

THE PRECEDENCE OF ENVIRONMENTAL  
PROTECTION OVER CHAPTER 11  
BANKRUPTCY PROTECTION:  
*COMMONWEALTH OIL REFINING CO.*  
*v. UNITED STATES ENVIRONMENTAL*  
*PROTECTION AGENCY*, 805 F.2d 1175  
(5th Cir. 1986)

Chapter 11 bankruptcy<sup>1</sup> temporarily protects a debtor<sup>2</sup> from his creditors to foster his financial rehabilitation.<sup>3</sup> A bankruptcy filing automatically stays new or continuing judicial proceedings and judgments against the debtor.<sup>4</sup> The Bankruptcy Reform Act<sup>5</sup> (BRA), however, exempts governmental units<sup>6</sup> use of police<sup>7</sup> or regulatory

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1. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-151326 and scattered sections of 28 U.S.C. (1986)), controls both Chapter 11 and Chapter 7 bankruptcy. Chapter 11 governs debtor reorganization, while Chapter 7 governs debtor liquidation. See generally Termini, *The Impact of Filing Bankruptcy on Environmental Protection: Police Power and the Automatic Stay* 11 U.S.C. § 362, 6 NORTHROP U.L.J. 1 (1985) (A review of bankruptcy proceedings and the effects of stays on police power in environmental regulation).

2. 11 U.S.C. §§ 1121-1129 (1982) allows a debtor 120 days to submit a reorganization plan.

3. Brief for Appellants Committee of Unsecured Creditors and Indenture Trustee at 30, *Commonwealth Oil Ref. Co. v. Environmental Protection Agency*, 805 F.2d 1175 (5th Cir. 1986) (No. 85-2828) [hereinafter Appellants Brief].

4. The Bankruptcy Reform Act provides 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 . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title . . .

11 U.S.C. § 362(a)(1)-(2) (1984).

5. Bankruptcy Reform Act of 1978, *supra* note 1.

6. The BRA explicitly limits the definition of governmental unit to true governmental entities:

power from automatic stay<sup>8</sup> to the extent that the unit does not attempt to enforce a money judgment<sup>9</sup> against the debtor.<sup>10</sup> In *Commonwealth Oil Refining Co. v. United States Environmental Protection Agency*,<sup>11</sup> the United States Court of Appeals for the Fifth Circuit held

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“Governmental unit” means United States; State; Commonwealth; District, Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States Trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(24) (1984).

Environmental organizations suing as private attorneys general under 33 U.S.C. § 1365(a)(1) (1972) to enforce environmental regulations are not governmental units with respect to the BRA’s automatic stay exceptions as codified at 11 U.S.C. § 362(b)(4) (1978). *In re Revere Copper & Brass, Inc.*, 32 Bankr. 725 (S.D.N.Y. 1983). See text of § 362(b)(4), *infra* note 8.

7. The police power is the government’s power to act in the public interest. It is not otherwise easily defined, but it is the cumulative result of many legislative acts. *Berman v. Barker*, 348 U.S. 26, 32 (1954). Only the Constitution limits the police power. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239 (1984). The police power “includes everything essential to the public safety, health and morals.” *Lawton v. Steele*, 152 U.S. 133, 136 (1894). For an extensive list of state police powers, see 152 U.S. at 136.

8. The BRA provides in pertinent part:

(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 . . . .

11 U.S.C. § 362(b)(4) (1978).

9. The common definition of a money judgment is “[a] final order, decree, or judgment of a court by which a defendant is required to pay a sum of money in contrast to a decree or judgment in equity in which the court orders some other type of relief; e.g. injunction or specific performance.” *BLACK’S LAW DICTIONARY* 907 (5th ed. 1979). Enforcement of a money judgment differs from the entry of a money judgment in that enforcement constitutes seizure of the defendant’s property. *Penn Terra Ltd. v. Department of Env’tl. Resources*, 733 F.2d 267, 275 (3d Cir. 1984). The *Penn Terra* court also stated that “[e]xecution upon a money judgment is the legal process of enforcing the judgment, usually by seizing and selling the property of the debtor.” 733 F.2d at 275 n.9 (quoting *BLACK’S LAW DICTIONARY* 510 (5th ed. 1979)). The seizure of a company’s assets is inapposite to the BRA’s goals because seizure depletes assets necessary for the company’s survival as well as depleting assets claimed by other creditors.

10. The BRA provides in pertinent part:

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

(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 . . . .

11 U.S.C. § 362(b)(5) (1978).

11. 805 F.2d 1175 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 3228 (1987).

that an Environmental Protection Agency (EPA) action requiring a Chapter 11 debtor's continuing operations<sup>12</sup> to comply with environmental protection laws<sup>13</sup> did not constitute an attempt to enforce a money judgment and that the BRA did not automatically stay the action.<sup>14</sup>

The Resource Conservation and Recovery Act of 1976<sup>15</sup> (RCRA) requires hazardous waste<sup>16</sup> facilities to obtain EPA permits.<sup>17</sup> On November 18, 1980, Commonwealth Oil Refining Co. (CORCO) obtained interim status,<sup>18</sup> thus allowing it to operate temporarily without a per-

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12. Commonwealth Oil Refining Co. rented its storage facilities to other industrial companies after it stopped refining petrochemicals on March 3, 1982. *Id.* at 1179.

13. The EPA charged Commonwealth Oil Refining Co. with violations of the Resource Conservation and Recovery Act (RCRA), which requires:

(2) In the case of each land disposal facility which has been granted interim status under this subsection before the date of enactment of the Hazardous and Solid Waste Amendments of 1984, interim status shall terminate on the date twelve months after the date of the enactment of such Amendments unless the owner or operator of such facility

(A) applies for a final determination regarding issuance of a permit under subsection (c) for such facility before the date twelve months after the date of the enactment of such Amendments; and

(B) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

RCRA § 3005(e)(2), 42 U.S.C. § 6925(e)(2) (1984).

14. 805 F.2d at 1188.

15. Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1984)). RCRA's objectives are to "promote the protection of health and environment and to conserve material and energy resources . . ." RCRA § 1003(a), 42 U.S.C. § 6902(a) (1984).

16. Hazardous waste is a solid which may cause or contribute to illness or death or which poses a "substantial present or potential hazard to human health or the environment when improperly" managed. RCRA § 1004(5), 42 U.S.C. § 6903(5) (1986). Commonwealth Oil Refining Co. became subject to RCRA when the company placed hazardous waste in its Puerto Rico facility's surface impoundment. 805 F.2d at 1180.

17. The EPA administrator has the duty to promulgate regulations related to the issuance of hazardous waste facility permits. RCRA § 3005(a), 42 U.S.C. § 6925(a) (1986).

18. Congress created "interim status" to allow facilities whose permit applications are backlogged by the EPA to continue the affected operations pending final EPA action on their permit application. 805 F.2d at 1178. A facility must meet three statutory requirements to obtain interim status. The facility must have 1) existed on November 19, 1980 or on the effective date of the statutory or regulatory change creating the permit requirement, 2) notified the EPA of its activity which is newly regulated, and 3) filed a Part A permit application conforming with EPA regulations. *Id.* The Part A

mit.<sup>19</sup> The EPA requested CORCO's Part B<sup>20</sup> permit application in April 1984.<sup>21</sup> Rather than honoring the EPA's request, CORCO chose to file for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Western District of Texas in July 1984.<sup>22</sup> The company subsequently petitioned the court to determine the BRA's automatic stay applicability to the EPA's impending RCRA enforcement action.<sup>23</sup> After the court deemed the EPA action exempt from automatic stay,<sup>24</sup> the Agency filed an administrative complaint citing CORCO for RCRA violations.<sup>25</sup> The EPA also issued a compliance order requiring the company to discontinue, or obtain a permit for, its hazardous

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Application consists of general descriptive information about the facility in question. See 40 C.F.R. §§ 270.1(b), 270.10(e), 270.13 (1987).

Final EPA action on the permit application begins when the EPA requests the company to submit the permit application's second part, known as Part B. *Id.* Part B consists of detailed information enabling the EPA to decide if an operating permit should be granted. *Id.* See also 40 C.F.R. § 270.14 to .29 (1987). The interim status of a company that fails to submit Part B within six months of the EPA's request may be terminated. 805 F.2d at 1178. A company whose interim status is terminated on the EPA's refusal to issue an operating permit has fifteen days to submit a plan to close its facility. *Id.*

19. 805 F.2d at 1179.

20. See *supra* note 18 for discussion of Part B permit applications.

21. 805 F.2d at 1179.

22. *Id.* The court said that the company told "the EPA that it would not submit its Part B application or a closure plan." *Id.* The Appellants Committee of Unsecured Creditors and Indenture Trustee countered that CORCO sought to defer completing the application or closure plan until it decided the nature of its postreorganization business. Appellants Brief, *supra* note 3, at 13.

23. 805 F.2d at 1179. The EPA, upon finding that a RCRA violation has occurred, may issue a compliance order or may begin a civil action in the United States district court to procure appropriate relief for that violation. RCRA § 3008, 42 U.S.C. § 6928 (1984). In the instant case, CORCO violated 40 C.F.R. § 270.1(b) (1980), by failing to submit its Part B application within six months of the EPA's request. 805 F.2d at 1179. CORCO also raised mootness as a defense in relation to its interim status termination date. *Id.* at 1180. Congress provided in RCRA § 3005(e)(2), 42 U.S.C. § 6925(e)(2) (1984) that the interim status of a land disposal facility would terminate automatically on November 8, 1985, unless the operator filed Part B of his permit application before that date. The district court affirmed the bankruptcy court's decision on November 5, 1985. See *infra* note 28. The Fifth Circuit held that the question of mootness need not be resolved as long as a viable claim existed. 805 F.2d at 1181. The court found that a controversy still existed between the EPA and CORCO and concluded that it thus had jurisdiction of the case. *Id.*

24. *In re Commonwealth Oil Ref. Co.*, 58 Bankr. 608, 615 (W.D. Tex. 1985). The bankruptcy court said that *Kovacs*, see *infra* note 51, controlled and that "the automatic stay provision does not apply to suits to enforce a State's regulatory statutes." *Id.*

25. 805 F.2d at 1179. The EPA alleged that CORCO failed to submit its Part B

waste activities and to file closure and postclosure plans for certain facilities.<sup>26</sup> The United States District Court for the Western District of Texas affirmed the bankruptcy court's holding.<sup>27</sup> The Court of Appeals for the Fifth Circuit affirmed the district court decision<sup>28</sup> on CORCO's appeal.<sup>29</sup>

The Bankruptcy Act Amendments of 1938<sup>30</sup> required Chapter 11 bankruptcy petitioners to allege insolvency.<sup>31</sup> Congress, reasoning that business preservation would improve society's economic stability,<sup>32</sup> repealed the insolvency requirement in 1978 when it enacted the BRA. Between 1938 and 1978, however, the legislature also subjected industry to increasing environmental regulation.<sup>33</sup> Congress did not explicitly address the resulting issue of whether a court may impose compliance with environment regulations upon a solvent bankruptcy petitioner's continuing operation, notwithstanding the necessity of

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permit application, failed to operate a groundwater monitoring system, and operated its facilities after expiration of its interim status. *Id.*

26. *Id.* at 1179-80. The EPA asked that CORCO be compelled to submit closure plans for its land disposal facilities and slop oil tank and to submit postclosure plans for the land disposal facilities. *Id.*

27. *Id.* at 1180. "[A]n injunction restraining enforcement of the environmental laws would disturb the public interest." *Id.*

28. *Commonwealth Oil Refining Co. v. United States Envtl. Protection Agency*, No. SA-85-CA-2044, slip op. (W.D. Tex. Nov. 5, 1985).

29. *Id.* at 1190.

30. Bankruptcy Act Amendments of 1938, ch. 575, § 1, 52 Stat. 840 (codified as amended at 11 U.S.C. §§ 1-1255 (1976)), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

31. "Every petition shall state . . . (1) that the corporation is insolvent or unable to pay its debts as they mature . . . ." 11 U.S.C. § 530(1) (1970).

32. Termini, *supra* note 1, at 4. A company which reorganizes continues to provide societal benefits, such as employment, creditor payment, and shareholder return, during its reorganization. A continuing business' value is higher than that of a business sold for scrap. Congress' repeal of the insolvency requirement allows a debtor to reorganize while still viable, as opposed to burdening the company with potentially unmanageable debt. *Id.* See generally H.R. REP. NO. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6179.

33. *E.g.*, Occupational Health and Safety Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§ 651-678 (1982)); Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370 (1984)); Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1986)).

money expenditures.<sup>34</sup>

*Department of Environmental Resources v. Peggs Run Coal Co.*<sup>35</sup> marked the first application of section 362(b)(4)'s automatic stay to environmental litigation.<sup>36</sup> In *Peggs Run* the Pennsylvania Department of Environmental Resources (DER) alleged that Peggs Run, a Chapter 11 debtor-in-possession, maintained a public nuisance and violated state environmental statutes.<sup>37</sup> The DER prayed for injunctive relief and for the posting of assurance bonds.<sup>38</sup> Peggs Run responded by asserting that section 362 of the BRA stayed all creditor actions.<sup>39</sup> The court disagreed, however, noting that section 362(b)(5),<sup>40</sup> which prohibits a governmental unit's enforcement of a money judgment against a debtor, applies only to outstanding money judgments, not to judgments arising after the debtor petitioned for bankruptcy.<sup>41</sup> The legislative history of sections 362(b)(4) and 362(b)(5)<sup>42</sup> further per-

34. Termini, *supra* note 1, at 2-3.

35. 55 Pa. Commw. 312, 423 A.2d 765 (1980).

36. *Id.* The federal bankruptcy courts first mentioned BRA § 362(b)(4) in an environmental context in *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979). Canarico Quarries petitioned for a stay of its creditors' proceedings under Rules of Bankruptcy 11-44(a) prior to the BRA's effective date of October 1, 1979. *Id.* at 1335. The United States District Court for the District of Puerto Rico cited § 362(b)(4) as supporting, although not controlling, in holding that the BRA's automatic stay exceptions evidenced Congress' intent "that public interest regulations are to outweigh [those] of the Bankruptcy Act and Rules in case of conflict." *Id.* at 1339-40.

37. 55 Pa. Commw. at 313-14, 423 A.2d at 766. The DER alleged that Peggs Run, the operator of a coal mine, a coal cleaning plant, and a coal refusal disposal area, violated Pennsylvania's Clean Streams Law, Act of June 22, 1937, P.L. 1987 (codified as amended at PA. STAT. ANN. tit. 35, §§ 691.1-1001 (Purdon 1986)), the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959) (codified as amended at PA. STAT. ANN. tit. 35, §§ 4001-4015 (Purdon 1986)), and the Rules and Regulations of the Environmental Quality Board, 25 PA. ADMIN. CODE §§ 1.1-951.12 (1986). *Id.*

38. 55 Pa. Commw. at 313-14, 423 A.2d at 766.

39. 55 Pa. Commw. at 314, 423 A.2d at 766. *See supra* note 4 for the text of the BRA's automatic stay provision.

40. 55 Pa. Commw. at 315, 423 A.2d at 767. *See supra* note 10 for the text of BRA § 362(b)(5).

41. 55 Pa. Commw. at 316, 423 A.2d at 767. The stay authorized by BRA § 362(a)(2) applies only to judgments obtained before the commencement of the case. *See supra* note 4 (text of statute).

42. Congress' desire to protect the environment is evident in the BRA's legislative history:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety, or similar police or regulatory laws, or

sued the court to exempt the DER's use of its regulatory power from the automatic stay.<sup>43</sup>

Four years later, in *Penn Terra Ltd. v. Department of Environmental Resources*,<sup>44</sup> the Third Circuit held that a state environmental department action was an "obvious" application of the state's police or regulatory functions under section 362(b)(4).<sup>45</sup> More importantly, the court construed section 362(b)(5)'s phrase "enforcement of a money judgment."<sup>46</sup> Lacking congressional guidance, the Third Circuit stated that the elements of a money judgment were "an identification of the parties for and against whom judgment [was] entered, and a definite and certain designation of the amount" that the defendant owed the plaintiff.<sup>47</sup> The court recognized that the DER's request, seeking to compel Penn Terra's performance of certain remedial acts,<sup>48</sup> indicated that the Department sought action rather than money.<sup>49</sup> The court held that the absence of a request for definite monetary damages pre-

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attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

S. REP. NO. 989, 95th Cong., 2d Sess. 52 (1978) reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5838; H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6296-97 (emphasis added).

43. 55 Pa. Commw. at 316-17, 423 A.2d at 767. The court quoted the BRA's legislative history, *supra* note 42.

44. 733 F.2d 267 (3d Cir. 1984). Penn Terra operated its coal surface mines in violation of various Pennsylvania environmental protection statutes. The company entered into a consent order with the DER to remedy the violations. Before doing so, the company petitioned for Chapter 7 bankruptcy, having assets of \$14,000 and debts of \$660,000. The DER sued Penn Terra to enforce the terms of the consent order. *Id.* at 269-70.

45. The court, commenting on the DER's request to force Penn Terra to remedy the harmful environmental hazards caused by the company, stated that "[n]o more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined." *Id.* at 274.

46. *Id.* at 274-78.

47. *Id.* at 274-75.

48. *Id.* at 270. The DER asked the court to compel Penn Terra to reclaim two mines, to seal one of the mines, to remove top soil placed over a gas line, and to control erosion and sedimentation at the mine sites. *Id.*

49. *Id.* at 275-76.

cluded the existence or enforcement of a money judgment.<sup>50</sup>

The *Penn Terra* court was concerned, however, that a plaintiff's "artful pleading" could disguise enforcement of a money judgment as equitable relief.<sup>51</sup> The court suggested that scrutiny of the nature of the plaintiff's action, rather than his claim, might reveal whether the plaintiff sought a money judgment or equitable relief.<sup>52</sup> The court noted that compensation for a prior wrong is usually "definite and certain" and the parties to the action are determinable.<sup>53</sup> The cost of protection from future harm, however, lacks the definite character of a money judgment.<sup>54</sup> Thus, a suit to compel an act designed to prevent future harm is less likely to be a money judgment enforcement than is compensation for a prior wrong.<sup>55</sup> Finally, the court stated that in to-

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50. *Id.* at 275. Compare *Penn Terra* with *Ohio v. Kovacs*, 469 U.S. 274 (1985). The State of Ohio sued Kovacs, the chief executive officer and stockholder of a chemical company who had a share in a hazardous waste disposal site, individually and on his company's behalf for violations of state environmental laws. 469 U.S. at 276-77. He settled the lawsuit, signing a stipulation and judgment entry to clean up the property, but defaulted on the agreement. *Id.* at 277. A state court appointed a receiver who took possession of Kovacs' property and began to implement the judgment entry. *Id.* The Supreme Court noted that the appointment of a receiver who must comply with state law and who sought money from the bankrupt (to remedy a hazardous waste site) constituted a money judgment enforcement in contravention of 11 U.S.C. §§ 362(a)(2), (b)(5). *Id.* at 283 n.11. Note that Kovacs filed for bankruptcy after entry of the judgment against him. The EPA had not had a judgment entered against CORCO before CORCO filed a petition in bankruptcy. *Id.*

51. 733 F.2d at 276. The court cited *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), as an example of a case in which the plaintiff couched a prayer for money damages as equitable relief. *Jaffee* requested an order requiring medical care. The *Jaffee* court found that the payment of money could satisfy *Jaffee's* request. Thus, the claim for equitable relief disguised a request for the enforcement of a money judgment, notwithstanding the form of the prayer. *Id.* at 276.

52. *Id.* at 276.

53. *Id.* at 275.

54. *Id.* at 276-77. The definition and certainty of compensation for the prior wrong is one of the elements of the money judgment as defined by the Third Circuit. See *supra* note 49 and accompanying text.

55. *Id.* at 277. "[A] traditional money judgment requires liquidated damages, i.e., a sum certain, and one cannot liquidate damages which have not yet been suffered. Nor can one calculate such sum with certainty. Indeed, the very nature of injunctive relief is that it addresses injuries which may not be compensated by money." *Id.* The United States Court of Appeals for the First Circuit held that a town's enforcement of its zoning ordinances against a debtor-in-possession is exempt from the automatic stay provision of § 362(a) by virtue of §§ 362(b)(4)-(5). *Cournoyer v. Town of Lincoln*, 790 F.2d 971, 977 (1st Cir. 1986). *Cournoyer* petitioned for Chapter 11 bankruptcy on June 25, 1982. *Id.* at 973. On April 8, 1983, the Rhode Island Superior Court ordered the town to clear *Cournoyer's* land of scrap trucks and parts. *Id.* The First Circuit held that this

day's society virtually everything costs something.<sup>56</sup> To restrict a governmental unit's ability to exercise its police or regulatory power over a bankruptcy petitioner by prohibiting the imposition of financial liability would effectively nullify section 362(b)(4).<sup>57</sup>

In *Commonwealth Oil Refining Co. v. United States Environmental Protection Agency*,<sup>58</sup> CORCO argued that section 362(a)(1) of the BRA should automatically stay the EPA's attempts to force the company's continuing operations to comply with environmental laws and regulations.<sup>59</sup> While the Fifth Circuit recognized that the automatic stay protects a debtor from his creditors,<sup>60</sup> the court also noted that the automatic stay is not absolute, as evidenced in the several exceptions provided by Congress.<sup>61</sup> One exception to the automatic stay is a governmental unit's action to enforce its police or regulatory power pursuant to section 362(b)(4).<sup>62</sup> The Fifth Circuit approved the bankruptcy court's conclusion that the EPA's action was the type of environmentally protective action Congress intended to exempt from the automatic stay.<sup>63</sup>

CORCO also argued that if the court compelled it to comply with the EPA order, it would be required to spend money.<sup>64</sup> Compelled expenditures, the company argued, would constitute the enforcement of a money judgment against it,<sup>65</sup> effectively violating section

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action was not a money judgment enforcement because the town did not seek money from Cournoyer, but sought instead to clear his property. *Id.* at 976.

56. 733 F.2d at 278.

57. *Id.* at 277-78.

58. 805 F.2d 1175 (5th Cir. 1986).

59. *Id.* at 1182.

60. *Id.* The automatic stay also protects creditors by preventing preferential treatment of one creditor, i.e., the fastest to file a claim against the debtor over other creditors. *See supra* notes 42-43.

61. *Id.* at 1182-83. *See supra* note 43.

62. *Id.* at 1182. *See supra* note 8 (text of statute).

63. *Id.* at 1183 (quoting *In re Commonwealth Oil Ref. Co.*, 58 Bankr. 608, 612 (W.D. Tex. 1985)). The BRA's legislative history, *supra* note 43, enumerates several types of action, including environmental protection, that are exempt from automatic stay. Any actions pursuant to RCRA appear to be exempt from automatic stay because the RCRA objectives, *supra* note 15, include the "promotion of health and the environment . . ." RCRA § 1003(a), 42 U.S.C. § 6902(a) (1984).

64. "The result of the EPA's order requires Corco to commit either \$500,000 to comply with the Permit B procedure or \$1,000,000 to comply with EPA closure plans to shut down the facility." Appellants Brief, *supra* note 3, at 12-13.

65. 805 F.2d at 1186.

362(b)(5).<sup>66</sup> The court, citing *Penn Terra*, stated that section 362(b)(5)'s scope would be significantly limited if all orders requiring money expenditure were construed to enforce money judgments.<sup>67</sup> The court also stated that a money judgment must include a "definite and certain" amount that the defendant owes the plaintiff.<sup>68</sup> The EPA's action was not, in the court's opinion, a money judgment enforcement because CORCO would not pay money to the EPA in complying with the order.<sup>69</sup> Rather, the company would pay salaries or fees to employees or consultants for preparation of the Part B application.<sup>70</sup> Finally, the court applied the *Penn Terra* test,<sup>71</sup> which examines whether the EPA sought compensation for past damages or to prevent future harm, to ascertain whether the EPA was attempting to enforce a money judgment as equitable relief.<sup>72</sup> Determining that the EPA sought only to prevent future harm, the court held that the EPA did not seek to enforce a money judgment.<sup>73</sup> Having already determined that the EPA validly exercised its regulatory power,<sup>74</sup> the court concluded that the EPA's actions fit squarely within section 362(b)(4)'s police and regulatory exception to the BRA's automatic stay.<sup>75</sup> The court further held that the EPA's actions were exempt from stay by virtue of section 362(b)(5).<sup>76</sup>

The Fifth Circuit reached the correct conclusion in *Commonwealth Oil Refining Co. v. United States Environmental Protection Agency* by evincing a literal interpretation of the controlling BRA sections.<sup>77</sup>

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66. See *supra* note 10 for text of statute.

67. 805 F.2d at 1186. Other courts have addressed the dilemma that an injunction may require the expenditure of money. See *United States v. Price*, 688 F.2d 204 (3d Cir. 1982). The possibility that an injunction might require the expenditure of money does not necessarily eliminate that form of relief. *Id.* at 211-13.

68. 805 F.2d at 1186-87. See *supra* note 47 and accompanying text for the *Penn Terra* definition of "money judgment."

69. *Id.* at 1187-88.

70. *Id.*

71. See *supra* notes 45, 52-57 and accompanying text for a discussion of the *Penn Terra* test.

72. *Id.* at 1187.

73. *Id.*

74. *Id.* at 1183.

75. *Id.* at 1183-84.

76. *Id.* at 1188.

77. *Id.* at 1184. The court rebuked Commonwealth's arguments that BRA §§ 362(b)(4)-(5) should only apply in situations where there was "imminent and identifiable harm" by literally interpreting those sections. Commonwealth had asserted that

Nevertheless, the court partially misconstrued the applicable statutes. Courts must analyze the automatic stay provisions of section 362 from two viewpoints: actions pursuant to governmental police or regulatory powers and actions to enforce judgments.

The court correctly construed sections 362(a)(1) and 362(b)(4). Section 362(a)(1) automatically stays proceedings against a debtor, while section 362(b)(4) excepts actions by governmental units exercising their police or regulatory powers from stay. Commonwealth was a debtor. The EPA exercised its regulatory power when it issued the compliance order against Commonwealth. Thus, the court correctly refused to stay the EPA's actions against Commonwealth as those actions were a proper exercise of governmental police or regulatory power.

The court, however, needlessly discussed the relationship between sections 362(a)(2) and 362(b)(5) of the BRA. The Pennsylvania Commonwealth Court called attention to the relationship between the sections when it stated in *Peggs Run* that money judgments obtained against a debtor by a governmental unit before the debtor files in bankruptcy are unenforceable.<sup>78</sup> Section 362(b)(5) exempts from stay the enforcement of all prebankruptcy government claims except for money judgments.<sup>79</sup> Judgments obtained by governmental units pursuant to their police or regulatory powers after the debtor files in bankruptcy are excepted from stay by section 362(b)(4). The court also mistakenly relied on *Penn Terra* because the DER had established a claim against Penn Terra<sup>80</sup> before the company filed in bankruptcy.<sup>81</sup> The EPA did not have a judgment outstanding against Commonwealth Oil Refining when it filed in bankruptcy.<sup>82</sup> Thus, neither section 362(a)(2) nor 362(b)(5) applied to Commonwealth's case.

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precedent set in *Midlantic Nat'l. Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986), prevented the invocation of the relevant BRA sections in the absence of "imminent and identifiable harm." The court distinguished *Midlantic* from *Commonwealth* on the basis that *Midlantic* represented a question of the scope of a bankruptcy trustee's abandonment power, under 11 U.S.C. § 554(a), while *Commonwealth* did not. 805 F.2d at 1185.

78. 55 Pa. Commw. at 316, 423 A.2d at 767 ("[T]he exception described in Section 362(b)(5) should be read in connection with part (a)(2) of the section . . .").

79. *Id.*

80. 733 F.2d at 269. The DER and Penn Terra entered into a consent order and agreement that the company would rectify alleged environmental infractions. *Id.*

81. *Id.* at 270.

82. Commonwealth Oil Refining filed in bankruptcy on July 11, 1984. It had received an extension from the EPA to delay submission of Part B until December 7, 1984 and did not become in default until after it had filed in bankruptcy. 805 F.2d at 1179.

Finally, the Fifth Circuit cursorily addressed the policy conflict between environmental preservation and business preservation. The court's reliance on *Penn Terra* is misleading because *Penn Terra* was insolvent and had filed for Chapter 7 liquidation,<sup>83</sup> whereas CORCO was solvent and had filed for reorganization under Chapter 11.<sup>84</sup> Although *Penn Terra*'s compliance with the DER's orders would quickly exhaust its remaining assets,<sup>85</sup> it would not be greatly affected due to its insolvency. CORCO's compliance with the EPA's orders, on the other hand, could conceivably worsen the company's financial position. An insolvent company does not further Congress' goal of economic stabilization.<sup>86</sup> The Fifth Circuit's decision would have been more persuasive if it had acknowledged Congress' mandate that debtors-in-possession shall obey all applicable laws and regulations.<sup>87</sup>

Through *Commonwealth Oil Refining*, the Fifth Circuit has signified that the Bankruptcy Reform Act will not shield a solvent company from environmental laws requiring compliance expenditures. Although compliance with environmental legislation might cause some Chapter 11 debtors to liquidate, environmental protection is a cost of doing business which cannot be ignored.

*William A. Shirley*

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83. 733 F.2d at 270.

84. 805 F.2d at 1179. Whereas *Penn Terra* sought to make orderly distributions to creditors, CORCO's objective was to maintain funds to enable it to come out of bankruptcy.

85. 733 F.2d at 270. *Penn Terra* listed assets of \$14,000 and debts of \$660,000 in its bankruptcy petition. *Id.*

86. The court could have examined the cost to satisfy the EPA's orders and the amount of CORCO's assets. Analysis of each such bankruptcy/environmental conflict, however, would strain the court system.

87. See 28 U.S.C. § 959, which provides in pertinent part:

b) [A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

28 U.S.C. § 959(b) (1978).

## **RECENT DEVELOPMENTS**

