
PRIORITY LIEN STATUTES: THE STATES' ANSWER TO BANKRUPT HAZARDOUS WASTE GENERATORS

United States industry generates over 250 million tons of hazardous waste¹ each year.² Both federal and state governments have enacted legislation to deal with the health and environmental risks created by mishandled toxic waste.³ This legislation is intended to prevent and abate dangerous waste sites and, if possible, hold the responsible parties

1. "Hazardous waste" is defined in the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-87 (1982). The broad definition includes any solid waste or combination of solid wastes that may cause or contribute to mortality, serious irreversible or incapacitating reversible illness. *Id.* § 6903(5). The definition also includes solid waste that may be a hazard to human health or to the environment if the waste is improperly managed. *Id.* The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-51 (1982), which complements RCRA's toxic waste standard provisions by dealing with the liability of those violating RCRA, refers to "hazardous substances" rather than "hazardous wastes." CERCLA adopts RCRA's definition of "hazardous substances" and includes the substances listed in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982), and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982). CERCLA also includes materials that the Environmental Protection Agency (EPA) has labeled hazardous, but CERCLA specifically excludes petroleum, certain natural gases, and synthetic gas usable for fuel. *See* 42 U.S.C. § 9601(14).

2. *St. Louis Globe-Democrat*, Jan. 20, 1985, at 28, col. 1.

3. Approximately 90% of toxic cleanups are handled by the responsible parties. 14 *Env't Rep. (BNA)* 1313 (1983). Federal legislation was still necessary, however, to provide rapid response to the approximately 50,000 mismanaged waste sites and to stimulate voluntary cleanup responses. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 804 (S.D. Ohio 1983) (holding that CERCLA may impose joint and several liability on generators and transporters of waste). In the past, about one-half of all waste sites have been abandoned, resulting in governmental cleanup actions estimated to cost taxpayers from 13 to 42 billion dollars. 9 *Env't Rep. (BNA)* 2085 (1979). More importantly, of the 738 most hazardous waste sites, only six have been made safe. *St. Louis Globe-Democrat*, Jan. 20, 1985, at 28, col. 1.

liable for the government's remedial costs.⁴

A policy conflict exists when the government attempts to recover remedial costs from a bankrupt party.⁵ The Bankruptcy Act⁶ is structured to provide not only a fair and orderly distribution of the debtor's assets to his creditors but also to give the debtor a fresh start.⁷ The government, however, needs to replenish its funds to enable it to remedy other hazardous sites.⁸ Thus, though government ultimately seeks to recover as much as possible from the debtor's assets,⁹ it is restrained

4. See, e.g., Tripp, *Liability Issues in Litigation under the Comprehensive Environmental Response Compensation and Liability Act*, 52 UMKC L. REV. 364, 396 (1984). The responsible party may be a waste generator, the owner or operator of a waste site, or a transporter of waste. See 42 U.S.C. § 9607(a)(1982). A waste "generator" is a chemical manufacturer that produces toxic chemical wastes as a by-product of the chemicals it markets. See Comment, *Generator Liability Under Superfund For Clean-Up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1230 n.10 (1982) (arguing Congress intended CERCLA to apply retroactively to generators that created hazardous situations before CERCLA was enacted).

5. See *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984). In *Penn Terra* the defendant violated several state pollution regulations. The state sought an injunction to force the defendant to correct the violations. The defendant, however, had filed a bankruptcy petition and asserted that the state's action was subject to the Bankruptcy Act's automatic stay. *Id.* at 269. See *infra* notes 66-75 and accompanying text for a discussion of *Penn Terra* and the automatic stay.

6. 11 U.S.C. §§ 101-1330 (1982).

7. See *Perez v. Campbell*, 402 U.S. 637, 648 (1971). For a discussion of *Perez*, see *infra* notes 126-28 and accompanying text. Extensive federal environmental regulation and enforcement creates severe difficulties for complying businesses. A corporation may go bankrupt due to the cost of purchasing resources sufficient to enable it to comply with federal standards. See Aaron, *Bankruptcy Stays of Environmental Regulation: Harvest of Commercial Timber as an Introduction to a Clash of Policies*, 12 ENVTL. L. 1 (1981). See also *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980) (EPA does not have to consider economic feasibility to grant variances from federal water pollution regulations).

8. Federal and state governments have attempted to avoid the insolvent generator problem by requiring proof of financial responsibility before authorizing hazardous waste-creating activities. See Cohen, *New Developments in State Hazardous Waste Legislation*, 9 CAP. U.L. REV. 489, 493 (1980); see generally Cohen & Derkics, *Financial Responsibility for Hazardous Waste Sites*, 9 CAP. U.L. REV. 509 (1980) (reviews proposed federal mechanisms that insure financial responsibility). Usually, financial responsibility is assured by requiring the generator to either carry insurance or post a surety bond. See *id.* at 514. In addition to recovering its costs, the government frequently penalizes or fines liable hazardous waste generators. See, e.g., N.H. REV. STAT. ANN. § 147-B:11 (Supp. 1986). Discussion of the issues raised by fines and penalties imposed on bankrupt generators is beyond the scope of this Note.

9. See, e.g., *Ohio v. Kovacs*, 467 U.S. 1224 (1985). In *Kovacs* the State of Ohio attempted to enforce an injunction that required the debtor to remedy his violations of state hazardous waste laws. See *In re Kovacs*, 681 F.2d 454 (1982), *vacated and re-*

by the Bankruptcy Act's harsh limitations on recovery from a debtor.

In response to the restraints the Bankruptcy Act presents in recovering from a bankrupt party or its trustee,¹⁰ three states enacted legislation providing the state with a priority lien in bankruptcy administration.¹¹ These statutes create a state "superlien."¹² Using the statute, the state places a lien on the debtor's property, thus placing the state in the position of a secured creditor.¹³ The Bankruptcy Act accords secured creditors preferential treatment; secured creditors recover from the bankrupts' assets before unsecured creditors.¹⁴ The state superliens further aid the state by giving the state's claim preference over the claims of other secured creditors.¹⁵

This Note evaluates the three state superlien statutes. Parts I and II examine the federal hazardous waste statutes and the relevant Bankruptcy Act provisions. Only after an introduction to these two areas of federal law can one appreciate the necessity of state superliens. Part

manded, 459 U.S. 1167 (1983). After the Court held that the state's injunction was subject to the Bankruptcy Act's automatic stay provision, the state argued that the obligation was not a "claim," thus prohibiting the debtor from using the Bankruptcy Act to discharge the obligation. See *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983). The Supreme Court affirmed the court of appeals decision and allowed Kovacs to discharge the debt under 11 U.S.C. § 727(b)(1982). This left the state unable to force Kovacs to clean up the site. See 465 U.S. 1078, 1081 (1984). For further support of the outcome in *Kovacs*, see Mathews, *The Scope of Claims Under the Bankruptcy Code*, 57 AM. BANKR. L.J. 339, 371 (1983) (concludes Congress intended claims to be all-inclusive).

10. Depending on whether the trustee successfully abandoned the hazardous waste site, the state may have to seek collection from the trustee of the bankrupt's estate. See *infra* notes 84-107 and accompanying text for discussion of a trustee's abandonment power.

11. N.J. STAT. ANN. § 58:10-23.11 (West Supp. 1986); MASS. ANN. LAWS ch. 21E, § 13 (Law. Co-op. 1986); N.H. REV. STAT. ANN. § 147-B:10 (Supp. 1986).

12. Schwenke & Lockett, *Superlien "Solutions" to Hazardous Waste: Bankruptcy Conflicts*, 1983-1984 ENVTL. L. NEWS. (ABA) 1. Congressman Florio introduced a bill, H.R. 2767, 98th Cong., 1st Sess. (1983), that would create a federal superlien. See *infra* notes 186-88 and accompanying text for a discussion of H.R. 2767.

13. See 11 U.S.C. § 506 (1982).

14. Secured creditors, including those with a valid statutory or judicial lien, bypass the Bankruptcy Act's main distribution system. See D. EPSTEIN & J. LANDERS, *DEBTORS AND CREDITORS* 377 (2d ed. 1982). The lienholder, however, must make sure that the bankrupt's trustee cannot avoid the lien under any of the provisions of 11 U.S.C. § 545 (1982).

15. The statutory language simply refers to precedence over other claims. See, e.g., N.H. REV. STAT. ANN. § 147-B:10(III) (Supp. 1986). See also *Kessler v. Tarrats*, 191 N.J. Super. 273, 466 A.2d 581 (Ch. Div. 1983), *aff'd*, 194 N.J. Super. 136, 476 A.2d 326 (App. Div. 1984). See *infra* note 141 and accompanying text for a discussion of *Kessler*.

III is a comparative analysis of how these state superlien statutes operate. Part IV discusses constitutional issues that may arise in superlien litigation. Part V evaluates the fairness and effectiveness of superlien provisions as a solution to the environmental law—bankruptcy conflict.

I. THE MAJOR FEDERAL TOXIC SUBSTANCES STATUTES

A. *The Resource Conservation and Recovery Act of 1976*

In 1976, Congress passed the Resource Conservation and Recovery Act (RCRA)¹⁶ to replace the Solid Waste Disposal Act of 1965.¹⁷ Because it was primarily intended to establish toxic waste disposal standards for existing and future waste generators, RCRA does not comprehensively regulate past generators or abandoned waste sites.¹⁸ Section 7003 of RCRA, however, authorizes the federal government¹⁹ to bring an action against generators that create an "imminent and substantial danger" to public health or the environment.²⁰

Although neither RCRA nor its legislative history defines section 7003's "imminent and substantial danger" standard,²¹ courts have interpreted the phrase to require a risk of serious harm.²² In order for

16. 42 U.S.C. §§ 6901-87 (1982).

17. Pub. L. No. 89-272, 79 Stat. 997 (1965).

18. See Note, *Superfund Proposed to Clean Up Hazardous Waste Disasters*, 20 NAT. RESOURCES J. 613, 618 (1980). See also Kovaks & Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM. J. ENVTL. L. 205, 216-20 (1976) (discusses RCRA's objectives and legislative history). Congress intended RCRA to solve all hazardous waste disposal problems. See H.R. REP. NO. 1491, 94th Cong., 2d. Sess. 4-5 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6241-43.

19. States may operate their own hazardous waste programs, but they must meet or exceed the standards the federal government requires. See F. ANDERSON, D. MANDELKER & A.D. TARLOCK, ENVIRONMENTAL PROTECTION 558 (1984) [hereinafter F. ANDERSON].

20. 42 U.S.C. § 6973 (1982). Under the statute, the Environmental Protection Agency's administrator may sue to "immediately restrain any person contributing to such handling, storage, treatment, transportation or disposal of waste, to stop such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary." *Id.* The Administrator is also authorized, after providing notice, to "take other action under this section including, but not limited to, issuing such order as may be necessary to protect public health and the environment." *Id.*

21. 42 U.S.C. § 6973 (1982).

22. For a discussion of the rationale and application of the "risk of serious harm" language, see Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 HARV. ENVTL. L. REV. 1, 16-18 (1982).

the government to institute an abatement action, the risk must be clear. The danger, however, does not actually have to exist.²³

Courts have used section 7003 to grant broad injunctive relief against hazardous waste generators.²⁴ In *United States v. Price*²⁵ the federal government used section 7003 to obtain an injunctive order against the owners of a hazardous landfill.²⁶ The government sought an order that would force the landfill owners to finance a study of various approaches to clean up the site.²⁷ Funding for the study was necessary in order to begin remedying the site.²⁸ The court held that section 7003 authorizes an injunction requiring the generators to appropriate money for a cleanup.²⁹ The court explained that its order constituted an injunction because it was a preventative measure and not compensatory in nature.³⁰ Because courts interpret section 7003 as authorizing broad injunctive relief, the federal government is able to use the section in cleanup actions.

23. See Hinds, *supra* note 22, at 17-18. See also *United States v. Vertac Chem.*, 489 F. Supp. 870 (E.D. Ark. 1980), *modified*, 588 F. Supp. 1294 (E.D. Ark. 1984) (holding that dioxin creates a health threat); *United States v. Midwest Solvent Recovery*, 484 F. Supp. 138 (N.D. Ind. 1980) (holding that toxic-contaminated soil is an imminent and substantial danger); Cohen & Derkics, *supra* note 8, at 509. *Accord*, *Jones v. Innmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984) (holding private parties have a cause of action to recover response costs and may obtain an injunction to abate the dangers posed by an inactive waste site); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (holding responsible parties liable for future costs of removal).

24. See Hinds, *supra* note 22, at 21. RCRA also allows the government to issue administrative orders that permit the imposition of fines. See *id.* at 21, 23-24.

25. 688 F.2d 204 (3d Cir. 1982).

26. *Id.* at 208.

27. *Id.*

28. *Id.* *Accord*, *United States v. Waste Indus.*, 734 F.2d 159 (4th Cir. 1984); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984). *But see* *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984) (holding that the government cannot use § 7003 to obtain mandatory injunctive relief).

29. *Id.* at 212. The court argued that § 7003's legislative history indicates an intent to authorize the granting of affirmative equitable relief to the extent necessary to eliminate toxic waste risks. *Id.* at 214. See also S. REP. NO. 848, 96th Cong., 2d Sess. 11 (1980); H.R. REP. NO. 1016, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6124.

30. 688 F.2d at 212.

B. *The Comprehensive Environmental Response, Compensation and Liability Act of 1980*

Four years after enacting RCRA, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)³¹ to regulate the cleanup of inactive or abandoned hazardous waste sites.³² Cleanup under CERCLA proceeds in two ways. Like RCRA, CERCLA contains an imminent danger provision that authorizes the federal government to seek an order forcing the responsible parties to remedy the site.³³

Alternatively, the government may clean the site itself by expending money from a 1.6 billion dollar "Superfund," and then bringing an action to recover the costs.³⁴ Section 107³⁵ of CERCLA holds the responsible parties liable for "all costs of removal or remedial action" and "any other necessary costs of response."³⁶ First, the Environmental Protection Agency (EPA) identifies the responsible parties and noti-

31. 42 U.S.C. §§ 9601-57 (1982). The Toxic Substances Control Act, 15 U.S.C. §§ 2601-29 (1982), also regulates hazardous waste. It contains an imminent hazard provision that authorizes civil action to abate dangerous conditions, but the provision is subordinated to RCRA and CERCLA causes of action. See Note, *Inactive or Abandoned Hazardous Waste Disposal Sites: Coping with a Costly Past*, 53 S. CAL. L. REV. 1709, 1726 (1980).

32. See F. ANDERSON, *supra* note 19, at 568. See also H.R. REP. NO. 1016, 96th Cong., 2d Sess. 1, 18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

33. See F. ANDERSON, *supra* note 19 at 581.

34. 42 U.S.C. § 9607. See Price, *Dividing the Costs of Hazardous Waste Site Cleanups Under Superfund: Is Joint and Several Liability Appropriate*, 52 UMKC L. REV. 339 (1984) (section 9607 authorizes recovery for cleanup costs incurred). Cf. *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984) (past off-site generators may be liable for cleanup costs under CERCLA); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984) (government has broad recovery rights under CERCLA); *United States v. A & F Materials Co.*, 578 F. Supp. 1249 (S.D. Ill. 1984) (government can recover some expenses even though it has incurred only a portion of total projected expenses at the time of suit).

35. 42 U.S.C. § 9607 (1982).

36. *Id.* The costs incurred must be consistent with a national contingency plan. *Id.* See 42 U.S.C. § 9605 (1982) for the Code provision that authorizes the national contingency plan.

Because § 9607(a)(4)(A) allows broad recovery rights, litigation over the necessary costs of response has been relatively sparse. In *Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Ohio 1984), the court defined what could be claimed as a "necessary cost of response." *Id.* at 1429. After discussing the statutory definitions of "remove," "response," and "remedial" the court concluded that § 9607(a)(4)(B) includes in damages the costs of medical testing, farming wells, and the loss of drinking water. *Id.*

fies them that a cleanup is necessary.³⁷ Next, the parties inform the EPA whether they are willing to assume all or part of the cleanup duties.³⁸ Finally, the EPA and the responsible parties coordinate a cleanup operation.³⁹

Despite EPA's leading role in CERCLA cleanup efforts, the individual states have significant rights and duties under the Act. States may bring an action against the responsible parties to recover remedial costs⁴⁰ and may also be eligible for federal reimbursement of costs.⁴¹ Under CERCLA, however, states must not only supply ten percent of the remedial outlays⁴² but must also finance the future maintenance of the abandoned waste site.⁴³

The obligations imposed on states under CERCLA have created heavy financial burdens. The majority of states have raised only one quarter of the requisite ten percent of the federal government's costs,⁴⁴ and states have reacted by initiating their own "superfunds."⁴⁵ To maintain superfund stability, three states included a superlien provision.⁴⁶

37. Tripp, *supra* note 4, at 368.

38. *See id.*

39. *See id.* Cleanups are possible even if one industry refuses to cooperate because CERCLA authorizes cleanups regardless of industry compliance without the government bearing the costs. *See id.* at 369.

40. F. ANDERSON, *supra* note 19, at 574.

41. *Id.* See 42 U.S.C. § 9604(d) (1982).

42. *Id.* § 9604(c)(3) (1982).

43. *Id.* See also Anderson, *Hazardous Waste Superfunds: Legislation and Economics*, 52 UMKC L. REV. 388 (1984).

44. *See id.* at 390.

45. *Id.* See, e.g., N.Y. ENVTL. CONSERV. LAW § 27-0923(1) (McKinney 1982); CAL. HEALTH & SAFETY CODE § 25,330 (West Supp. 1984).

46. *See supra* note 11 and accompanying text. The state and federal governments may also bring a public nuisance action to abate hazardous waste mismanagement. *See generally* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (holding that federal environmental statutes do not preempt federal common law); Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 593-96 (1981) (discussing public suits).

II. BANKRUPTCY ACT PROVISIONS THAT LIMIT STATE ENVIRONMENTAL PROTECTION ACTIONS

A. *The Automatic Stay—Section 362*

The Bankruptcy Reform Act's⁴⁷ automatic stay provides immediate protection from creditors to a debtor who has filed a bankruptcy petition.⁴⁸ In a voluntary Chapter 7 proceeding, creditors receive the proceeds from the debtor's liquidated estate.⁴⁹ The stay, therefore, enables the trustee to collect the property of the estate.⁵⁰ In an involuntary Chapter 7 proceeding,⁵¹ the stay allows the debtor to organize his de-

47. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C. §§ 101-1330 (1982)). For a comprehensive evaluation of the Bankruptcy Act, see AMERICAN ENTERPRISE INSTITUTE, *BANKRUPTCY REFORM* (1978) (provides supplementary explanation to Code's text).

48. The Act's automatic stay provision, 11 U.S.C. § 362 (1982), reads in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; (3) any act to obtain possession of property of the estate or of property from the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(b) The filing of a petition under section 301, 302 or 303 of this title does not operate as a stay—

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; (5) under subsection (a)(2) of this section, of 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. . . .

49. The filing of the bankruptcy petition creates a bankruptcy estate, the property of which is defined in 11 U.S.C. § 541 (1982). See D. EPSTEIN & J. LANDERS, *supra* note 14, at 376.

50. At the commencement of a Chapter 7 bankruptcy, the court appoints a trustee. See 11 U.S.C. § 701 (1982). The trustee controls the debtor's non-exempt assets so that the debtor's estate can be liquidated. See D. EPSTEIN & J. LANDERS, *supra* note 14, at 409. See 11 U.S.C. § 704 (1982) for the trustee's additional duties.

51. See D. EPSTEIN & J. LANDERS, *supra* note 14, at 410. This Note is limited to

fense against the petition.⁵² More importantly, the automatic stay permits the orderly administration of creditor claims⁵³ and allows debtors to pursue a discharge from creditor claims.⁵⁴

Section 362(a)'s broad language shields the debtor from nearly all collection efforts, including governmental enforcement of a court judgment or lien.⁵⁵ Congress, however, specifically excepted governmental police power regulations from the stay⁵⁶ in order to prevent parties from using the stay as a shelter from the enforcement of state police

Chapter 7 bankruptcy proceedings. In a Chapter 11 Reorganization proceeding, state environmental regulations remain enforceable because the debtor continues to operate his business. The Bankruptcy Code, at 28 U.S.C. § 959(b) (1982), requires Chapter 11 business operators to comply with state laws. In *In re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984) (Gibbons, J., dissenting), *aff'd sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection, 106 S. Ct. 755 (1986), New York State sought to prevent a trustee from abandoning a hazardous waste processing and storage facility. 739 F.2d at 913. The court, holding that the trustee could not abandon, found § 959(b) persuasive. *Id.* at 919. The court argued that § 959(b) could apply to Chapter 7 proceedings because Chapter 7 trustees may operate the debtor's business in some situations. *Id.* But see *Missouri v. United States Bankr. Ct.*, 647 F.2d 768, 778 n.18 (8th Cir. 1981) (distinguishing between § 959(b)'s applicability to Chapter 11 and Chapter 7 proceedings); 2 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 66.04(4) (2d ed. 1982). See *infra* notes 95-103 and accompanying text.

52. See D. EPSTEIN & J. LANDERS, *supra* note 14, at 410.

53. See *id.*

54. See *id.* Thus, the automatic stay aids creditors as well as debtors. Without it, creditors would be forced to race to recover on their claims from the debtor's depleting assets. If a debtor meets the requirements stated in 11 U.S.C. § 727 (1982), he is permitted a discharge from unsatisfied debts. Only individuals, however, are allowed discharge under the Act. See 11 U.S.C. § 727(a)(1) (1982). See also S. REP. NO. 989, 95th Cong., 2d Sess. 98, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5884.

55. See 11 U.S.C. § 362(1). The stay applies to all entities, including governmental units. See 11 U.S.C. § 101(14) (1982). See also Aaron, *Bankruptcy Stays of Environmental Regulation: Harvests of Commercial Timber as an Introduction to a Clash of Policies*, 12 ENVTL. L. 1, 25 (1981). See generally Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 177 (1978) (discusses development of the stay and the issues prompted by its application). "Governmental unit" is defined at 11 U.S.C. § 101(21) and includes the federal, state, and municipal governments and their instrumentalities.

56. 11 U.S.C. § 362(b)(4) (1982). See generally Comment, *Bankruptcy Law—When Is a Governmental Unit's Action to Enforce Its Police or Regulatory Power Exempt from the Automatic Stay Provisions of Section 362*, 9 FLA. ST. U.L. REV. 369 (1981) (discussing how courts have determined which regulations qualify for the stay's exception). See 7 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* (C. Nichols 3d ed. 1981) for a thorough treatment of the police power.

power regulations.⁵⁷

Courts have no difficulty in applying the stay's police power regulation exception to state environmental regulation actions. In *Department of Environmental Resources v. Peggs Run Coal Co.*⁵⁸ the court held that a state action seeking the posting of bonds and injunctive relief against an air and water polluter qualified as an exception to the stay.⁵⁹ Similarly, the court in *In Re Canarico Quarries, Inc.*⁶⁰ concluded that the stay's exception encompassed a state administrative board order that prohibited debtor from operating his business in violation of air pollution regulations.⁶¹

The Bankruptcy Act, however, does not extend application of the stay's police power exception to actions that serve the government's pecuniary interest in the debtor's property.⁶² Section 362(b)(5) prohibits the enforcement of a money judgment rendered under the state's police power. Thus, actions to enforce money judgments do not come within the police power exception. Although Congress wanted to limit interference with police power regulations, it found that similar limitations were not necessary to protect the government's fiscal resources.⁶³ Section 362(b)(5) effectively prevents the government from obtaining preferential treatment over similarly situated creditors.⁶⁴

Applying section 362(b)(5), courts have had difficulty distinguishing between money judgments and injunctions.⁶⁵ An injunctive order may compel a debtor or his trustee to spend much of the estate's assets to comply. In *Penn Terra Ltd. v. Department of Environmental Re-*

57. See S. REP. NO. 989, 95th Cong., 2d Sess. 55, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5838-41.

58. 55 Pa. Commw. 312, 423 A.2d 765 (1980).

59. *Id.* at 316, 423 A.2d at 767.

60. 466 F. Supp. 1333 (D.C.P.R. 1979).

61. *Id.* at 1340.

62. See Aaron, *supra* note 55, at 6.

63. For legislative history supporting a narrow construction of the government's ability to invoke the police power exception for financial reasons, see 124 CONG. REC. 517, 409 (Oct. 6, 1978).

64. See Aaron, *supra* note 55, at 7 n.22. The author contends that the policy of putting the government in the same position as private creditors runs throughout the Bankruptcy Act. See *id.*

65. In *United States Fidelity & Guaranty Co. v. Ft. Misery Highway Dist.*, 22 F.2d 369, 372 (9th cir. 1927), the court defined money judgment as "one that adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be transferred or restored."

*sources*⁶⁶ the Third Circuit defined a money judgment under section 362(b)(5). Reversing the previous bankruptcy court and district court decisions, the court held that a state's injunction action was not an action for a money judgment.⁶⁷ The injunction would force Penn Terra, a Chapter 7 debtor, to operate its coal mines in compliance with state environmental statutes.⁶⁸ Penn Terra contended that the substance of the state's "injunction" constituted a money judgment.⁶⁹ Rejecting Penn Terra's argument, the court stated that a money judgment contains two elements.⁷⁰ It must identify the opposing parties⁷¹ and specify "a definite and certain designation of the amount" that the claimant will recover.⁷² Furthermore, the court observed, the Bankruptcy Act allows the state to record a money judgment.⁷³ The automatic stay only prevents the state from enforcing a money judgment.⁷⁴ In support of its decision, the court pointed out that the state was merely seeking to prevent future environmental damage, rather than obtain compensation for Penn Terra's previous violations.⁷⁵

Though *Penn Terra* presents valid arguments for restricting application of the automatic stay, other courts have ruled differently. A recent case is *In re Kovacs*.⁷⁶ In *Kovacs* the debtor breached an agreement to clean up a hazardous waste site and to refrain from further polluting water by operating his industrial waste business.⁷⁷ Reacting to the breach, the state instituted an action to appoint a receiver of Kovacs' non-exempt assets.⁷⁸ The state also wanted to encumber Kovacs' future earnings to help fund the cleanup operation.⁷⁹ The court invoked the automatic stay to prevent the state from encumbering future earnings, finding the request indistinguishable from a money

66. 733 F.2d 267 (3d Cir. 1984).

67. *Id.* at 275.

68. *Id.* at 270.

69. *Id.* at 275.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 277.

76. 681 F.2d 454 (6th Cir. 1982), *vacated and remanded*, 459 U.S. 1167 (1983).

77. 681 F.2d at 454.

78. *Id.*

79. *Id.* at 455.

judgment.⁸⁰

A court may lift the automatic stay in one of three ways. First, the stay is removed if the court dismisses the bankruptcy petition.⁸¹ Second, the stay is terminated if the court discharges the debtor from his debts.⁸² Finally, the Bankruptcy Act authorizes creditors to request the stay's termination.⁸³

B. *The Abandonment Power*

In a Chapter 7 proceeding a trustee collects and liquidates the property of the debtor's estate and distributes the proceeds to the creditors.⁸⁴ To maximize the distributable amount, the Bankruptcy Act authorizes either the trustee or the bankruptcy court to abandon certain property. The trustee may abandon any property that burdens the estate or is of inconsequential value.⁸⁵

"Burdensome" is a term of art that refers to property that is so heavily subject to taxes, liens, or other encumbrances that the property is virtually worthless.⁸⁶ Of equal significance is the term "inconsequential," which refers to the debtor's lack of equity in the property.⁸⁷

The Bankruptcy Act recognizes that creditors may desire to abandon the property even when the trustee or court does not. The Act allows a "party in interest" to petition the bankruptcy court to compel the trustee to abandon worthless property.⁸⁸ A creditor must hold a possessory interest in the property to qualify as a party in interest.⁸⁹ A

80. *Id.* at 456. *Accord*, *Donovan v. TMC Indus., Ltd.*, 20 Bankr. 997 (Bankr. N.D. Ga. 1982) (holding that an injunction requiring debtor to pay wages and overtime is equivalent to a money judgment, and, therefore, subject to the stay); *But see* *Department of Env'tl. Resources v. Peggs Run Coal Co.*, 55 Pa. Commw. 312, 423 A.2d 765 (1980) (holding that an action for injunctive relief and posting of bond is not a money judgment and is excepted from the stay).

81. *See* D. EPSTEIN & J. LANDERS, *supra* note 14, at 411.

82. *See* 11 U.S.C. § 362(c) (1982).

83. *See* 11 U.S.C. § 362(d)-(g) (1982). *See generally* Martin, *Creditor Alternatives to Obtain Relief from Automatic Stays in Bankruptcy*, 87 COM. L.J. 22 (1982) (discusses the advantage to creditor means of obtaining relief from the stay).

84. *See* D. EPSTEIN & J. LANDERS, *supra* note 14, at 421.

85. 11 U.S.C. § 554(a) (1982). Before the trustee can exercise the abandonment power he must provide notice and a hearing. *Id.*

86. Martin, *supra* note 83, at 34.

87. *Id.*

88. 11 U.S.C. § 554(b) (1982).

89. *See* Martin, *supra* note 83, at 34.

creditor might benefit from abandonment if ownership rights revert to him. This will be the result if, for example, the creditor holds a lien on the property.⁹⁰ A state creditor, however, will not benefit from acquiring ownership of a toxic waste site requiring substantial cleanup. Thus, a state is unlikely to initiate abandonment.

After a trustee or court exercises the abandonment power, the debtor reacquires ownership rights because the estate no longer owns the property.⁹¹ If the debtor is discharged from his outstanding debts, he owns the abandoned property free from all claims.⁹²

Under the Bankruptcy Act, however, only individuals, not corporations, can obtain a discharge.⁹³ Thus, discharge is not an issue when a state is attempting to recover cleanup costs from a corporation. A bankrupt corporation, which owns little more than its exempted assets and other abandoned property, will not have sufficient assets to cover the massive costs of a toxic waste cleanup.⁹⁴ The state, therefore, is not likely to benefit from abandonment.

Courts usually will not permit abandonment because they realize it would leave the state remediless. In *In re Quanta Resources Corp.*⁹⁵ the debtor, Quanta Resources, operated a waste oil storage and processing plant. The plant was contaminated with large quantities of PCB, a toxic waste, when the debtor filed for bankruptcy.⁹⁶ The trustee gave notice of his interest to abandon the site and the State of New York objected, arguing, *inter alia*,⁹⁷ that abandonment would

90. See D. EPSTEIN & J. LANDERS, *supra* note 14, at 516. Technically, abandonment may be to any person with a possessory interest in the property. *Id.*

91. *Id.* See also *In re Perry*, 29 Bankr. 787 (Bankr. D. Md. 1983) (upon abandonment by trustee, property leaves the estate and reverts to debtor); *In re Enriquez*, 22 Bankr. 934 (Bankr. D. Neb. 1982) (abandonment of property by trustee divests control of property); *In re Motley*, 10 Bankr. 141 (Bankr. M.D. Ga. 1982) (upon abandonment by trustee, real estate is no longer property of estate). *But see In re Erwin*, 25 Bankr. 363 (Bankr. D. Minn. 1982) (abandoned property reverts to lien holder, not debtor).

92. See 11 U.S.C. § 727 (1982).

93. See *id.* § 727(a)(1).

94. For a listing of exemptions see 11 U.S.C. § 522 (1982).

95. 739 F.2d 912 (3d Cir. 1984), *aff'd sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755 (1986).

96. *Id.* at 913.

97. The state argued that under 11 U.S.C. § 959(b) the debtor must comply with all state laws. *Id.* at 914. See *supra* note 5 and accompanying text.

In *Gillis v. California*, 293 U.S. 62 (1934), for example, a state licensing agency required a debtor to post bond before he could distribute fuel. The Court, rejecting the

controvert public policy.⁹⁸ The state pointed out that abandonment would vest title to the site in Quanta, which lost its assets upon commencement of the bankruptcy case.⁹⁹ Because Quanta could not help fund the state's cleanup,¹⁰⁰ the site, unless remedied, would exist in continual violation of the state's environmental protection statutes.¹⁰¹

The court held that the trustee could not abandon the toxic site, reasoning that state statutes should be enforced unless the Bankruptcy Act preempts them.¹⁰² The court recognized the absence of legislative history on the abandonment power, and relied on case law to find that the Bankruptcy Act does not preempt state police power regulations, including environmental protection statutes.¹⁰³ The court emphasized that a toxic site creates a threat to public health.¹⁰⁴

In *Midlantic National Bank v. New Jersey Department of Environmental Protection*¹⁰⁵ the Supreme Court affirmed the *Quanta* decision. Justice Powell, writing for the Court in a 5-4 decision, relied on case law to rule that Congress intended to prohibit abandonment in contravention of laws protecting public health or safety.¹⁰⁶ Because the Court limited the exception to the abandonment power to particular laws and situations in which harm is not "speculative," the ability to

debtor's claim to enjoin the state's requirement, stated that Congress intended to force debtors to comply with state law. *Id.* at 66.

The *Gillis* case can be distinguished from *Quanta*. *Gillis* was a reorganization case in which the debtor continued operating his business. In *Quanta*, a Chapter 7 case, the debtor's business was liquidated for distribution. *But see* Wein, *Environmental Regulation and the Bankruptcy Act*, 17 DUQ. L. REV. 133, 141 (1978-79) (finds *Gillis* indicative of congressional intent to prohibit all bankrupts from violating state police power regulations).

98. 739 F.2d at 914.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 916.

104. *Id.* The *Quanta* court cited the analogous case of *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952). In *Ottenheimer* the trustee wanted to abandon some floating barges anchored in Baltimore harbor. *Id.* at 289. The court recognized that abandonment would vest title in the incapable bankrupt, and prohibited abandonment. *Id.* at 290. The court asserted that the bankrupt would allow the barges to sink, thereby blocking navigation and violating federal law by causing a hazard. *Id.* The *Ottenheimer* court did not rely on public policy. Nevertheless, *Quanta* is similar because in both cases abandonment would likely result in the violation of law.

105. 106 S. Ct. 755 (1986), *reh'g denied*, 106 S. Ct. 1482 (1986).

106. *Id.* at 759-60.

use the abandonment power remains largely undefined.¹⁰⁷

III. HOW THE SUPERLIEN STATUTES OPERATE

State superlien statutes enable the state to circumvent many of the Bankruptcy Act's obstacles to recovery. States need to maintain sufficient resources to conduct thorough cleanups. A state can improve its recovery position under the Bankruptcy Act by obtaining secure creditor status.¹⁰⁸ Enforcement of the state's superlien statute furnishes it with a lien that assures the state secured creditor status.¹⁰⁹

The three existing state superlien statutes differ significantly. For example, two of the three require the state to file a statement of claim to secure the lien.¹¹⁰ A statement of claim notifies subsequent purchasers that the state holds a lien on the property.

The statutes vary concerning the type of claims under which the

107. *Id.* at 760, 762 n.9. Justice Rehnquist authored a strong dissent that refuted the majority's interpretation of congressional intent and asserted that the Court cannot search for a congressional intent to support an exception to the abandonment power. *Id.* at 763. Citing the fact that Congress explicitly excluded certain environmental injunctions from the automatic stay proviso, Justice Rehnquist inferred that the Court must rely only on the statutory language when dealing with abandonment. *Id.* at 763-64.

108. A secured creditor's lien represents a present interest in the debtor's property. Under 11 U.S.C. § 541 (1982), the lien never becomes part of the bankruptcy estate. See D. EPSTEIN & J. LANDERS, *supra* note 14, at 514.

If the state does not procure secured creditor status, or if the property the state is interested in is worth less than the state's claim, then the state is in the position of an unsecured creditor. The Bankruptcy Act's priority provision, 11 U.S.C. § 507, dictates the distribution of the proceeds from the debtor's liquidated estate.

The estate's administrative expenses are the first priority. *Id.* The expenses that qualify as administrative are listed in 11 U.S.C. § 503(b) (1982), and includes expenses necessary to preserve the estate. *Id.* In *In re Vermont Real Estate Investment Trust*, 25 Bankr. 804 (Bankr. D. Vt. 1982), the court allowed the City of Montpelier to recover its expenses under the administrative expense provision. *Id.* at 805. The city incurred the expenses when it removed the debtor's dangerously constructed building. *Id.* The court declared that the expenses were necessary to preserve the debtor's estate. *Id.* at 806. The administrative expense provision is therefore an alternative means of recovering cleanup expenses. It may be used either in conjunction with or without a statutory lien. The expenses must, however, be necessary to preserve the debtor's estate. 3A COLLIER ON BANKRUPTCY § 62.14[1] (L. King 15th ed. 1979).

109. A "lien" is defined at 11 U.S.C. § 101(28) as a "charge against or interest in property to secure payment of a debt or performance of an obligation." Section 101(39) defines a statutory lien as a lien "arising solely by force of a statute on specified circumstances or conditions. . . ."

110. MASS. ANN. LAWS ch. 21E, § 13 (Law. Co-op. 1986); N.J. STAT. ANN. § 58:10-23.11f (West Supp. 1986).

states may recover. The Massachusetts provision allows recovery for any liability imposed under its general toxic waste statute, plus twelve percent interest per year on the debt.¹¹¹ The general statute holds responsible parties liable for all cost the state incurred while investigating or conducting a cleanup, and authorizes a civil fine.¹¹² The New Hampshire superlien statute entitles the state to recover any amount spent from its superfund because of the waste generator's acts or omissions.¹¹³ The state, however, may not place a lien on property to recover any fines or penalties.¹¹⁴ The New Jersey superlien statute resembles New Hampshire's; the state may use the lien only to recover its cleanup expenses.¹¹⁵

The superlien provisions also identify what property the state may encumber. In New Jersey all of the debtor's revenue, real property, and personal property are subject to the lien.¹¹⁶ Again, New Hampshire's superlien statute is similar to New Jersey's, except that only business revenues, not personal revenues, are subject to New Hampshire's lien.¹¹⁷ Originally, Massachusetts could place a lien on all debtor's real and personal property regardless of whether the debtor acquired ownership before or after incurring the debt.¹¹⁸ In response to political pressure¹¹⁹ the state amended the act to include only property located on the hazardous waste site.¹²⁰

A critical issue arising under superliens is whether the state's lien takes priority over other secured creditor's claims. The Massachusetts statute clearly gives the state priority over all other creditors.¹²¹ The New Jersey and New Hampshire statutes give the state's lien priority over "all other claims."¹²² These statutes make state claims superior to

111. MASS. ANN. LAWS ch. 21E, § 13.

112. *Id.* § 11.

113. N.H. REV. STAT. ANN. § 147-B:10 (Supp. 1986).

114. *Id.*

115. N.J. STAT. ANN. § 58:10-23.11f.

116. *Id.*

117. N.H. REV. STAT. ANN. § 147-B:10.

118. MASS. ANN. LAWS ch. 21E, § 13.

119. The Federal Home Loan Mortgage Corporation left the Massachusetts mortgage market because of the effect the encumbrance could have on various properties. See Schwenke & Lockett, *supra* note 12, at 2.

120. *Id.*

121. MASS. ANN. LAWS ch. 21E, § 13.

122. N.J. STAT. ANN. § 58:10-23.11f; N.H. REV. STAT. ANN. § 147-B:10.

all creditors, secured or not, by simply using the word "claim." The statute may not, however, subordinate other secured claims.¹²³

Courts have not defined the scope of any superlien application. Clearly, resolution of statutory ambiguities will have a crucial effect on the states' recovery rights, debtor obligations, and secured creditors' rights.

IV. CONSTITUTIONAL ISSUES RAISED BY STATE SUPERLIEN STATUTES

Although state superliens heavily burden both debtors and creditors, they serve an important state objective. Consequently, courts confronted with constitutional challenges to superlien statutes usually sympathize with the challengers but hesitate to invalidate the statutes. Claimants can make three constitutional attacks on the superliens: preemption by the Bankruptcy Act; and violation of the Constitution's contract clause and taking clause.

A. *Whether the Bankruptcy Act Preempts State Superlien Statutes*

When Congress exercises an enumerated power, as it did when it enacted the Bankruptcy Act under the supremacy clause, the federal legislation preempts all directly conflicting state legislation.¹²⁴ The state statute must give way, however, only if the state and federal legislation unavoidably conflict.¹²⁵ Thus, a debtor or creditor subjected to a superlien could challenge the lien by asserting that it hinders the Bankruptcy Act's objectives of giving the debtor a fresh start and distributing the debtor's non-exempt assets equitably.

123. New Jersey's superlien was tested in *Kessler v. Tarrats*, 191 N.J. Super. 273, 466 A.2d 581 (Ch. Div. 1983), *aff'd*, 194 N.J. Super. 136, 476 A.2d 326 (App. Div. 1984). In *Kessler* the administrator of New Jersey's Spill Compensation Fund attempted to assert the state's claim ahead of other secured interests. *Id.* at 281, 466 A.2d at 585. A mortgage holder, one of the displaced secured creditors, challenged the superlien's constitutionality. *Id.* The court upheld both the state's first priority position and the superlien's constitutionality. See *infra* notes 141-48, 164-65 and accompanying text.

124. See G. GUNTHER, *CONSTITUTIONAL LAW* 317 (11th ed. 1985). See also *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (holding state regulations invalid because compliance would violate federal law). The Constitution explicitly grants Congress the power to enact bankruptcy legislation. U.S. CONST. art. I, § 8.

125. G. GUNTHER, *supra* note 124, at 317. See also *Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) (holding a city ordinance restricting airport operation hours invalid because it interfered with a federal statute's objectives).

In *Perez v. Campbell*¹²⁶ the Supreme Court dealt with such a claim. A state statute mandated revocation of a driver's registration and license if the driver failed to satisfy a court judgment within sixty days, even if the driver was insolvent.¹²⁷ The Court held that the statute unduly interfered with the federal policy of giving a bankrupt debtor a new start, unrestricted by previous debts.¹²⁸

The superlien statutes, however, are designed to operate within the framework of the Bankruptcy Act.¹²⁹ The state simply makes itself a lienholder through superliens. The Bankruptcy Act favors lienholders by giving them a priority preference.¹³⁰ By acquiring lienholder status, the state works within and does not defeat bankruptcy objectives.

B. *The Contract Clause*

The contract clause prohibits states from passing laws that "impair the obligation of contracts."¹³¹ The clause protects private contracting parties from state action.¹³² Courts have used the clause to protect creditors from debtor relief legislation.¹³³ Debtor relief laws interfere with a creditor's collection rights—rights for which he contracted.¹³⁴ The Supreme Court tempered the clause by limiting its application to state laws that operate retroactively to affect contracts already in existence.¹³⁵

Because the state is allowed broad discretion to regulate the economic rights of citizens,¹³⁶ the contract clause is an important means

126. 402 U.S. 637 (1971).

127. *See id.*

128. *See id.* at 654. One author distinguished *Perez* from cases arising in the environmental protection content. In *Perez* one citizen benefitted from the state regulation. In contrast, the public benefits from environmental protection regulations. *See Wein, supra* note 97, at 145. The Court may be less inclined to hold that the Bankruptcy Act preempts a critical police function.

129. State laws have an important role in bankruptcy administration. *See, e.g., In re Dawson*, 10 Bankr. 680 (Bankr. E.D. Tenn. 1981) (interpreting a state exemption allowed under 11 U.S.C. § 522).

130. *See supra* note 14 and accompanying text.

131. U.S. CONST. art I, § 10.

132. G. GUNTHER, *supra* note 124, at 487.

133. *See id.*

134. *See id.*

135. *See Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (holding a state insolvency statute valid because it did not operate retroactively).

136. *See, e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (rejecting a due

of protecting private economic rights.¹³⁷ In *Allied Structural Steel Co. v. Spannaus*¹³⁸ the Supreme Court applied the contract clause to a state law that regulated employers' pension funds.¹³⁹ The Court struck down the state law, holding that it fatally changed the contractual obligations employers assumed when they established the funds.¹⁴⁰ The *Allied Structural Steel* decision, therefore, interpreted the contract clause to protect citizens from overly intrusive state regulation.¹⁴¹

State superlien statutes clearly interfere with debtor-creditor relations and present a contract clause issue. In *Kessler v. Tarrats*¹⁴² a mortgage holder argued that New Jersey's superlien was unconstitutional under the contract clause.¹⁴³ The claimant attempted to foreclose a mortgage that he had acquired and recorded not only before the state recorded its superlien,¹⁴⁴ but before the state enacted the superlien statute.¹⁴⁵ Although the claimant contended that the statute impermissibly operated retroactively,¹⁴⁶ his contractual right to foreclose was subordinated to the state's lien.

The court rejected the claimant's contract clause argument,¹⁴⁷ asserting that a state may enact laws that protect public health despite

process challenge to a state statute that regulated economic rights because the law might be rationally related to a legitimate state end).

137. See G. GUNTHER, *supra* note 124, at 475.

138. 438 U.S. 234 (1978).

139. *Id.* at 240.

140. *Id.* at 250-51. The Court pointed out that the state statute did more than nullify the employer's contractual obligations. The Court stated that the statute "imposes a completely unexpected liability in potentially disabling amounts." *Id.* at 247.

141. See G. GUNTHER, *supra* note 124, at 498.

142. 191 N.J. Super. 273, 466 A.2d 581 (Ch. Div. 1983), *aff'd*, 194 N.J. Super. 136, 476 A.2d 326 (App. Div. 1984).

143. *Id.* at 281, 466 A.2d at 585.

144. *Id.* The state incurred expenses when it removed and tested toxic waste taken from the site. *Id.* at 297, 466 A.2d at 595.

145. *Id.* at 281, 466 A.2d at 585. The original mortgage holder recorded before the state enacted the superlien provision. The claimant, however, acquired title two years after the statute was in effect. *Id.* at 287-88, 466 A.2d at 589. Because the claimant had two years notice of the statute, the court rejected his due process claim. *Id.* at 288, 466 A.2d at 589. The court cited *Gibraltar Factors Corp. v. Slapo*, 41 N.J. Super. 381, 125 A.2d 309 (App. Div. 1956), *aff'd*, 23 N.J. 459, 125 A.2d 567, *appeal dismissed*, 355 U.S. 13 (1957), and charged the claimant with knowledge of all previously enacted state statutes. 191 N.J. Super. at 287-88, 466 A.2d at 589.

146. *Id.*

147. *Id.* at 305, 466 A.2d at 600.

the impairment of a prior contractual right.¹⁴⁸ The court also acknowledged the state's purpose of assuring funds sufficient to abate hazardous conditions.¹⁴⁹ The court, therefore, considered the state's pecuniary interest in the debtor's property a legitimate object of the state's police power.

The United States Supreme Court employs a three part test when deciding contract clause claims.¹⁵⁰ First, the court decides whether the state law substantially impairs a contractual relationship.¹⁵¹ This is merely a threshold inquiry that superlien statutes clearly satisfy. The statutes can divest a secured creditor of a perfected security interest that the creditor contracted to obtain. The mortgage holder's loss in *Kessler* is an excellent example of how superliens can change contractual expectations.

The second part of the Court's test requires the state to show that the statute is intended to serve a significant and legitimate public purpose.¹⁵² Undoubtedly, remedying the dangerous situation that mismanaged toxic waste sites create is a significant and legitimate public purpose. The superlien provisions, however, are intended to protect the state's pecuniary interest in the property. Thus, the state must show that unless the statute protects its monetary interest, it will not be able to maintain the funds necessary to deal with the toxic waste threat.

The third part of the Supreme Court's test, applied after the state has shown a significant and legitimate public purpose, requires the court to determine if the law is based on reasonable conditions and appropriately serves the purpose articulated.¹⁵³ The state must demonstrate that the lien is a sound approach to recovering its costs. The state may also have to show why alternative methods of funding are unacceptable.

148. *Id.* at 289, 466 A.2d at 590. The court relied on two Supreme Court decisions. See *Northwestern Fertilization Co. v. Hyde Park*, 97 U.S. 659, 667 (1878) (holding an ordinance that prohibited nuisance-creating businesses valid even though the legislature granted a corporate charter); *Erie R. Co. v. Board of Pub. Util. Comm'rs*, 254 U.S. 394 (1920) (ordered incorporated railroad to comply with a state law enacted after incorporation, and required railroad to construct multi-million dollar crossings).

149. See 191 N.J. Super. at 300, 466 A.2d at 597.

150. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).

151. *Id.* at 411-12.

152. *Id.*

153. *Id.* at 412.

The state may find it difficult to argue that there are no feasible alternatives to the superlien. Unquestionably, the superlien is intended to hold the party responsible for the cleanup costs liable. In their operation, however, the statutes penalize innocent parties. Other secured creditors may not be even remotely culpable and may, in fact, have acquired an interest in the property without notice of the superlien's existence. In short, depending on how strictly a court applied the three part test, superlien statutes raise serious contract clause issues.¹⁵⁴

C. *The Taking Clause*

The fifth amendment states that the government cannot take private property for public use without paying just compensation.¹⁵⁵ The fifth amendment taking clause applies to state action through the fourteenth amendment's due process clause.¹⁵⁶ Like the contract clause, the taking clause protects private economic interests from state interference.¹⁵⁷ The taking clause does not prevent the state from acquiring private property rights, but instead limits the state's eminent domain powers by imposing the just compensation and public use requirements.

Courts have distinguished between state eminent domain actions and state police power regulations,¹⁵⁸ maintaining that police power regulations are not fifth amendment takings and thus do not require the state to pay compensation.¹⁵⁹ Courts use several criteria in determining

154. The state has considerable power to protect the public from toxic waste and other threats to health. In *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), the Supreme Court upheld retroactive application of a state law to a debtor's obligations. Under the law, courts could grant extensions to debtors threatened with mortgage foreclosure. *Id.* at 416. The Court declared that the state could retroactively impair the debtor-creditor contract to serve vital public interests. *Id.* at 434. The Court stated that the "[r]eservation of essential attributes of sovereign power is . . . read into contracts." *Id.* at 435.

155. U.S. CONST. amend. V.

156. U.S. CONST. amend. XIV, § 1. *See Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226 (1897).

157. *See G. GUNTHER, supra* note 124, at 475.

158. *See generally* F. BOSSELMAN, D. CALLIES & J. BANTER, *THE TAKING ISSUE* (1973) (tracing the history of Supreme Court rulings on the taking clause); Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 REAL EST. L.J. 211 (1983) (discussing the eminent domain-police power regulation distinction).

159. *See Mugler v. Kansas*, 123 U.S. 623 (1888) (holding state did not have to pay compensation to a brewer whose rights were curtailed by a state law that prohibited the manufacture of liquor.)

whether a state action is an eminent domain action or a police power regulation.¹⁶⁰ In addition, the Supreme Court has ruled that even police power regulations can be considered a taking if they sufficiently invade a property owner's rights. In these instances, the state is required to pay just compensation.¹⁶¹

Courts have designated "noxious use" cases as a subject area in which a state's regulation generally is not considered a taking.¹⁶² A court confronts a noxious use case when the property owner uses his property in a way that threatens the health or safety of the public.¹⁶³ Because the state's regulation is merely a police power reaction to the threat the property owner created, the state's regulation is not considered a taking, regardless of its effect on the value of the property.¹⁶⁴

In *Kessler*, for example, the mortgagee claimed that the state, by enforcing its superlien to his detriment, "took" his secured creditor's rights¹⁶⁵ without paying just compensation.¹⁶⁶ The court, without elaborating, rejected the claimant's taking argument and asserted that the state was simply using its police power to regulate a nuisance.¹⁶⁷

160. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-1201 (1967) (evaluating the merits of the different approaches the courts have taken); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

161. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that if regulation "goes too far" it is a taking).

162. See Sax, *supra* note 160, at 39.

163. The state's power to terminate noxious property uses is an extension of the state's traditional power to abate nuisances. See, e.g., *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 63 (1851) (statute enjoining erection of a wharf not a taking but a prohibition of a noxious use); *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding state law authorizing destruction of red cedar trees without paying compensation because of their harmful rust).

164. See Sax, *supra* note 160, at 39; Michelman, *supra* note 160, at 1196-1201.

165. *Kessler*, 191 N.J. Super. at 281, 466 A.2d at 585. A secured creditor's rights in the debtor's assets are property rights protected by the taking clause. *United States v. Security Indus. Bank*, 459 U.S. 70, 75-76 (1982).

166. 191 N.J. Super. at 287, 466 A.2d at 585. A bankruptcy trustee asserted a similar taking argument in *Quanta*. The trustee contended that if the court refused to allow him to abandon the hazardous waste site, the result would be a severe depletion of the estate's assets because the estate would be forced to spend money to comply with state law. 739 F.2d 912, 914 (3d Cir. 1984). The trustee claimed that the state would be taking the estate's secured creditors' rights by prohibiting abandonment. *Id.* See *supra* notes 95-103 and accompanying text for discussion of *Quanta*.

167. 191 N.J. Super. at 288-96, 466 A.2d at 589-95.

Though cleanup is a justified police power act, it does not end the taking inquiry.

The state superliens do not constitute a taking if they affect only the responsible parties. Under noxious use—nuisance taking analysis, no taking occurs when the property owner is at fault for creating the hazard.¹⁶⁸ The responsible party's insolvency also alters the focus of taking analysis. The superliens expropriate the secured creditor's property rights without affecting the debtor. The debtor renounces his ownership by filing the bankruptcy petition. In superlien litigation the real issue is whether the state divests the other creditors, not the debtor, of their rights.¹⁶⁹

Secured creditors, on the other hand, can assert a strong taking claim. They can argue that the state should abate a noxious property use without paying compensation only if it is a matter of public necessity.¹⁷⁰ Undoubtedly, hazardous waste cleanup is an important state function. The superlien, though protecting the state's pecuniary interest in a site that it has remedied, does not enable the state to clean up a site. Thus, balanced against its harsh effect on creditors' rights, the superlien may not be a matter of public necessity.

To determine the environmental superlien's constitutionality, a court can apply decisions on superliens outside of the environmental law context. In *Provident Institution for Savings v. Jersey City*,¹⁷¹ for example, the Supreme Court upheld a statute that supplied Jersey City with a lien to recover delinquent water rents.¹⁷² The claimant, a mortgage holder, lost his priority position.¹⁷³ The *Provident Institution* lien is similar to an environmental superlien because it also protects the state's financial resources.

A more common priority lien exists when states enact legislation that authorizes destruction of subcode buildings that are a public nuisance.¹⁷⁴ The state's lien has priority over all claims except liens for

168. See *supra* note 163.

169. The dissenting judge in *Quanta* made a similar argument in response to the majority's quick disposal of the taking claim. See 739 F.2d at 923 (Gibbons, J., dissenting). *Accord, In re New York, New Haven & Hartford R.R.*, 330 F. Supp. 131, 147 (D. Conn. 1971) (stating that the taking clause limits the state's ability to erode the debtor's assets).

170. 7 E. McQUILLIN, *supra* note 56, § 24.574.

171. 113 U.S. 506 (1885).

172. *Id.* at 516.

173. *Id.* at 508.

174. 7 E. McQUILLIN, *supra* note 56, § 24.561.

taxes or assessments.¹⁷⁵ Given the constitutionality of these liens, environmental superliens may also be valid. Courts will hesitate to invalidate a law intended to aid toxic waste cleanup, particularly if the state convinces the court that superliens are essential to effectively conduct cleanups.

V. THE FAIRNESS AND EFFECTIVENESS OF STATE SUPERLIEN STATUTES

Apart from the serious constitutional issues superliens present, the statutes pose other difficulties. Superliens clearly limit a creditor's recovery rights. Depending on the particular statute, the superlien may also fail to notify subsequent purchasers of encumbered property of the state's claim. These problems prompt an inquiry into whether superliens are the sole and best method of protecting the state's monetary resources.

The importance of the government's presence to regulate and ensure cleanups is evident. Without government regulation, residents threatened by toxic waste danger would bear both the costs of cleanups and the risk of harm.¹⁷⁶ Because cleanups are an unprofitable venture, the private sector will not act until absolutely necessary.¹⁷⁷ With government-initiated cleanups, cleanup costs are reduced and the danger is effectively abated before it becomes an irreversible threat. In addition, the costs are more fairly distributed than when only those threatened pay.

Unless a funding mechanism like a superfund exists, taxpayers bear the cleanup costs. Even when the government's superfund largely consists of generator contributions, the generators can pass the increased costs on to consumers.¹⁷⁸ Taxpayers must also cover any deficit be-

175. *Id. See, e.g.,* *Brown v. Tobriner*, 312 F.2d 334 (D.C. Cir. 1962) (state lien for expenses incurred to remove unsafe building given priority over deed of trust); *City of Chicago v. City Realty Exch.*, 127 Ill. App. 2d 185, 262 N.E.2d 230 (1970) (lien on demolition costs subordinated to tax lien); *Cleveland Metro. Hous. Auth. v. Lincoln Property Management Co.*, 22 Ohio App. 2d 157, 259 N.E.2d 512 (1970) (lien on demolition costs given priority over mortgage).

176. *See* Note, *Allocating the Costs of Hazardous Waste Disposal*, 94 HARV. L. REV. 584, 585 (1981) (examining the effect of legislation on cost distribution).

177. *See id.* at 587.

178. *See id.* at 586. *See also* Note, *Superfund Proposal to Clean Up Hazardous Waste Disasters*, 20 NAT. RESOURCES J. 613, 623 (1980) (arguing that consumers ultimately bear costs of cleanup regardless of who conducts it).

tween the superfund and the actual cost of cleanup.¹⁷⁹

Distributing cleanup costs among the public is fair because hazardous waste production is an unavoidable external cost of operating a business in a technological sophisticated society.¹⁸⁰ The public benefits from both the cleanups and the products or processes that produce the waste. The public should further welcome government initiated cleanup programs because the consequences of improper waste management are life threatening.

Superliens distort the fair cost distribution that exists under joint industry-public funding, and disproportionately burden those whose claims are subordinated to the state's lien. The lien enables the state to gain a priority position in bankruptcy claims,¹⁸¹ but it penalizes other innocent creditors.

Superliens have additional undesirable effects. For example, fearing subordination to the lien, creditors may refrain from extending credit to potential violators of state hazardous waste laws. Creditors would at least exact a higher price to reflect their increased risk.¹⁸²

As an encumbrance on property, superliens affect real estate transactions. If the state does not have to file a statement of claim, subsequent purchasers of the encumbered property may not have notice of the lien.¹⁸³ This is particularly true if the state can encumber any of the debtor's real and personal property. If the state can place the lien only on the waste site, a subsequent purchaser should at least have notice that the property is subject to environmental regulations.

The lack of notice problem prompted the Federal Home Loan Mortgage Corporation to withdraw from a segment of the Massachusetts

179. See *supra* note 44 and accompanying text.

180. See Note, *supra* note 178, at 623.

181. Courts have encountered a plethora of cases in which corporations use the Bankruptcy Act to avoid state regulation. See, e.g., *In re Dolly Madison Indus., Inc.*, 504 F.2d 499 (3d Cir. 1974) (holding that court lacks authority under Bankruptcy Act to order the state to grant debtor an operating license); *Bay Ridge Inn, Inc. v. New York State Liquor Auth.*, 94 F.2d 555 (2d Cir. 1938) (state cancelled liquor license of trustee for violating state law); *Colonial Tavern, Inc. v. Byrne*, 420 F. Supp. 44 (D. Mass. 1976) (holding that bankrupt's status did not prevent state from enforcing liquor laws). But see *In re Parkchester Gen. Hosp.*, 4 Bankr. Ct. Dec. (CRR) 292 (S.D.N.Y. 1978) (state cannot revoke hospital's operating certificate after court authorized hospital's continued operation); *In re Hillsdale Foundry Co.*, 1 Bankr. Ct. Dec. (CRR) 195 (W.D. Mich. 1974) (holding that Congress intended to permit bankrupt's continued operation without state interference).

182. See *Schwenke & Lockett*, *supra* note 12, at 3.

183. *Id.*

mortgage market.¹⁸⁴ The Corporation apparently felt threatened by the potential encumbering of property to which it held a mortgage, despite the fact that the Corporation's loan was unrelated to hazardous waste management. Massachusetts subsequently amended its superlien provision to limit the lien to waste sites.¹⁸⁵

Despite the shortcomings of superliens, a federal superlien proposal is pending before the House Committee on Energy and Commerce. The House proposal would insert a superlien provision into both RCRA and CERCLA.¹⁸⁶ The bill would give federal and state claims for cleanup costs priority over all other claims, secured or unsecured.¹⁸⁷ The government would not have to file a statement of claim. More importantly, the proposal fails to specify the types of property to which the lien may be attached.

Governments enacting superlien provisions should opt for alternative solutions to replenish superfunds. The solution must enable the government to maintain funds necessary to be effective. Ideally, the solution should go one step further and deter the proliferation of mis-managed sites.

One such solution may be to increase the annual contributions industry must make to the superfund. This would place the costs of hazardous waste cleanup directly on the responsible parties,¹⁸⁸ while

184. *Id.*

185. *See supra* note 199 and accompanying text.

186. The bill H.R. 2767, 98th Cong., 1st Sess. (1983), would amend CERCLA by adding the following section:

PRIORITY OF CLAIMS

Sec. 116(a) Any claim of the United States, a State, or a political subdivision of a State for the costs of removal or remedial action taken under section 104 of this Act for which a debtor is liable under section 107 of this Act, and any claim of the United States for any relief or fine for which a debtor is liable under section 106 of this Act, shall have priority over all other classes of claims against such debtor, without regard to whether such claims are secured.

187. The legislation also permits the federal government to impose the maximum fines for CERCLA violations. *See supra* note 186. One author asserts that the optimal solution advances welfare by minimizing the costs of avoiding the hazardous situation and minimizing the costs of abating the hazard. *See G. CALABRESI, THE COSTS OF ACCIDENTS* 26 (1970).

188. Congress considered the issue of financial responsibility for cleanups in connection with CERCLA:

The most desirable system of loss distribution is one in which the prices of goods accurately reflect their full cost to society. This therefore requires, first, *that the cost of injuries be borne by the activities which caused them, whether or not fault is involved*, because, either way, the injury is a real cost of these activities.

S. REP. NO. 848, 96th Cong., 2d Sess. 34 (1980) (emphasis added). A superlien provi-

assuring the public that steps are being taken to keep toxic waste out of the ground, water, and air through government regulation.

By requiring the hazardous waste industry to pay more into the superfund, the government would deter entry into the field. Restricting entry, however, is desirable. If a generator is incapable of contributing more to the superfund, it is unlikely to have the necessary resources to help fund a cleanup. The government, by restricting entry, can prevent undercapitalized and financially irresponsible firms from entering the field, thus lessening the probability of later encounters with an insolvent party. In short, raising entry costs deters financially weak, bankrupt-prone industrialists.

Forcing industry to maintain a larger superfund is also beneficial because it encourages the private sector to develop safer waste management techniques. Private industry is constantly searching for methods to cut costs. The knowledge that they must find their own cleanups by contributing more into the superfund would motivate industry to develop safer practices. Safer practices lead to fewer cleanups, thus reducing the demands on the superfund.

Though abuse of the Bankruptcy Act seems inevitable, the government can decrease the probability of sloppy waste management if it continues to enforce waste management standards. The government needs to maintain ample funds to act in case of an emergency cleanup. Superlien statutes help maintain fiscal resources, but they penalize blameless creditors rather than the responsible parties. Because burdening generators is both more equitable and more effective, the government should require waste generators to contribute more into superfunds.

*Steven R. Selsberg**

sion is inconsistent with this statement because the subordinated creditors bear the cost of injuries. In contrast, requiring generators to contribute more to the superfund would be consistent with the statement. Even if a contributing generator never leaves a cleanup for the government to oversee, it is more fair for the generator to bear the costs than innocent creditors.

* J.D. 1986, Washington University.

COMMENTS

