

## BANKRUPT'S OBLIGATION TO REMOVE TOXIC WASTE CONSTITUTES A "CLAIM": *OHIO v. WILLIAM LEE KOVACS ENTERPRISES*

The purpose of the federal Bankruptcy Act<sup>1</sup> is to give debtors a fresh start while treating creditors equitably.<sup>2</sup> Recently, conflicts have developed between the Bankruptcy Code's "fresh start"<sup>3</sup> objective and state environmental interests.<sup>4</sup> Traditionally, a state's interest in protecting public health and safety is beyond the reach of federal legislation absent a direct conflict with federal law.<sup>5</sup> Thus, a state's interest in envi-

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1. Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 101-1330 (1982)). The Bankruptcy Reform Act, which repealed the Bankruptcy Act of 1898, became effective for cases filed on or after October 1, 1979.

2. See, e.g., *Perez v. Campbell*, 402 U.S. 637, 648 (1971) (Bankruptcy Code gives debtors "a clear field for future effort, unhampered by the pressure and discouragement of preexisting debts"); see also *Kothe v. R.L. Taylor Trust*, 280 U.S. 224, 226 (1930) (Code provides for an equitable settling of creditors' claims by usurping the debtor's control over the distributions of his assets); *William v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 544-45 (1915) (purpose of Bankruptcy Act is to "convert the assets of the bankrupt into cash for distribution among creditors . . . and permit [the debtor] to start afresh free from the obligations and responsibilities consequent upon business misfortunes"). See also *In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984) (liquidation proceeding under Chapter 7 is to provide fair distribution of debtor's assets to creditors), *aff'd sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 106 S. Ct. 755 (1985); *In re Sampson*, 17 Bankr. 528, 530 (D. Conn. 1982) (purpose of Bankruptcy Code is to give debtors a fresh start). See generally Note, *Cleanup Order and the Bankruptcy Code: An Exception to the Automatic Stay*, 59 ST. JOHNS L. REV. 292, 293 (1985) (discussion of the exceptions to the automatic stay in bankruptcy).

3. See *supra* note 1 and accompanying text.

4. See, e.g., *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984) (state injunctive order not subject to Code's automatic stay provisions); *In re Quanta Resources*, 739 F.2d 912 (3d Cir. 1984) (Bankruptcy Reform Act does not permit abandonment of toxic waste site), *aff'd sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 106 S. Ct. 755 (1986); *State v. Electrical Utils.*, 41 Bankr. 874 (N.D. Ill. 1984) (automatic stay does not apply to state injunction to enforce cleanup of toxic wastes in a Chapter 11 proceeding). *But see In re Kovacs*, 681 F.2d 454 (6th Cir. 1982) (state injunction to enforce the cleanup of a toxic waste site is subject to automatic stay), *vacated and remanded*, 459 U.S. 1167 (1983), *vacated as moot*, 755 F.2d 485 (6th Cir. 1985). See *infra* notes 37-51 and accompanying text for a discussion of the automatic stay provision.

5. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (there is a basic as-

ronmental protection will take priority over the Code unless a direct conflict exists with the Code and its objectives of protecting debtors and creditors.<sup>6</sup> In *Ohio v. William Lee Kovacs Enterprises*<sup>7</sup> the United States Supreme Court held that a debtor's obligation to remove toxic wastes was a "claim"<sup>8</sup> under the Code and, therefore, dischargeable like other monetary judgments.

William Lee Kovacs was the chief executive officer and majority stockholder of Chem-Dyne Corporation.<sup>9</sup> In September 1976, Ohio sued Kovacs and the Chem-Dyne Corporation in state court for violating state and local environmental statutes.<sup>10</sup> In July 1979, Kovacs settled the action by agreeing to clean up the Chem-Dyne site.<sup>11</sup> After Kovacs and the other defendants failed to comply with the agreement, the state court appointed a receiver to take possession of Kovacs' prop-

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sumption that Congress did not intend to displace state law); *see also* Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963) (supremacy clause will not preempt a state regulation unless the nature of the subject matter allows no other conclusion or it is Congress' explicit intent to displace state law); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (a state law is valid unless it is an obstacle to the accomplishment and objectives of Congress).

6. *See* Note, *supra* note 1, at 295 (conflict between the Third and Sixth Circuits concerning whether a corporate debtor's pre-petition cleanup order should be exempt from the automatic stay).

7. 469 U.S. 274 (1985).

8. Section 101(4) of the Bankruptcy Code defines a claim as a:

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

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment. . . .

11 U.S.C. § 101(4) (1982).

9. 469 U.S. at 276. Kovacs was one of two principle corporate officers and was a defendant both in an official and individual capacity. He was a defendant in an individual capacity because the state contended that many of the unlawful acts were committed in his presence and under his direction. Brief for Petitioner at 5, *Ohio v. William Lee Kovacs Enterprises*, 469 U.S. 274 (1985) [hereinafter Brief for Petitioner].

10. 469 U.S. at 276. The environmental violations included polluting public waters, maintaining a public nuisance, and causing fish kills. *Id.* Chem-Dyne dumped toxic pollutants into public waters in violation of state law. *See* OHIO REV. CODE ANN. § 6111 (Anderson 1977). Ohio also accused Chem-Dyne of causing a nuisance in violation of state law. *See id.* § 3767 (Anderson 1980); Brief for Petitioner, *supra* note 9, at 4.

11. 469 U.S. at 276. The agreement also prohibited the defendants from causing further pollution and ordered them to pay \$75,000 to the state as compensation for the fish kills. *Id.*

erty and other assets to conduct the cleanup.<sup>12</sup> Before the receiver finished, however, Kovacs filed a Chapter 7 bankruptcy petition.<sup>13</sup> In an attempt to apply Kovacs' postbankruptcy earnings toward the unfinished cleanup, Ohio then motioned in state court to discover Kovacs' current income and assets.<sup>14</sup> The federal bankruptcy court granted Kovacs' motion to stay the state court proceedings, holding that Ohio could not seek a monetary payment from a bankrupt debtor.<sup>15</sup> The district court and the Sixth Circuit Court of Appeals affirmed the bankruptcy court's decision.<sup>16</sup> Ohio also commenced a second action (*Kovacs II*) in bankruptcy court seeking a ruling that Kovacs could not discharge his obligation under the Code because it did not qualify as a "debt"<sup>17</sup> or "claim."<sup>18</sup> The Sixth Circuit concluded that the state's

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12. *Id.*

13. *Id.* Kovacs originally filed a petition for reorganization under Chapter 11 of the Code. See *In re Kovacs*, 717 F.2d 984, 985 (6th Cir. 1984). See also *In re Canarico Quarries*, 466 F. Supp. 1333 (D.P.R. 1979) (automatic stay will not be granted to corporation under a Chapter 11 bankruptcy when corporation has violated state environmental laws and seeks to continue operation in violation of state laws); *In re Thomas Solvent*, 44 Bankr. 83 (W.D. Mich. 1984) (while a Chapter 7 debtor may enjoin state from taking action against debtor to purify contaminated ground water, Chapter 11 debtor engaged in business is not entitled to such an injunction because debtor in possession may not operate a business and avoid its responsibility to society by filing Chapter 11 petition).

14. 469 U.S. at 276.

15. 29 Bankr. 816, 819 (S.D. Ohio 1982). Kovacs argued that the automatic stay provision, 11 U.S.C. § 362 (1982), required relief from the state court proceeding. Whether a court considers an injunctive obligation a monetary judgment is significant because enforcement of a monetary judgment is subject to the automatic stay. The applicable portions of § 362(b) provide that:

The filing of a petition [in bankruptcy] . . . 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 units 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 units police or regulatory power.

11 U.S.C. § 362.

16. 681 F.2d 456 (6th Cir. 1982). The court rejected Ohio's argument that it was merely trying to enforce Kovacs' equitable obligation to clean up the site. *Id.* The court noted that the state appointed a receiver and that "[t]here is very little substance to distinguish that order and a money judgment." *Id.* But cf. *Penn Terra v. Department of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984).

17. See 11 U.S.C. § 101(11) (1982). Section 101(11) defines a debt as "liability on a claim."

18. See *id.* § 101(4). See *supra* note 8 for the Code definition of claim. Ohio argued that Kovacs' obligation was not a claim because the state had no right to payment as an

action was a "claim" that Kovacs could discharge under the Code.<sup>19</sup> On appeal, the Supreme Court affirmed the Sixth Circuit's conclusion.<sup>20</sup>

Under the police power states can legislate to protect the health and safety of their citizens.<sup>21</sup> Nevertheless, federal law preempts state police power laws if they directly conflict.<sup>22</sup> For example, the Supreme Court invalidated the portion of a state automobile safety statute that conflicted with the Bankruptcy Code in *Perez v. Campbell*.<sup>23</sup> In *Perez* part of an Arizona law provided that a discharge in bankruptcy following an automobile tort judgment did not relieve the debtor of his obligation to repay the judgment.<sup>24</sup> The state enforced the repayment by withholding the driving privileges of the state.<sup>25</sup> The Court held that

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alternate remedy to compliance with the injunction. 469 U.S. at 279. Ohio attempted to equate the statutory language "breach of performance," found in the Code's definition of "claim," with a breach of contractual performance. *Id.* If Ohio were successful, it could levy on Kovacs' wages after the automatic stay expired or after his bankruptcy case closed. *See Kovacs*, 717 F.2d at 986 (6th Cir. 1983) (quoting *Kovacs*, 29 Bankr. 816, 818 (S.D. Ohio 1982)). Kovacs argued that the debtors' conduct was a violation of law, not a breach of performance or contractual duty. 469 U.S. at 279.

19. 717 F.2d 984, 988 (6th Cir. 1983). The court noted that Kovacs could not personally clean up the Chem-Dyne site; he could only pay money. *Id.* The court also noted that Ohio recognized the pursuit of payment as an alternative to personal performance, and that the state's claim "cannot be concealed by legerdemain or linguistic gymnastics." *Id.*

20. 469 U.S. 274 (1985).

21. *See, e.g., A & P Tea Co. v. Cottrell*, 424 U.S. 366, 471 (1976) (states have broad power to legislate protection for their citizens in matters such as public health); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954) (it is elemental that states have broad power under their police power to enforce standards of conduct relating to their citizens' health). *See also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 531-32 (1949).

22. *See* U.S. CONST. art. VI, cl. 2. *See supra* note 5 for cases dealing with federal preemption of state law.

23. 402 U.S. 637 (1971).

24. *Id.* at 642-43. ARIZ. REV. STAT. ANN. § 28-1163(B) (Supp. 1970-71) provides that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article."

25. 402 U.S. at 642. ARIZ. REV. STAT. ANN. § 28-1163(A) (Supp. 1970-71) provides that the license and registration "shall remain suspended and shall not be renewed, nor shall any license or registration be thereafter issued in the name of that person . . . until the person gives proof of financial responsibility. . . ." 402 U.S. at 642. In *Perez* the state court entered a tort judgment against Mr. and Mrs. Perez following an automobile accident. *Id.* at 638. The couple filed for bankruptcy and at the same time their car license and registration was suspended until the outstanding judgment was satisfied. *Id.* at 639.

the Arizona provision that protected judgment creditors directly conflicted with the Code's "fresh start"<sup>26</sup> principle.<sup>27</sup>

While it is settled that the Bankruptcy Code preempts a conflicting state law, whether a conflict exists is not always clear. Thus, courts can interpret such situations either in favor of the Code or state law. Three examples of potential conflicts between the Code and state environmental laws involve property abandonment,<sup>28</sup> the automatic stay,<sup>29</sup> and the discharge.<sup>30</sup> Under the Code, a trustee can abandon property that has little value or is burdensome to the bankrupt estate.<sup>31</sup> The Supreme Court, however, held that a trustee could not abandon property in violation of New York and New Jersey state and city environmental laws in *Midlantic National Bank v. New Jersey Department of Environmental Protection*.<sup>32</sup> In *Midlantic*, New York and New Jersey opposed the abandonment of waste oil processing and storage facilities containing hazardous chemicals.<sup>33</sup> The Court held that without express congressional intent, the Code did not allow a trustee to abandon

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26. See *supra* note 2.

27. 402 U.S. at 656. The court added that any state legislation that frustrates the Code's purpose is invalid under the supremacy clause, even if the state legislative purpose was legitimate. *Id.* at 651-52.

28. See 11 U.S.C. § 554 for the Code's abandonment provision.

29. See *supra* note 15 for the Code's automatic stay provision.

30. See 11 U.S.C. § 727. A court will generally discharge debts that arose before the action commenced unless the debtor is a corporation or the debtor has intentionally defrauded a creditor or officer of the bankrupt estate. *Id.*

31. See 11 U.S.C. § 554. This section provides that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate, or that is of inconsequential value to the estate." *Id.*

32. 106 S. Ct. 755 (1986).

33. *Id.* at 758. Quanta Resources Corporation (Quanta) had stored over 70,000 gallons of toxic, PCB-contaminated oil at its New York City facility. *Id.* In New Jersey, Quanta had violated its operating permit by accepting more than 400,000 gallons of oil contaminated with PCB. *Id.* at 757. After Quanta filed for bankruptcy, the Bankruptcy Court approved the abandonment of the two sites. *Id.* at 758. Upon abandonment, the trustee discontinued the 24-hour guard service and the fire suppression system. *Id.* As a result of the abandonment, New York spent about \$2.5 million to decontaminate the site. *Id.*

New York and New Jersey separately appealed the Quanta abandonment to the Third Circuit Court of Appeals, which held in both cases that the Bankruptcy Court erred in allowing abandonment. *Id.* at 759. See *In re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984) (New York); *In re Quanta Resources Corp.*, 739 F.2d 927 (3d Cir. 1984) (New Jersey). The Supreme Court granted certiorari and consolidated the cases. 106 S. Ct. at 759.

property in violation of state and local health and safety laws.<sup>34</sup> The Court examined federal law and found several indications that Congress did not intend to displace state environmental laws in the situation presented.<sup>35</sup> Furthermore, the Court stated that there were judicially recognized restrictions on a trustee's abandonment power and, therefore, abandonment was impermissible without adequate safeguards to protect public health and safety.<sup>36</sup>

Another example of potential conflict arises when a state seeks enforcement of an environmental cleanup order and the bankrupt debtor is entitled to an automatic stay that forbids state enforcement of a money judgment.<sup>37</sup> In 1982 the Sixth Circuit found the interests of the Code superior to state environmental interests in *In re Kovacs (Kovacs I)*.<sup>38</sup> The issue in *Kovacs I* was whether the injunctive obligation to clean up a waste site issued against an individual debtor was subject to an automatic stay.<sup>39</sup> In *Kovacs I* the court granted the debtor an auto-

34. 106 S. Ct. at 759-60.

35. *Id.* at 760-62. The first indication that Congress did not intend to displace state police power regulations are the Bankruptcy Code exceptions to the automatic stay. *Id.* at 760-61. The second indication is 28 U.S.C. § 959(b), which requires a trustee to operate property in his possession according to the laws of the state. *Id.* at 761. The third consideration is the Resource Conservation and Recovery Act, which authorizes the United States to seek restraint of activities involving hazardous wastes that may be dangerous to public health. *Id.* at 762.

36. *Id.* The Court did not disclose what safeguards would "adequately" protect the public's health and safety. The Court, however, noted the minimal steps not taken by Quanta to reduce public danger after the abandonment of the New York facility:

The trustee was not required to take even relatively minor steps to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents. Moreover, the trustee's abandonment at both sites aggravated already existing dangers by halting security measures that prevented public entry, vandalism, and fire.

*Id.* at 758 n.3.

37. See *supra* note 15 for the Code's automatic stay provision.

38. 681 F.2d 545 (6th Cir. 1982), *vacated and remanded*, 459 U.S. 1167 (1983), *vacated as moot*, 755 F.2d 484 (6th Cir. 1985).

39. The pertinent language states that an action does not operate as a stay if it is for "the enforcement of a judgment, other than a money judgment." 11 U.S.C. § 362(b)(5) (1982).

In *Kovacs I*, Ohio could have enforced the injunction through an exception from the automatic stay or by a judicial finding that the debt was not dischargeable. If *Kovacs'* debt could not be stayed or discharged he must immediately pay the debt from his assets. If the debt could not be discharged but could be stayed, the state must wait for payment from *Kovacs'* bankruptcy assets like all other creditors. If the debt is dischargeable, the automatic stay becomes irrelevant because the obligation to pay the debt is extinguished.

matic stay, reasoning that Ohio was actually seeking a monetary judgment to satisfy Kovacs' injunctive obligation.<sup>40</sup> The court stated that though section 362 of the Code permits states to enforce their police power regulations, it restricts the ability to collect money in enforcement efforts.<sup>41</sup> The court concluded that if Ohio proceeded with its action, it would subvert the Code's purpose of rehabilitating debtors and relieving them from the future harassment of creditors.<sup>42</sup>

In a similar case, the Third Circuit held that Pennsylvania's environmental interests did not conflict with the Bankruptcy Code. In *Penn Terra v. Department of Environmental Resources*<sup>43</sup> the court held that a state court order directing a debtor corporation to correct environmental violations was not subject to an automatic stay.<sup>44</sup> The debtor in *Penn Terra*, as in *Kovacs I*, failed to comply with the court order and subsequently filed bankruptcy under Chapter 7.<sup>45</sup> Similarly, both the bankruptcy court and district court held that Pennsylvania was actually seeking a money judgment and stayed the state's claim.<sup>46</sup>

The Third Circuit, however, found the *Kovacs I* definition of "money judgment" unduly broad.<sup>47</sup> The court stated that the term should be interpreted narrowly to leave the states with as much of their police

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40. 681 F.2d at 456. The court adopted the bankruptcy court's holding that, in substance, no difference existed between efforts to collect money from a debtor by securing a court order and efforts to enforce a money judgment against him. *Id.*

41. *Id.*

42. *Id.*

43. 733 F.2d 267 (3d Cir. 1984).

44. *Id.* at 278. See also *Illinois v. Electrical Utils.*, 41 Bankr. 874, 877 (N.D. Ill. 1984) (state action to enforce cleanup order not an attempt to get money judgment); *In re Frenville Co.*, 744 F.2d 332, 337 (3d Cir. 1984) (if cause of action arose before bankruptcy proceeding then state action to enforce environmental cleanup is exempt from automatic stay), *cert. denied*, 105 S. Ct. 911 (1985).

45. The state claimed several violations including mining in a restricted area, failure to maintain adequate erosion and sediment controls, and failure to close a deep mine pit. See *Penn Terra v. Department of Env'tl. Resources*, 24 Bankr. 427 (W.D. Pa. 1982).

46. 733 F.2d at 270. The bankruptcy court ruled in favor of *Penn Terra* and concluded that any judgment requiring the expenditure of money was a monetary judgment. 24 Bankr. at 433. The Third Circuit rejected this interpretation. 733 F.2d at 277.

47. 733 F.2d at 277. The Third Circuit concluded that most injunctions require the expenditure of money, and if courts considered every injunction a money judgment the exceptions to automatic stay would become virtually useless. *Id.* at 277-78. The court also stated that virtually everything can be reduced to a monetary sum and an injunction that does not require some loss or expenditure of money "may often be an effective nullity." *Id.* at 278.

power as possible.<sup>48</sup> The court employed a two prong test to determine if the proceeding was, in essence, to enforce a money judgment. First, the court examined whether the remedy sought could be reduced to a sum certain.<sup>49</sup> Second, the court evaluated whether the remedy was intended to compensate past injuries or prevent future harm.<sup>50</sup> The court concluded that the state brought an equitable action to prevent future harm and, therefore, the suit was not an action to enforce a money judgment.<sup>51</sup>

A third conflict between the Code and state environmental laws arises when a debtor attempts to discharge an injunctive obligation in bankruptcy. Whether an injunction requiring a debtor to clean up an environmental hazard is dischargeable in bankruptcy depends on whether the obligation is a "claim."<sup>52</sup> The Bankruptcy Reform Act

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48. *Id.* at 278. The court of appeals noted that *Kovacs I* supported the bankruptcy court's interpretation, but it maintained that because the Supreme Court vacated *Kovacs I* the decision has no authoritative value. *Id.* at 277 n.11. The Third Circuit also declined to predict how the Sixth Circuit would decide the *Penn Terra* case. *Id.*

49. *Id.* at 276-77.

50. *Id.* The court found that any action that seeks to prevent future culpable conduct would not be an action for a money judgment. *Id.* at 277. The court asserted that a traditional money judgment required liquidated damages and the nature of injunctive relief is to prevent future conduct, not to compensate with money. *Id.*

51. *Id.* at 277-78. See Wise, *High Court Hears Arguments on Thorny Bankruptcy Issue*, N.Y.L.J., Oct. 11, 1984, at 1, col. 3. The author argues that the creation of an exception for environmental obligations would give cleanup orders priority over all other creditors, including tax collectors. *Id.* at 4, col. 3.

Two factual differences distinguish the *Penn Terra* and *Kovacs I* cases. First, in *Penn Terra* the state had a claim against a corporation. 733 F.2d at 269. In *Kovacs I* the claim was against an individual. 681 F.2d at 454. A claim is a right to payment, or an equitable remedy that gives rise to a right of payment. In a Chapter 7 bankruptcy involving a corporation, after the payment of creditors' claims, the corporation's obligations are dismissed because the corporation is dissolved after bankruptcy. When an individual debtor files a Chapter 7 proceeding, however, the individual remains after the claims of creditors have been paid. The individual, however, does not remain liable for his debts after bankruptcy unless his obligations are not "claims" under the Code and, therefore, are not extinguishable. This was the state's argument in *Kovacs II*. See *infra* notes 57-65. See Baird & Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1202-03 (1984) (if obligation of corporation is not a claim, state will not have recourse to bankruptcy assets and will not recover because corporation dissolves after bankruptcy). Second, the appointment of a receiver to collect *Kovacs*' assets in order to defray cleanup costs also distinguishes *Kovacs I* from *Penn Terra*. See *Kovacs I*, 681 F.2d at 484.

52. See *supra* note 8 for the Code's definition of claim. In a Chapter 7 bankruptcy proceeding the assets of the debtor are sold and the proceeds are distributed according to 11 U.S.C. § 726. Section 726 refers only of payments on claims. See Baird & Jackson, *supra* note 51, at 1203. See also Mathews, *The Scope of Claims Under the Bank-*

broadened the scope of a "claim" by amending the definition of that term.<sup>53</sup> The definition clearly makes all monetary rights subject to bankruptcy proceedings by including any right to payment as a claim.<sup>54</sup> Similarly, the provision states that a wide range of equitable rights are also claims in bankruptcy.<sup>55</sup> Precisely which equitable rights are claims, however, is not clear from the statute or legislative history.<sup>56</sup>

In *Ohio v. William Lee Kovacs Enterprises (Kovacs II)*<sup>57</sup> the Court addressed the issue of whether the obligation to clean up the Chem-

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*ruptcy Code*, AM. BANKR. L.J. 221-46 (1983) (claims are dischargeable in bankruptcy but problem arises when determining what constitutes a "nonclaim" under 11 U.S.C. § 101(4)).

53. The House originally defined a claim more broadly than the comparable concept of provable debts in the 1898 Bankruptcy Act. A 1978 House report stated:

The definition [of claim] also includes as a claim an equitable right to performance that does *not* give rise to a right of payment. By this broadest possible definition and by use of the term through the title 11, . . . the bill contemplates that all legal obligations of the debtor . . . will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6266 [emphasis added] (the same comment in the Senate report is found at S. REP. NO. 989, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5785, 5807-08). *See Mathews, supra* note 52, at 237 (argues that Congress intended a sweeping definition of claims including all monetary obligations); *see also* 2 COLLIER ON BANKRUPTCY § 101.04 (Levin & Klee 15th ed. 1984) (Congress intended a broad definition of claim).

54. *See supra* note 8.

55. *Id.*

56. *See Mathews, supra* note 52, at 237 (status of claims under § 101(4)(B) is not always certain; the version adopted by Congress is seemingly less inclusive than original version).

An equitable remedy is considered a claim under § 101(4)(B) if two requirements are fulfilled. First, there must be a breach of performance. Second, the breach must give rise to a right of payment. The legislative history does not elaborate on these requirements, but only summarizes the scope of § 101(4)(B) and provides an example of a subsection (B) claim. Senator De Concini remarked that:

Section 101(4)(B) . . . is intended to cause the liquidation . . . of contingent rights of payment of which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in Bankruptcy. For example, in some states, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a 'claim' for purposes of a proceeding under title II.

124 CONG. REC. 33,992 (1978) (remarks of Sen. De Concini).

57. 469 U.S. 274 (1985).

Dyne site was dischargeable as a claim.<sup>58</sup> The Court found no support in the statute or legislative history for the state's argument that the injunction did not fall within the Code's definition of "claim."<sup>59</sup> Furthermore, the Court agreed with the lower court's findings that the state reduced the cleanup duty to a monetary obligation.<sup>60</sup> The Court emphasized that its holding was narrowly confined to the facts and the discharge issue.<sup>61</sup>

Justice O'Connor wrote a brief concurring opinion, addressing the state's concern that the Court's decision will hinder the enforcement of state environmental laws.<sup>62</sup> Justice O'Connor noted that although Kovacs' obligation was dischargeable, the state could change its laws to prevent recurring situations.<sup>63</sup> Justice O'Connor suggested that the state protect its interests by treating cleanup judgments as statutory

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58. *Id.* at 275. The Supreme Court first rejected Kovacs' mootness argument. *Id.* at 277. Kovacs argued that he no longer owed an obligation to the state because the Army Corps of Engineers removed the industrial wastes. *Id.* Kovacs asserted that any obligation he owed was to the United States, not Ohio. *Id.* The state argued that the case was not moot because the surface cleanup did not satisfy all of Kovacs' obligations; contaminated soil remained. *Id.* at 278. The Court rejected Kovacs' argument, concluding that the state had a stake in the outcome of the case. *Id.*

59. *Id.* at 279-80. The state argued that the injunction was not a claim under 11 U.S.C. § 101(4)(B) on two grounds. First, Kovacs' default was a breach of statute, not a breach of contractual duty. *Id.* at 279. Second, the obligation did not give rise to an alternative right of payment within the meaning of the definition. *Id.* The Court concluded that the statutory language did not indicate that a right of performance cannot be a claim unless it arises from a contractual agreement. *Id.*

60. *Id.* at 282. The Court noted that the state chose to appoint a receiver instead of taking other available action such as prosecution under the environmental laws or civil and criminal contempt proceedings. *Id.* at 282-83. The Court found that the receiver sought money from Kovacs to pay for the cleanup. *Id.* at 283. The Court also noted that Ohio attempted to discover Kovacs' post-petition income. *Id.* at 282 (quoting *In re Kovacs*, 717 F.2d at 987-88). Finally, the Court pointed out that during oral argument, Ohio's counsel conceded that after the appointment of the receiver the only performance sought was the payment of money. *Id.* at 282.

61. *Id.* at 284-85. The Court noted five issues that were not decided. First, whether Kovacs' discharge would shield him from further prosecution or criminal contempt for not performing his obligations prior to bankruptcy. *Id.* at 284. Second, if a fine or penalty had been imposed by the state prior to bankruptcy, his obligation to pay the fine or penalty would not be discharged. *Id.* Third, what the legal effect would have been if Kovacs had taken bankruptcy before a receiver and trustee had been designated. *Id.* Fourth, the injunction against further pollution was not dischargeable. *Id.* at 285. Fifth, the ultimate possessor of the Chem-Dyne site must make certain the site complies with state environmental laws. *Id.*

62. *Id.* (O'Connor, J., concurring).

63. *Id.* at 286.

liens or secured claims, which are more difficult for debtors to discharge.<sup>64</sup> She pointed out that the Court's holding avoids potentially adverse consequences if the debtor is a corporation rather than an individual.<sup>65</sup>

The Court's decision in *Kovacs II* suggests a preference toward bankruptcy interests over state environmental interests. In *Penn Terra*<sup>66</sup> the Third Circuit interpreted the Code narrowly with regard to the automatic stay issue and found no conflict between the Code and state police power objectives. The court held that a cleanup order was not a money judgment or "claim" and, therefore, not subject to the automatic stay.<sup>67</sup> Under *Midlantic*<sup>68</sup> the trustee or person in possession of abandoned property must take steps to adequately protect public health and safety. The Court did not disclose the precautions that are necessary to make the abandoned property adequately safe. Such protective measures, however, require the expenditure of money.<sup>69</sup> In the case of a debtor in possession, such expenditure may be interpreted as a monetary obligation or "claim" against the debtor and dischargeable under *Kovacs II*.

The Court intended the holding in *Kovacs II* to be narrowly confined to the discharge issue.<sup>70</sup> If *Kovacs II* is interpreted to hold that all environmental cleanup orders are essentially monetary judgments, however, a conflict will arise between state environmental regulations and the Code's automatic stay provision.<sup>71</sup> The courts, therefore, will

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64. *Id.*

65. *Id.* See *supra* note 51 for a discussion of a corporate debtor in bankruptcy. If *Kovacs*' obligation is not a claim under the Code, neither is the obligation of a debtor corporation. Baird & Jackson, *supra* note 51, at 1203. The definition of claim does not depend on whether the debtor is an individual or a corporation. Thus, the state will have no postbankruptcy recourse against a corporate debtor because corporations usually dissolve after distributing funds to those creditors with claims. *Id.* Thus, when the debtor is a corporation, a state's only avenue of relief may be its "claim" to the prebankruptcy assets. *Id.* Baird and Jackson argue that *Kovacs II* presents two different issues. First, the status of the rights of state and federal governments toward a debtor's existing assets to enforce cleanup orders. Second, whether an individual's right to discharge prebankruptcy obligations includes discharging a duty to cleanup toxic wastes. *Id.* at 1200.

66. See *supra* notes 43-51 and accompanying text.

67. *Id.*

68. See *supra* notes 32-36 and accompanying text.

69. See *supra* note 36 for a discussion of possible minimal safeguard requirements.

70. See *supra* note 61.

71. *Kovacs II* held that Ohio's environmental cleanup order was essentially a mone-

enforce the Code's automatic stay provision over state law.<sup>72</sup> In addition, courts may treat the obligation to maintain abandoned property as a monetary claim dischargeable in bankruptcy. As a result, *Kovacs II* may allow more opportunities for polluting individuals and businesses to use bankruptcy as an escape from expensive cleanup obligations at the expense of the environment.

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tary obligation and thus a "right to payment" under the Code's claim provision. 469 U.S. at 280-83. Likewise, the environmental cleanup order can also be a monetary judgment under the Code's automatic stay provision. See *supra* note 15 and accompanying text.

72. See *supra* notes 22-27 and accompanying text for a discussion of federal preemption.