardous Waste*, 19 ENVTL. L. REP. 10427 (1989), where "government can help to avoid the [conflict between environmental law and bankruptcy law] through vigorous environmental enforcement of ongoing, industrial operations. . . ." *Id.*

environmental lien that trumps all liens whether preexisting or not.

It is important for Congress, in providing for a federal superlien, to institute adequate procedural safeguards so that the lien could not be attacked as an unconstitutional taking of property without due process.¹⁴⁶ If denied due process, a trustee or debtor-in-possession may seek to invalidate CERCLA liens imposed on contaminated property prior to filing for protection, thereby rendering the EPA a general unsecured creditor for pre-petition cleanup costs.

The practical effect of a federal superlien would be to force lenders to take a proactive role in enforcing environmental legislation. A lender will know that if a borrower does not comply with environmental legislation, the lender's perfected security interest will be primed by federal legislation.¹⁴⁷

For example, consider the large lender who takes a security interest in the debtor's property. As part of the transaction, lenders should protect their interests by including covenants in the security agreement which provide that failure to comply with state and federal environmental statutes are tantamount to a breach of contract in

¹⁴⁶ In the recent non-bankruptcy case of *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991), the court held that the filing of a lien under CERCLA, without prior notice and a hearing in which the landowner could contest both the reasonableness and propriety of the lien, constitutes a taking of a property interest which is protected by the due process clause of the United States Constitution. The court relied principally upon the Supreme Court decision in *Connecticut v. Doehr*, ___ U.S. ___, 111 S. Ct. 2105 (1991), whereby a state prejudgment attachment statute was held unconstitutional despite the fact that an ex parte hearing was required prior to attachment.

¹⁴⁷ Until recently, substantial involvement by a lender or other creditor in this manner was not without risk. Under CERCLA, the term "owner or operator" exempts one who holds indicia of ownership primarily to protect a security interest, where that is done "without participating in the management of the facility." 42 U.S.C. §9601(20)(A) (1988). However, in the case of *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 752 (1991), the Eleventh Circuit Court of Appeals implied that a secured lender who had the "capacity to influence" a borrower's environmental management of hazardous materials could lose that exemption from CERCLA liability. As a result, questions regarding the judicial interpretation of this "security interest" exemption generated uncertainty within the financial and lending communities for the purpose of protecting a security interest without incurring CERCLA liability. In response to *Fleet Factors*, the EPA clarified the safe harbor for a secured lender from CERCLA liability by promulgating *Subpart L, Lender Liability Under CERCLA, to the National Oil and Hazardous Substances Pollution Contingency Plan*. 57 Fed. Reg. 18,344 (1992) (to be codified at 40 C.F.R. §300.1100). Under the new rule lenders can, *inter alia*, freely enforce and monitor debtor environmental cleanups as loan conditions or terms.

which the secured party/lender may foreclose on the property. In order to comply with the security agreement, the lender will require periodical environmental audits to ensure compliance. Such private policing will further the national environmental policy of early detection of pollution as well as swift remediation and reduced costs. The effect will be for creditors to increase their oversight of the facility's operations in order to limit the debtor's environmental liability exposure while affording some relief to the already overburdened public enforcement agencies.

IX. CONCLUSION

Environmental legislation is intended to ensure compliance with the national policy of minimizing the threat which hazardous wastes pose to the public health and to the environment. However, the Code has been used to trump this national public policy based upon judicially created doctrine which frustrates the goals of environmental legislation. This impedes the strong national public policy of regulating substances which may adversely affect the public health or the environment.

In effect, courts have been faced with the policy choice of whether the public, as an involuntary creditor, should be held liable for environmental remediation costs or whether other potentially responsible private entities should shoulder the responsibility. Congress must enact legislation which apportions financial responsibility with all entities responsible for environmental pollution, whether or not such entities are seeking relief under the Code. Therefore, Congress should affix financial responsibility on the debtor by amending the relevant statutory provisions to the Code so as to prevent abandonment of contaminated property and grant non-dischargeable super-priority status to environmental claims of governmental entities. The effect of ensuring the government a super-priority for clean-up costs will force lenders to be proactive in policing their debtors' environmental liabilities since a large super-priority claim could leave little or nothing for secured creditors primed by such a lien.