

## **Countering Corporate Evasion Of Environmental Obligations Through Bankruptcy**

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Corporations have used a variety of tactics to attempt to evade their environmental obligations. Bankruptcy has been one of the most effective corporate strategies to accomplish this end. Conflicts that have arisen between the environmental laws<sup>[1]</sup> and the Bankruptcy Act<sup>[2]</sup> have made it easier for corporations to escape liability for environmental remediation.<sup>[3]</sup> This paper examines the various ways that corporations have exploited these conflicts, and how to counter their evasion of environmental obligations through bankruptcy. The paper argues that the most effective way to hold corporations accountable for the external costs they impose on the environment and public health is to give priority to environmental claims in bankruptcy proceedings. <sup>[4]</sup>

The primary conflict between environmental laws,<sup>[5]</sup> such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Bankruptcy Act lies in their competing objectives. CERCLA's goal is to ensure that toxic waste dumpsites are promptly cleaned up and that those responsible for the waste are held accountable. Whereas the goal of the Bankruptcy Act is to allow debtors to reorganize for a "fresh start" by relieving them of liability.<sup>[6]</sup> A conflict among the circuit courts in interpreting these laws has widened the gap between the competing statutes and has made it easier for corporations to evade environmental liabilities.<sup>[7]</sup> The first section of this paper will give an overview and background of CERCLA and the Bankruptcy Act and the problems that have ensued from the conflict between their competing goals.

Section II will examine the various tactics that corporations are using to attempt to evade environmental accountability, such as contesting government claims for cleanup and precisely when they arose, abandonment of property contaminated with hazardous waste, attempts to suppress the priority of hazardous waste cleanup administrative expenses, and the use of bankruptcy's automatic stay provisions to block government claims. This section also will examine the ways solvent corporations use bankruptcy, the corporate veil, and the conflict among the circuits to evade their environmental obligations.

Section III examines how to prevent corporations from escaping environmental accountability through the use of bankruptcy. Among the recommendations are: the more consistent use of the estimation procedure in bankruptcy to provide a cleanup trust, aggressive use of criminal enforcement to prevent a discharge of a government claim, dismissal of the bankruptcy petition where there is no value in the assets of the estate, and prioritizing the government lien on the debtor's property after establishing a cleanup claim. Other recommendations include requiring immediate notice and financial assurance under CERCLA after filing for bankruptcy, limiting liability of the corporations for cleanup and cost share with the government to ensure that corporations pay for at least some of damage they have caused to the environment. This section will then focus upon the two most effective countermeasures for ensuring that corporations do not escape their environmental obligations through bankruptcy. These include prioritizing government claims in bankruptcy over creditors for pre- and post-petition cleanup and amending the statutory law to allow an environmental claims exception to pierce the corporate veil.

Section IV recommends that Congress amend the Bankruptcy Act or CERCLA to give environmental claims priority over all other claims. Priority over secured and unsecured claims would force creditors to be much more careful when financing debtors that deal with hazardous and toxic waste. Creditors not only would monitor the debtors to a much greater degree, but they also would pass on the risk of their investment via higher interest charges and greater selectivity in financial lending. This in turn would force out most of the undercapitalized and marginal corporations leaving only the corporations that are financially more capable of covering their environmental obligations.<sup>[8]</sup>

## I. THE RELATIONSHIP BETWEEN CERCLA AND THE BANKRUPTCY ACT

### A. CERCLA

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was enacted by Congress in response to releases of hazardous substances and toxic chemicals that threatened public health and safety.<sup>[9]</sup> The court in *Voluntary Purchasing Groups v. Reilly*<sup>[10]</sup> explained that CERCLA has two primary goals:

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of a national magnitude and resulting from hazardous waste disposal.

Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.<sup>[11]</sup>

The first goal provides that government should have strong statutory support to promptly and effectively respond hazardous waste sites. However, the second goal of CERCLA, ensuring that parties who create hazardous conditions bear the costs of remediating them, is jeopardized when a corporation or its subsidiary files for bankruptcy. Section 106 of CERCLA provides the government with the authority to seek an injunction for remediation in a U.S. district court where an imminent and substantial danger to public health or the environment exists.<sup>[12]</sup> Yet, when a responsible party files for bankruptcy, it creates an "orphan share"<sup>[13]</sup> that must be borne by someone else such as the government, public taxpayers and other Potential Responsible Parties (PRPs),<sup>[14]</sup> to ensure the cleanup of the toxic waste site.<sup>[15]</sup> The Environmental Protection Agency (EPA) has defined the "orphan share" as the cleanup and response cost share left behind by insolvent or bankrupt corporations.<sup>[16]</sup>

The "orphan share" problem is substantial. In *U.S. v. Atlas Minerals and Chemicals Inc.* where the clean up costs were estimated at twenty-five million dollars, the court indicated that the orphan share could be up to nineteen percent of that total.<sup>[17]</sup> One commentator noted that in "a 1993 EPA study of 78 sites, 52 sites (67 percent) had an orphan share, and the average size of the orphan share was 26.9 percent."<sup>[18]</sup> To promote fairer distribution of the orphan share among PRPs, the EPA began to compensate settling parties.<sup>[19]</sup> In a recent EPA statement before the U.S. House of Representatives Subcommittee on Finance and Hazardous Materials, the Administrator stated that the EPA "offered orphan share compensation over \$100 million during the past two years" to PRPs "willing to negotiate long-term cleanup settlements."<sup>[20]</sup> To further facilitate recovery of cleanup, response and enforcement costs, Congress created a trust fund known as the "Superfund."<sup>[21]</sup>

The EPA has been authorized to use money from the Superfund for removal and remediation purposes.<sup>[22]</sup> These funds can be used to address only sites on the National Priority List (NPL).<sup>[23]</sup> The Superfund initially received financing through taxes on feedstock chemicals used by petroleum and chemical corporations, and general taxes.<sup>[24]</sup> Section 107 of CERCLA, however, makes the potential responsible party who created the hazardous condition ultimately responsible for cleanup costs.<sup>[25]</sup> This section states that PRPs include: 1) Current owners and operators; 2) Owners and operators at the time waste was disposed of at the facility; 3) Generators of waste, and; 4) Persons who transported the waste to the facility.<sup>[26]</sup> Congress required that the National Contingency Plan be established to provide standards and procedures for cleaning up hazardous substances.<sup>[27]</sup>

Section 104 of CERCLA authorizes the EPA<sup>[28]</sup> to respond to any release or threatened release, consistent with the National Contingency Plan, and to initiate removal and remediation action.<sup>[29]</sup> When it initiates a removal action, the EPA may order the PRP to conduct the cleanup<sup>[30]</sup> or the EPA can perform the removal itself and seek reimbursement under section 107 for incurred costs.<sup>[31]</sup> Congress also gave EPA the option of allowing the PRP to initiate cleanup and to settle with the government. By entering into a settlement agreement with EPA and agreeing to pay for some of the cleanup costs, the PRP can get the government to agree not to seek any future contribution costs from it.<sup>[32]</sup>

In 1986, Congress provided another option for potential responsible parties to limit their liability. Under the Superfund Amendments and Reauthorization Act (SARA), Congress authorized PRPs who incur cleanup costs to seek reimbursement from other potential responsible parties through contribution actions.[33] Because CERCLA has been interpreted to be a retroactive[34] strict liability statute[35] that imposes joint and several liability,[36] the ability for PRPs to seek contribution is of great importance to them. Even a corporation that legally dumped only a small amount of toxic waste prior to the passage of CERCLA potentially can be held liable for massive cleanup costs due to joint and several liability and the difficulty of proving divisibility.[37] Contribution provides a way for a responsible party to recover some of its costs, thus reducing its liability, by seeking reimbursement for them from other PRPs that also have contributed to the hazardous waste site. However, if a potentially responsible party files for bankruptcy to escape its environmental obligations, the orphan share it left behind becomes a financial burden on the remaining PRPs, the government and the taxpayers.[38]

## **B. The Bankruptcy Act**

The Bankruptcy Reform Act of 1978 provides debtors with a "fresh start" by allowing a debtor to discharge many of its debts,[39] and it gives the debtor a "breathing spell" under an automatic stay to reorganize and recover without pressure from creditors.[40] The Bankruptcy Act also allows for the equitable distribution of the debtor's remaining assets among its creditors.[41] Upon filing a bankruptcy petition, a bankruptcy estate is created and an automatic stay takes effect that prevents creditors from pursuing their claims outside the proceeding.[42] Corporations may file a petition for bankruptcy to liquidate their assets under chapter 7[43] of the Bankruptcy Code or to reorganize their business structure under chapter 11.[44]

In a chapter 7 liquidation, the corporation liquidates its assets to its creditors in an equitable manner and typically dissolves following the bankruptcy.[45] A trustee is appointed to oversee the liquidation after a corporation files a petition for bankruptcy.[46] The assets of the corporation are then liquidated and the debts are paid on a priority basis. The secured creditors are paid first up to the value of their collateral, and unsecured general creditors are generally paid last on a pro rata basis in the distribution of the assets from the estate.[47] Unlike a chapter 11 reorganization, chapter 7 corporations are not permitted to discharge their pre-petition debts.[48]

Chapter 11 reorganization permits corporations to avoid complete liquidation of their assets and to discharge many of their pre-petition debts.[49] An automatic stay gives the corporation a "breathing spell" to reorganize its debts.[50] The stay prevents creditors from pressuring and harassing the company while it focuses on reorganizing and restructuring its business to enable continued operation.[51] The corporation must draft a reorganization plan to indicate how it intends to restructure its debts and organization in accordance with the Bankruptcy Code.[52] Claims by creditors under Chapter 11 are paid in accordance with the reorganization plan upon confirmation by the bankruptcy court.[53] Secured creditors have priority status and are paid first according to the plan and unsecured creditors, in which most governmental environmental claims land, are paid last on a pro rata basis.[54] Upon a successful reorganization, the corporation emerges debt free and can continue operating as it did before filing for bankruptcy.

As noted above, the tension between CERCLA's "polluter pays" principle and the Bankruptcy Act's "fresh start" for debtors objective has created significant conflict among the courts. Some circuits have embraced the bankruptcy principle by supporting the debtor in broadly interpreting what constitutes a claim and allowing the discharge or disallowance of environmental claims by the government. These circuits seek to allow corporations to reorganize and to continue in operation, consistent with the primary purpose of bankruptcy.[55] Other circuits place more emphasis on CERCLA's "polluter pays" principle and do not allow the debtor to discharge environmental obligations in bankruptcy.[56] The obligations either survive bankruptcy or the courts allow injunctions requiring cleanup by the debtor even where costs would be incurred. These courts hold that debts incurred pursuant to the injunctions are paid by the debtor upon reorganization after the bankruptcy process ends or are paid by the debtor as an administrative expense of its reorganization plan.[57] Either way, these courts hold that the polluter pays.

Neither the Supreme Court nor Congress has resolved this conflict among the circuits. Therefore, whether the environmental claim is paid or not depends, in many cases, on where the case is litigated.[58] The Supreme Court has clarified certain matters such as whether environmental obligations constitute a "claim" and when the trustee can abandon contaminated property.[59] However, there are still many unresolved issues and conflicts that persist.[60] This conflict among the circuits has not gone unnoticed by corporations seeking to avoid their environmental obligations. The following section explores how some corporations use bankruptcy as a way to evade environmental accountability.

## II. CORPORATE USE OF A BANKRUPTCY TO AVOID ENVIRONMENTAL OBLIGATIONS

The confused state of the law at the intersection of environmental and bankruptcy law has provided ample ammunition for companies to avoid environmental obligations through bankruptcy. Many polluters believe that bankruptcy can provide a "safe haven" to escape environmental liabilities, thus eliminating the deterrent effect of environmental regulations.[61] One commentator also has argued that if the Supreme Court "continues to allow CERCLA's liability provisions to be manipulated by all the federal courts to provide an inconsistent liability scheme, then CERCLA will be evaded by corporations taking advantage of relaxed rules in certain states." [62]

This section examines some of the tactics, challenges and defenses that corporations have used in their attempts to escape environmental accountability. These include corporate challenges that question what constitutes a claim within bankruptcy and when that claim arises, parent companies' use of the corporate veil, abandonment of contaminated hazardous waste property, abuse of bankruptcy's section 362 automatic stay provision, and attempts to suppress the priority of post-petition cleanup administrative expenses. This section also will examine how solvent corporations use these and other tactics prior to and within bankruptcy proceedings to avoid environmental obligations.

### *A. What Constitutes a Claim and When Does it Arise?*

Early on corporations found that one way to dispose of an environmental obligation, once they were found liable for cleanup and response costs, was to file for bankruptcy and to have the claim discharged under the Bankruptcy Code. The Supreme Court in *Ohio v. Kovacs*[63] addressed the issue of whether an environmental claim for cleanup was a 'claim' under bankruptcy and if it could be discharged as such.[64] In 1976, William Kovacs[65] was charged by the State of Ohio with dumping large amounts of carcinogenic pesticides at the Chem-Dyne site that leaked into a nearby river that supplied public drinking water.[66] State officials obtained an injunction that ordered Kovacs to clean up the site and to compensate the state for damage to the natural resources.[67] Kovacs not only disregarded the injunction and compensation order, but he also dumped more waste at the site.[68] Ohio petitioned the court to appoint a receiver to take possession of Kovacs' assets and to implement the prior judgment requiring Kovacs to clean up the Chem-Dyne site.[69] Within a few months of a receiver being appointed, Kovacs filed for chapter 11 bankruptcy. He attempted to block any further government collection through bankruptcy's automatic stay provision, and he asserted that the state's order for payment was a dischargeable claim.[70]

The Supreme Court in *Kovacs* focused on whether Kovacs' obligation under the state's injunction was a claim subject to discharge under the Bankruptcy Code.[71] The Court held that since the state took away Kovacs' ability to personally clean up the property by appointing a receiver to take his assets to defray cleanup costs and to finish cleaning the site, the cleanup duty had been reduced to a "monetary obligation." [72] The Court held that the state had converted the equitable injunction to clean up the property to a monetary payment, thus making it dischargeable under the Bankruptcy Code.[73] Justice O'Connor, in a concurring opinion, indicated that if injunctions of this type were not treated as a "claim" in bankruptcy, then in chapter 7 cases where the corporation usually dissolves after bankruptcy, the state would never get paid.[74] Although this is a legitimate concern, federal and state governments appear to be more concerned over ensuring that their environmental claims survive a chapter 11 reorganization.[75]

One commentator stated that the Court should have considered Kovacs actions prior to filing for

bankruptcy more closely when making its decision and should have given less weight to Kovacs' interests.[76] Kovacs "flagrant disregard" of the initial injunction and continued dumping of toxics on the Chem-Dyne property should have been considered bad faith.[77] The commentator argued, not only that the debtor's actions just prior to filing for bankruptcy should be considered to a greater degree, but also that the courts should "view a debtor filing for bankruptcy solely to evade obligations to dispose of hazardous waste as acting in bad faith." [78]

In *Kovacs*, the Supreme Court removed any doubt that where a pre-petition receiver is appointed and the state reduces an injunction to a monetary payment, that payment constitutes a dischargeable claim in bankruptcy.[79] This opinion has still left many unanswered questions as to what exactly constitutes a claim in bankruptcy and when a claim arises. Furthermore, the decision left the door open for more challenges by corporations to evade environmental liability. The circuits, viewing *Kovacs* as fairly limited in relation to a receiver appointment, continue to clash on the environmental claim issue.

This is illustrated by the Second Circuit's decision in *In re Chateaugay*,[80] where a corporation filed chapter 11. The court stated that claims in bankruptcy should be broadly defined, that the Bankruptcy Code limits environmental cleanup and recovery efforts, and that Congress should make exceptions in the Code to achieve environmental objectives.[81] The issue in *Chateaugay* was whether a CERCLA injunction, combined with cleanup costs, could be a dischargeable claim.[82] The corporation sought to have all pre-petition and post-conformation government claims under CERCLA discharged.[83] The government argued that post-confirmation response costs are not dischargeable and that it does not have a "claim" that would be dischargeable under bankruptcy "until those costs have been incurred." [84] The court held that costs owed to the government for cleanup were claims regardless of when they arose.[85] Additionally, an injunction obtained by the EPA to require cleanup of existing waste not currently leaking also was held to be a dischargeable claim.[86] However, an order by the government to stop and remediate ongoing pollution was held not to be a dischargeable claim.[87] Finally, the court held that where there are hybrid injunctions, involving an injunction to remediate ongoing pollution and existing hazardous substances that are not leaking, there is not a dischargeable claim.[88]

Corporations also have challenged courts to identify precisely when a claim and environmental liability arise. The corporate strategy has been to argue that a claim arises at the earliest possible time and continues through the bankruptcy process, and is thus a dischargeable claim. The circuits have also split on this issue. Four approaches, as explained in the following cases, have evolved in the circuits regarding when a claim arises.[89] These include: (1) the debtor's conduct test, (2) the pro-creditor expenditure of response costs test, (3) the fair contemplation test and (4) the legal relationship test.[90]

The Second Circuit in *In re Chateaugay*[91] and the Ninth Circuit in *In re Jensen*[92] followed the first approach, the debtor's conduct test, in holding that a claim arises pre-petition when a hazardous release or threatened release occurs.[93] The court in *In re Jensen* qualified this test by holding that where the state had sufficient knowledge of the debtor's potential liability for pre-petition cleanup costs, the claim would be dischargeable under bankruptcy.[94] These courts have given a broader interpretation to the bankruptcy code and greater leeway to discharge claims for environmental liability.

A bankruptcy court in the Eighth Circuit followed the second approach, the pro-creditor expenditure of response costs test, in its holding in *United States v. Union Scrap Iron & Metal*. [95] The court in *Union Scrap* focused on the legal relationship between the parties and held that each element of the claim must be established before a dischargeable claim arises.[96] These elements include the incurrence of response costs by the government.[97] The court here narrowly defined a "claim" for bankruptcy purposes,[98] and it further held that the "mere release of a hazardous substance prior to the confirmation of a bankruptcy plan does not give rise to a CERCLA claim which is discharged by the confirmation." [99]

A district court in Texas, in *In re National Gypsum*, [100] followed the third approach, the fair contemplation test, mentioned in *Union Scrap*. The court in *National Gypsum* attempted to reconcile the tension between the Bankruptcy Code and CERCLA by holding that pre-petition conduct that resulted in an actual release or threat of release, constituted a claim only if it could have been fairly contemplated by the polluter and the government.[101] The court went on to identify factors based on

pre-petition conduct that may indicate fair contemplation between the parties concerning future cost.[102] These factors include "knowledge by the parties of a site in which a PRP may be liable, NPL listing, notification by EPA of PRP liability, commencement of investigation and cleanup activities and incurrence of response costs." [103] Although *National Gypsum* is widely cited, the Fifth Circuit noted in *In re Crystal Oil Company*[104] that even though the district court is within its jurisdiction, it has not adopted the more complex *National Gypsum* "fair contemplation test."

The Third Circuit, in *In re Penn Central Transportation Co.*,[105] adopted the fourth approach, the legal relationship test, cited in *Union Scrap*. [106] The court in *Penn Central* held that the government could recover pre-petition response costs against a reorganized debtor.[107] Citing its earlier decision in *Schweitzer v. Consolidated Rail Corp.*, which involved a contingent asbestos claim,[108] the court stated that CERCLA created a legal relationship between the debtor and the government.[109] From this legal relationship, the government has a potential cause of action and can assert a claim.[110] The court concluded in this case that the government's asserted claims under CERCLA "did not constitute dischargeable claims," and therefore survived bankruptcy.[111] In a later case,[112] the Third Circuit reaffirmed its adoption of the legal relationship test but explained that it applied only to contingent claims as in its *Schweitzer* and *Penn Central* decisions.

In addition to challenging what constitutes a claim and when it arises, corporations also have argued that environmental claims should either be barred upon a bankruptcy filing or discharged in bankruptcy when they no longer have possession of property where they have dumped toxic wastes. The Seventh Circuit's *In re CMC Heartland Partners*[113] decision and the Third Circuit's *In re Torwico* decision[114] rejected both arguments by the corporations. The court in *In re CMC Heartland Partners* held that where there is an ongoing hazard from dumping toxic wastes into a pit on the corporation's land, the obligation to clean up the "gunk" ran with the land.[115] In that case, CMC permitted another corporation to dump paint sludge containing heavy metals and coal ash into a pit on its property.[116] The court held that bankruptcy did not bar the corporation's obligation to clean up the pit in accordance with the EPA's order.[117]

Building on *CMC Heartland's* holding, the court in *In re Torwico*[118] held that an ongoing hazard was not a claim. Therefore, it could not be discharged by a corporation that filed for bankruptcy, even when the company did not have possession of the polluted land.[119] The corporation, after it filed chapter 11 bankruptcy "seeking to avoid its obligations to the state," initially sought to bar the state's claims on an issue of claim filing timeliness.[120] The district court disagreed with the corporation's challenge, so *Towico* attempted another approach to avoid its obligation.[121] *Towico* asserted that since it was no longer in possession of the land where an "illegal seepage pit containing hazardous waste" was found, it could not be held liable for cleanup.[122] The court disagreed and held that because *Towico's* obligation under the state's order did not constitute a claim, it was not dischargeable.[123] The court also held that *Towico* was a generator of hazardous waste and that its obligations to ensure that the waste did not present a continuing environmental hazard ran with the waste.[124]

The conflict among the circuits as to what constitutes a claim, when it arises and when it can be discharged persists and is growing more complex. However, the overall trend now seems to be in favor of CERCLA's polluter pays principle and Congress' overriding concern for public health and the prevention and remediation of environmental damage.[125] As the noose tightens and more environmental claims are barred from discharge through bankruptcy, corporations have begun to look for other ways to evade environmental accountability. Some companies have sought to abandon polluted property within bankruptcy and to avoid any administrative expense associated with maintaining and preserving such property.

#### *B. Abandonment of Contaminated Property and Avoidance of Administrative Expenses*

The Bankruptcy Code and environmental laws also clash over the issue of abandonment. A related issue is whether liability should attach and receive administrative priority if abandonment is disallowed.[126] Some corporations have sought to use abandonment to their advantage "as a means to avoid compliance" with environmental cleanup obligations.[127] Section 554 of the Bankruptcy Code at authorizes the trustee to abandon the "property of the estate that is burdensome to the estate or is of

inconsequential value."<sup>[128]</sup> Once abandoned, the property is removed from the bankruptcy estate and is returned to the owner or operator of the property. When the owner or operator regains property, lienors can then foreclose on the property.<sup>[129]</sup> The Supreme Court, in *Midatlantic National Bank v. New Jersey Department of Environmental Protection*,<sup>[130]</sup> limited a "debtor's ability to rely on abandonment as a means to escape liability for the costs of environmental cleanup."<sup>[131]</sup> However, whether the property is abandoned or not, the issue remains of who ultimately pays for the remediation of releases of hazardous substances.<sup>[132]</sup>

The Supreme Court in *Midatlantic National Bank*<sup>[133]</sup> held that bankruptcy courts can not authorize the abandonment of contaminated property if it would violate a state statute or regulation that was designed to protect public health and welfare.<sup>[134]</sup> The Court additionally held that the Bankruptcy Code did not preempt the environmental laws and it emphasized CERCLA's goal of protecting public health, welfare and the environment from a release of hazardous substances.<sup>[135]</sup> However, the Court's decision did not end the conflict regarding when contaminated property can be abandoned. Subsequent litigation focused on footnote nine of the Court's *Midatlantic* decision. This footnote stated that the "abandonment power is not fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm."<sup>[136]</sup>

The circuits are split on their interpretation of what constitutes an "imminent and identifiable harm."<sup>[137]</sup> Some courts, such as the Fourth<sup>[138]</sup> and Tenth Circuits<sup>[139]</sup> have narrowly interpreted what constitutes an "imminent and identifiable harm." The Fourth Circuit in *In re Smith-Douglass, Inc.*<sup>[140]</sup> authorized the abandonment of contaminated property and it held that *Midatlantic's* exception only applied where there was a "serious health risk, not where the hazards are speculative or may await appropriate action by an environmental agency."<sup>[141]</sup> The Tenth Circuit in *In re L.F. Jennings Oil Co.*, following the Fourth Circuit, also held that the exception in *Midatlantic* was a "narrow one" that depended on an "immediate and identifiable harm to public health or safety."<sup>[142]</sup> Other courts, however, have broadly construed *Midatlantic's* holding to prohibit the bankruptcy court from authorizing abandonment whenever a violation of CERCLA existed<sup>[143]</sup> and even where a threat to public health and environmental damage may exist in the future.<sup>[144]</sup>

In circuits where *Midatlantic's* holding is narrowly construed, the trustee will be able to abandon the contaminated property, thus benefiting the creditors and the estate. The land typically will return to the debtor owner/operator. However, the debtor in many cases will not have enough assets to pay for the costs of remedial action that will fall instead on other potential responsible parties.<sup>[145]</sup> These PRPs will pay a greater portion of the expenses due to the orphan share left behind by the insolvent corporation.<sup>[146]</sup> If there are no other contributors to the hazardous condition on the land, then the debt may fall solely on the government and its taxpayers.<sup>[147]</sup> Either way, the insolvent or dissolved corporation after bankruptcy may be able to avoid liability altogether through abandonment.

In contrast, courts that broadly construe the Supreme Court's *Midatlantic* holding will be less likely to permit abandonment by the trustee. This will force the estate and its creditors to bear the cost of the cleanup.<sup>[148]</sup> The critical issue then becomes whether cleanup of the contaminated property becomes an administrative expense necessary to preserve the estate under section 503 of the Bankruptcy Code.<sup>[149]</sup>

When cleanup costs are given administrative expense priority in bankruptcy, bankrupt corporations and their creditors must bear the cost of remediation.<sup>[150]</sup> Where cleanup expenses are not given priority, they fall in the category of a general unsecured expense and the likelihood of the government recovering its response costs is slim due to the pro rata distribution among the creditors.<sup>[151]</sup> Courts seem to be in agreement that cleanup expenses should be given priority where the release of hazardous material occurs post-petition and the cleanup involves the debtor corporation's contaminated land or other personal property.<sup>[152]</sup> In this situation, the courts give administrative priority to costs necessary to preserve the estate.<sup>[153]</sup> Upon confirmation of the reorganization plan, the cleanup costs are given priority over other unsecured creditors, but secured creditors are still paid first to the value of their collateral.<sup>[154]</sup> Courts conflict, however, on whether administrative expenses should be given priority for cleaning up hazardous waste after the corporation has filed for bankruptcy, but the release actually occurred pre-petition.<sup>[155]</sup>

Corporations argue that bankruptcy's fresh start policy should reduce any administrative expenses for pre-petition releases to general unsecured claims. Some circuits, such as the Ninth Circuit in *In re Dant & Russell, Inc.*,<sup>[156]</sup> and the Third Circuit in *Southern Railway v. Johnson-Bronze*<sup>[157]</sup> have agreed with the fresh start argument. The court in *In re Dant & Russell, Inc.* noted that a vital concern was to ensure that the debtor corporation be given its "best shot at emerging" from bankruptcy as a reorganized business.<sup>[158]</sup> Other circuits, focusing on the goals of CERCLA, have reasoned that if "property on which toxic substances pose a significant hazard to public health cannot be abandoned, then it must follow" that expenses to remove pre-petition hazardous waste are necessary to preserve the estate and should be treated as administrative expenses of the estate.<sup>[159]</sup> The Sixth Circuit, in *In re Wall Tube & Metal Products*,<sup>[160]</sup> followed the Ohio bankruptcy court's decision in *In re T. P. Long Chemical, Inc.*<sup>[161]</sup> by focusing on CERCLA's primary purpose of requiring the "prompt cleanup of hazardous waste sites."<sup>[162]</sup> Neither the Supreme Court nor Congress have specifically addressed administrative priority for cleanup expenses. The Supreme Court indicated in *Ohio v. Kovacs*<sup>[163]</sup> that hazardous waste cleanup expenses were general unsecured claims.<sup>[164]</sup> However, in the Supreme Court's subsequent *Midatlantic*<sup>[165]</sup> decision, the Court refused to answer the question of administrative priority in regard to environmental claims.<sup>[166]</sup> Commentators and the courts have interpreted the Supreme Court's comments in *Midatlantic*, coupled with the absence of any reference to its *Kovacs* decision, to indicate that *Kovacs* was not controlling in regard to administrative expense priority.<sup>[167]</sup>

Depending on the circuit, corporations may enjoy some success by suppressing any expenses incurred by the government as general unsecured claims paid on a pro rata basis. However, it seems that the trend among lower courts is to allow administrative expense priority over unsecured creditors.<sup>[168]</sup> Corporations have also sought to use one of the most powerful provisions in the Bankruptcy Code, the automatic stay, to prevent any government action or enforcement requiring an expenditure of money to clean up toxic chemical releases. The following section discusses where the conflict among the circuits arises in regard to the automatic stay and where corporations seek to use those conflicts to avoid environmental liability.

### C. The Automatic Stay and the Discretionary Stay

The Bankruptcy Code's automatic stay provision in section 362 prevents actions or litigation by creditors the moment the debtor files bankruptcy.<sup>[169]</sup> The automatic stay provides the debtor with a "breathing spell" from its creditors and allows it to concentrate on reorganization.<sup>[170]</sup> There is an important exception to the automatic stay for environmental claims. That exception is the "police or regulatory" power exception in section 362(b)(4), which has been combined with section 362(b)(5),<sup>[171]</sup> limiting governmental police power from enforcing a "money judgment."<sup>[172]</sup> The "police or regulatory" power exception has been interpreted by the courts to allow injunctions ordering environmental cleanup, but it has limited government agencies from actually enforcing a money judgment.<sup>[173]</sup> The majority of courts have allowed government agencies to continue to pursue litigation to a judgment, but most courts have held that the automatic stay bars the government from enforcing that judgment.<sup>[174]</sup>

Some circuits have held that lawsuits to recover cleanup costs by government also fall within the section 362(b)(4) automatic stay exception. The Second Circuit, in *The City of New York v. Exxon Corporation*,<sup>[175]</sup> where the defendant corporations were found to have hired waste-hauling companies to illegally dump toxic waste into the city's landfills, held that the automatic stay did not bar the city's pursuit of CERCLA litigation.<sup>[176]</sup> The court held that the 362(b)(4) exception permitted the city, under its police and regulatory powers, to fix damages for a violation of the law.<sup>[177]</sup> The court reasoned that actions to collect damages provided an "effective deterrent to violators, who will be forced reimburse the government for its costs in responding to their violations."<sup>[178]</sup> The Third Circuit in *United States v. Nicolet, Inc.*<sup>[179]</sup> allowed a specific monetary judgment to be entered against a polluter. *Nicolet* also highlighted the necessity for a deterrent element to ensure that corporations will be held responsible for their "environmental misdeeds."<sup>[180]</sup> Most notably, the court in *City of New York* pointed out a need to continue actions against corporate environmental violators "to avoid frustrating 'necessary governmental functions by seeking refuge in bankruptcy court.'"<sup>[181]</sup>

The primary challenge by corporations is the argument that the automatic stay provision prevents an injunction that requires the bankrupt corporate debtor to spend money to comply with the order. Some courts have agreed with the corporation's arguments and have held that such an injunction is a monetary judgment and is barred by the automatic stay. In *In re Thomas Solvent Co.*,<sup>[182]</sup> where the corporation improperly stored toxic chemicals that leaked into groundwater leading to the town's drinking water supplies, the court held that the automatic stay barred the government's injunction requiring the debtor to clean up the mess.<sup>[183]</sup> The court reasoned that using the corporation's funds to clean up its pollution would deplete the estate of its funds and leave nothing for other creditors.<sup>[184]</sup>

The majority of courts generally have quelled this argument by holding that an injunction requiring a cost expenditure for remediation from the estate is within the 362(b)(4) "police and regulatory" power of the state. The leading case on this issue is the Third Circuit's *Penn Terra Limited v. Department of Environmental Resources*<sup>[185]</sup> decision. Penn Terra Limited, an operator of coal surface mines, entered into a consent agreement with the state to correct numerous environmental violations.<sup>[186]</sup> Penn Terra sought to avoid its environmental obligations by refusing to abide by the agreement.<sup>[187]</sup> Less than a year after signing the consent agreement, Penn Terra filed for bankruptcy.<sup>[188]</sup> The state immediately responded by seeking a preliminary injunction to have the violations corrected.<sup>[189]</sup> Penn Terra's effort to have the state's injunctions stayed as an action to enforce a money judgment under section 362(b)(5)<sup>[190]</sup> was initially upheld by the bankruptcy court.<sup>[191]</sup> The Third Circuit reversed on appeal and held that an order to compel cleanup, even where it required an expenditure of money, was squarely within the state's police and regulatory power under the Bankruptcy Code's 362(b)(4) exception.<sup>[192]</sup> The court stated that 362(b)(4) and (5) should be construed broadly and its scope should not be limited.<sup>[193]</sup> The court noted that "almost everything costs something" and that an injunction that does not compel some cost would mean nothing.<sup>[194]</sup>

Finding for the state, the Third Circuit in *Penn Terra* instituted the now widely adopted<sup>[195]</sup> past damage/future harm test.<sup>[196]</sup> The test, focusing on the environmental violation itself rather than when it occurred, states that an impermissible money judgment is one that compensates for past injuries and is reduceable to a sum certain, while a permissible injunction requires prevention of future harm.<sup>[197]</sup> This prevention of future harm, whether it requires an expenditure of money by the estate or not, is within the state's police and regulatory power and does not constitute an action to enforce a money judgment.<sup>[198]</sup> In explaining its holding, the court stated: "Congress recognized that in some circumstances, bankruptcy policy must yield to higher priorities."<sup>[199]</sup>

Although some corporations continue to challenge government injunctions under 362(b)(4), most realize that *Penn Terra's* ruling, which has been followed by the majority of courts, has diminished their chances for success. Corporations also have attempted to seek a section 105 discretionary stay as opposed to seeking relief after the fact from the automatic stay.<sup>[200]</sup> Section 105 grants the bankruptcy court discretion under its equity powers to enjoin acts against a claimant that are not prohibited by the section 362 automatic stay.<sup>[201]</sup> In further supporting its willingness to favor state police and regulatory powers, the Third Circuit in *Penn Terra* noted that the bankruptcy court has "ample powers" to stay actions not covered by the automatic stay and that a trustee could "move the court into action" rather than request relief later.<sup>[202]</sup>

Indeed, the bankruptcy court in *In re Security Gas & Oil, Inc.*<sup>[203]</sup> held that a court may enjoin a state government's environmental order where the cleanup would unduly interfere with the bankruptcy case.<sup>[204]</sup> The Court stated that environmental cleanup orders could interfere in two ways: (1) by affecting the priority scheme in relation to other creditors and (2) by reducing the chances of a successful reorganization.<sup>[205]</sup> However, the court noted that where risks from an environmental hazard are severe, "bankruptcy concerns should give way to health and safety."<sup>[206]</sup> The court also held a section 105 discretionary stay should not be used where an injunction by the state is designed to bring the polluting corporation into compliance with state or federal environmental laws.<sup>[207]</sup> Therefore, commentators have noted that a section 105 discretionary stay is rather difficult to obtain by corporate polluters because of the U.S. Code's section 959(b) requirement for the trustee to comply with state laws.<sup>[208]</sup>

The Bankruptcy Code's automatic stay provision is a powerful mechanism to prevent monetary

judgments from being enforced upon corporate polluters. However, the stay does not prevent government agencies from protecting the environment and public health through the use of cleanup orders. Similarly, discretionary stays under section 105 may prohibit some governmental action, but corporations cannot use the provision to continue to violate environmental laws.

#### *D. Use of the Protective Corporate Veil*

Corporate tactics to evade environmental accountability have not been limited to the utilization of the post-petition strategies described above. Some large, solvent corporations have sought to insulate themselves from environmental liability through the use of multiple layers of subsidiaries. This section describes how these corporations have attempted to use their subsidiaries as "shock absorbers" for riskier aspects of their business, such as the production and disposal of hazardous waste.[209] If the smaller subsidiary company, that produces or disposes of hazardous waste, becomes insolvent and files for bankruptcy, liability under CERCLA and state environmental laws is generally limited to the subsidiary. Unless the corporate veil between the parent corporation and its subsidiary can be pierced, the larger parent corporation will not be held liable for any of the hazardous waste cleanup.[210] The corporate veil, a general principle of corporate law, is a common law doctrine that limits liability of the parent corporation and protects investors.[211] The justification for this principle is that it encourages investors to take risks that they otherwise might avoid.[212]

Courts initially recognized that while this may be a sound policy for individual shareholders, parent corporations could use the corporate veil to evade public policy through the manipulation of the corporate structure.[213] While recognizing the importance of the corporate veil concept, these courts have held the parent company vicariously liable to prevent parent corporations from using thinly capitalized companies, or subsidiaries that were "created and dissolved for purposes unrelated" to the parent, to circumvent the law.[214] Other courts have developed a "modified piecing" doctrine to ensure parent corporations were held liable for the illegal actions of their subsidiaries under various statutes.[215]

In applying the "modified piercing," the Sixth Circuit in *SEC v. Elmas Trading Corp.* stated that the court would disregard the corporate structure and "treat the acts of the corporation as if they were done by the controlling corporation lying behind the corporate shell." [216] Corporate veil piercing issues also have arisen in CERCLA cases.[217] The circuits conflicted as to when, how, and to what extent the corporate veil may be pierced.[218] In 1998, the Supreme Court in *United States v. Bestfoods* sought to "resolve the conflict among the circuits" over the CERCLA liability of parent corporations operating facilities under the control of their subsidiaries.[219]

Rejecting many of the previous lower courts veil piercing decisions, the Supreme Court held the parent corporation could only be held liable for either for its own direct actions in its operation of the facility or if it could be found responsible under derivative CERCLA liability for its subsidiary's actions.[220] The primary corporate defendants in *Bestfoods*, CPC International Inc., and Aerojet-General Corp., had insulated their parent corporations through several layers of wholly owned subsidiaries.[221] A subsidiary company operated a chemical manufacturing plant in Michigan and began polluting the surrounding property and groundwater with toxic chemicals as early as 1957.[222]

In 1977, after a third corporation, Story Chemical Company, operating the plant declared bankruptcy, the state natural resource department found the land "littered with thousands of leaking and even exploding drums of waste, and the soil and water saturated with noxious chemicals." [223] The natural resource department arranged for Aerojet-General Corp. to purchase the land.[224] Aerojet then insulated itself with multiple layers of wholly owned subsidiary companies and continued to manufacture chemicals at the same site until 1986.[225] In 1981, the EPA took over cleanup under CERCLA and, in an effort to recover some of the tens of millions of dollars the agency had spent in cleaning up the site, the EPA initiated a contribution suit against the parent corporations and their subsidiaries.[226]

Reviewing the fundamental principle of corporate law, the Supreme Court stated that generally the parent corporation is not liable for its subsidiaries' acts.[227] The Court went on to explain that the

corporate veil generally may only be pierced when the corporate form is used for wrongful purposes on the shareholder's behalf.[228] The Court held that the parent also could be "charged with derivative CERCLA liability" where the parent controls the facility owned by its subsidiary.[229] Derivative CERCLA liability is applicable where the parent's control over the subsidiary facility is pervasive and used for a "sufficiently improper purpose to warrant veil piercing." [230] The Court held that parent corporations could also be held directly responsible for its own actions in operating its subsidiary's facility.[231]

In explaining direct liability, the Supreme Court sharpened CERCLA's definition of "operating," stating that operating meant actually managing, directing or conducting operations related to environmental compliance and disposal of hazardous waste.[232] Furthermore, CERCLA liability under 9607(a)(2), holding operators strictly liable for cleanup costs, applies for any act done directly on behalf of the parent, regardless of the parent-subsidary relationship under state corporate law.[233] The Court then rejected prior circuits' use of the participation-and-control test that focused on the subsidiary operation and stated that the question is whether the parent actually operates the facility itself, not the subsidiary.[234] The Supreme Court noted that one of the agents of the CPC parent corporation might have acted in a manner sufficient to find direct liability of the parent by his direct control over a variety of the subsidiary's environmental matters.[235] The Court then remanded the case back to the district court to consider CPC's direct liability.[236] On remand, the district court concluded that parent corporation was not directly liable under CERCLA because it did not have the "requisite control over the facility to render it liable as an operator." [237]

In a recent case employing the *Bestfoods*[238] standard, the parent company attempted to shut down its subsidiary by declaring it insolvent and transferring its assets in attempt to evade liability when the subsidiary was found liable under CERCLA and RCRA.[239] In *United States v. Union Corp.*, [240] where hazardous material was released into the soil and nearby river and the corporations were held liable for response costs, the court recognized Union Corporation's use of the corporate shell.[241] In finding the parent's control pervasive enough to pierce the corporate veil, the court held that "it would be fundamentally unfair to allow Union to circumvent liability for the environmental contamination that it helped to create merely by shutting down its subsidiary." [242]

Commentators have noted that the Supreme Court's decision in *Bestfoods* may have made cost recovery and cleanup more difficult.[243] This could be particularly evident in the area of bankruptcy. The Supreme Court's ruling may have prevented direct liability in earlier CERCLA cases such as *United States v. TIC Inv. Corp.*[244] In *Tic Inv.* the bankrupt company was taken over by the parent corporation pursuant to a bankruptcy court's order, and the parent corporation pressured its subsidiary to cut costs for hazardous waste disposal.[245] The court noted that a parent corporation's "exercise of authority in areas seemingly unrelated to waste disposal" may "directly affect the subsidiary's handling of its waste disposal problems." [246] Where the prior "actual-control" standard found the corporation liable for its cost cutting measures and actions regarding its subsidiary, the Supreme Court's new standard as applied to future similar cases may not.[247]

Critics have noted that the *Bestfoods* decision, limiting the liability of corporations, may encourage irresponsible behavior by the parent corporation.[248] Since *Bestfoods*, a parent corporation may "maximize the value" of its marginally solvent subsidiary companies and enjoy profits from the subsidiaries without taking the risk of environmental liability under CERCLA.[249] Corporations may also encourage their subsidiaries to take excessive risks in the disposal and handling of hazardous waste as was the case in *TIC Inv.*[250] Commentators have indicated that parent corporations, in an effort to avoid environmental liability, may "shun all unnecessary involvement with their subsidiaries' facilities" where they may otherwise have been able assert pressure on the subsidiary to comply with environmental laws.[251] If the subsidiary is then held liable for its polluting actions under CERCLA and files for bankruptcy, the parent corporation has successfully reaped the benefit of the profits and only lost its investment.

How widespread the current uses of corporate shells are to avoid liability is unknown. There are numerous corporate law articles and law reviews advising corporations on precautions to take in order to avoid environmental liability under the *Bestfoods* standard. One commentator noted that corporations

can evade environmental liability if their subsidiary dumps hazardous waste then files bankruptcy unless "(1) under traditional corporate law principles, a court is empowered to pierce the corporate veil; or (2) they directly and personally participate in the wrongful conduct at a specific facility or they are so involved in the management of the facility that this management control is tantamount to direct participation."<sup>[252]</sup>

### III. COUNTERING CORPORATE EVASION: RECOMMENDATIONS & COUNTERMEASURES

#### A. Overview of Proposed Recommendations

Corporations have intentionally and illegally dumped hazardous wastes that have contaminated soil and drinking water supplies, then have sought to evade their environmental cleanup obligations. Due to conflicting interpretations of the law, some of these corporations have successfully evaded liability through bankruptcy or by shielding the parent company through the use of the corporate veil once the subsidiary files bankruptcy. The following is an overview of recommendations and some of the countermeasures instituted by the courts to recover costs from these insolvent corporate polluters and to hold them accountable.

##### 1. Estimation and the Cleanup Trust

Corporations frequently seek to block environmental claims by the government and other PRPs once they file for bankruptcy to avoid paying for the cleanup. Some corporations have successfully used Bankruptcy Code section 502 to disallow contingent claims by the EPA and other third parties for future cleanup costs.<sup>[253]</sup> Many courts, however, highlighting Congressional intent that the polluter should be "responsible for problems caused by the disposal of chemical poisons" and "bear the costs and responsibility for remedying the harmful conditions they created," have allowed the use of estimations under section 502(c)<sup>[254]</sup> for future CERCLA costs in bankruptcy.<sup>[255]</sup> Courts have explained that the use of the estimation process not only can speed up the cleanup and recovery cost valuation process, but it also can "secure the possible payment by PRPs in bankruptcy for the costs of environmental damage they may have caused."<sup>[256]</sup>

Other courts have gone a step further and have recommended that bankruptcy courts use their equitable power to establish a cleanup trust based on the 502(c) estimation process.<sup>[257]</sup> The court in *In re Allegheny International, Inc.*<sup>[258]</sup> recommended that a third party's claim for future cleanup costs could be "placed in a trust to be expended on the remediation of the waste sites."<sup>[259]</sup> *Allegheny* stated that the use of a trust for contingent claims is an effective way of guaranteeing that some assets from the distribution of claims would be used for the cleanup of waste sites.<sup>[260]</sup> The use of cleanup trusts based on section 502 estimations has since met with some success.<sup>[261]</sup>

The court in *In re Harvard Industries, Inc.*<sup>[262]</sup> followed this recommendation in allowing a cleanup trust where the parties agreed that it was the best solution to deal with the future response costs.<sup>[263]</sup> In this manner, the parties could be sure of fairer distribution and apportionment of the cleanup costs.<sup>[264]</sup> One commentator noted that broader acceptance and use of cleanup trusts and estimation procedures by the courts would ensure that funds would be allocated for cleanup and facilitate the return of contaminated land to the market without third party encumbrances on the property.<sup>[265]</sup>

##### 2. Aggressive Use of Criminal Environmental Actions

Use of the Bankruptcy Code's discharge provision by companies to avoid government claims has led some commentators to recommend the aggressive use of criminal environmental actions to prevent abuse of bankruptcy as a "shield" for polluters.<sup>[266]</sup> The Supreme Court in *Ohio v. Kovacs* specifically stated that the decision to grant a discharge did not "shield him from prosecution for having violated the environmental laws" or "for criminal contempt for not performing his obligations under the injunction prior to bankruptcy."<sup>[267]</sup> Furthermore, the automatic stay provision does not protect the bankrupt corporation from criminal prosecutions or subsequent fines or penalties.<sup>[268]</sup> This is so even when the criminal contempt prosecution is reduced to a monetary judgment.<sup>[269]</sup> However, where the government uses criminal prosecution solely as a pretext to collect a debt discharged in bankruptcy, the court may enjoin such action.<sup>[270]</sup>

### 3. Dismissal of Bankruptcy Petitions and Limiting Liability

Where property of the corporate debtor becomes so contaminated that cleanup costs substantially exceed the assets of the estate, some courts have dismissed the bankruptcy petition altogether.[271] Little benefit would be gained from the matter remaining in the bankruptcy courts. [272] In such a circumstance, full cleanup could not be conducted due to the lack of corporate assets and creditors ultimately would gain nothing.[273] Moreover, by dismissing the petition, the corporation will not be able to gain any of the benefits it otherwise may gain through the bankruptcy process.[274] Government agencies then can pursue claims or foreclose on statutory liens through normal court procedures. Where there is no chance of recovery from the insolvent corporation, the government also may be able to induce a third party to purchase the contaminated property from the insolvent corporation at a reduced price in exchange for cleaning up the property.[275] Congress and some states have recently made such transactions much more attractive to third parties by exempting purchasers from any future governmental cost recovery or contribution actions.[276]

Limiting liability of the bankrupt corporate debtor has been suggested where the corporation has the availability of some assets in its estate to pay for cleanup.[277] In 1986, Congress amended CERCLA with the Superfund Amendment & Reauthorization Act of 1986 (SARA) to allow settlement negotiations between responsible parties and the EPA, and to soften the potential harshness of CERCLA.[278] Commentaries have suggested that debtor corporations should initiate settlement negotiations under the amendments as early as possible, not only to limit their liability, but also to help ensure a successful reorganization following bankruptcy.[279]

Other commentators have gone a step further and recommended that CERCLA be amended once again to limit the extent of environmental liability in bankruptcy.[280] A limited liability amount excepted from the discharge of a claim would benefit the purposes of both bankruptcy and CERCLA by ensuring that the PRP would pay some of the costs. [281] This would also allow the bankrupt corporation to reorganize successfully. While these steps might help the PRP make a fresh start they also may lessen CERCLA's deterrent effect by reducing liability as well as the amount of cost recovery.

### 4. Notice and Financial Assurance

Prompt notifications of bankruptcy and providing financial assurances have also been suggested as possible solutions. CERCLA could be amended to require corporations dealing with hazardous waste to promptly notify environmental agencies of a bankruptcy filing, provide a cleanup plan and provide alternative financial assurance for cleanup and hazardous waste remediation.[282] Currently only a few state and federal statutes require debtor corporations to notify environmental agencies of a bankruptcy filing and to provide financial assurance for cleanup costs. The Resource Conservation and Recovery Act (RCRA)[283] requires licensed companies operating hazardous waste treatment, storage and disposal facilities to notify the EPA within 10 days of filing for bankruptcy. Owners and operators of underground storage tanks also must notify EPA of bankruptcy and provide financial assurance for cleanup within 30 days.[284]

Some state regulations, such as New Jersey's Industrial Site Recovery Act, also require companies to provide notification of bankruptcy to state environmental agencies, along with a cleanup plan and financial assurances before ownership of property is transferred.[285] CERCLA's section 108 financial responsibility provision provides for limited financial assurance, yet it does not specifically address response costs recovery.[286]

Where financial assurances have been sought by environmental agencies, PRPs have attempted to block the action through bankruptcy's automatic stay provision.[287] The court in *Safety-Kleen v. Wyche*[288] rejected a corporation's claim that a state environmental regulation, mirroring RCRA's financial assurance requirement, violated the automatic stay. The court ordered the PRP to provide a cleanup financial assurance bond.[289] The court held that the "financial assurance requirements here are part of South Carolina's police and regulatory power" and were exempt under 362(b)(4) from the automatic stay.[290]

The court in *Safety-Kleen* also noted that the state's financial assurance regulation served as a deterrent for "environmental misconduct" and that it encouraged a safer design and operation of hazardous waste facilities.[291] Adding similar provisions to CERCLA through an amendment to CERCLA's existing financial responsibility section would provide additional and more certain financial assurances for recovery of remediation expenses upon a filing of bankruptcy.[292] Such an amendment also would ensure that the EPA and state environmental agencies receive adequate notification that will enable the agencies to file timely claims against the estate prior to the confirmation of the chapter 11 reorganization plan.[293]

### 5. Superliens and Property Liens Over Unsecured Creditors

Some states have sought to recover cleanup costs and hold corporations accountable through the use of "superliens" on the debtor corporation's property.[294] By enacting state statutes that provide priority status over existing liens on the contaminated property, states have found a way to overcome some of the shortfalls in CERCLA's federal lien provision.[295] CERCLA section 9607 provides for a government lien over the debtor's property for cost recovery, but it is subordinate to existing liens and limited only to the debtor's contaminated property.[296]

Some states, such as New Jersey, have taken section 9607 a step further to not only give environmental cleanup liens priority status over other lien creditors, but also have expanded property liens to other non-contaminated property owned by the debtor.[297] The New Jersey Superior Court in *Kessler v. Tarrats*,[298] where a corporation was illegally storing toxic chemicals, held that New Jersey's superlien provision even gave priority lien status for cleanup of hazardous waste over the city's pre-existing tax lien.[299] The court additionally upheld the state's statute against both Takings and Contracts Clause challenges.[300]

Superlien statutes have been credited with improving the environmental quality of the state and also with reducing costs to the government and taxpayers.[301] Commentators have noted another benefit to the superlien statutes is that they "generally increase the likelihood that a state will undertake an environmental cleanup," since it will be more likely to recover cleanup expenses.[302] Non-uniformity of the superlien laws among the states has been cited as a problem with the superlien provisions.[303] Commentators have noted that the "piecemeal" approach and variance in laws between the few states that have enacted superlien statutes limits the effectiveness of recovery and PRP accountability.[304]

Each of the recommendations noted above has its advantages and drawbacks. By strengthening the prospects for cost recovery, they reflect CERCLA's polluter pays policy. Perhaps the primary problem with these suggestions is a lack of uniformity throughout the nation. Only a few courts have used the estimation procedure in bankruptcy to establish a cleanup trust. Similarly, most prosecutors are reluctant to aggressively pursue criminal action in environmental cases and to use contempt proceedings to compel bankrupt corporations to clean up their hazardous waste. Courts also vary in their willingness to dismiss bankruptcy petitions and to limit liability. Some federal and state statutes have increased the probability of corporate accountability by requiring notice of bankruptcy, by making provisions for financial assurances and superliens, but there are many gaps that remain to enable corporations to avoid environmental obligations. The following section recommends the two most effective countermeasures to prevent corporate evasion through bankruptcy.

#### B. Statutory Amendments

The most effective methods for preventing corporate polluters from evading liability through bankruptcy is to amend CERCLA and the Bankruptcy Code to prioritize environmental claims in bankruptcy over all other creditors[305] and to allow an environmental obligations exception to the traditional corporate veil doctrine.[306] Amending the code in this manner will force both the corporations and their creditors to internalize environmental costs.[307] Creditors, when facing the possibility of claim subordination if the corporation dealing with hazardous waste files bankruptcy, will offset their risk by charging higher interest rates, thus internalizing the cost of cleanup obligations.[308] In *In re T. P. Long Chemical Inc.*, where cleanup costs were given administrative priority, Justice White stated cleanup expenses were "a risk which creditors must bear. Creditors must generally bear the risk of any enterprise." [309]

## 1. Environmental Claim Prioritization

Giving environmental claims prioritization over all creditors, secured and unsecured, would ensure that response costs incurred by the government, taxpayers and other PRPs are paid first.[310] Justice O'Connor, in her concurring opinion in *Kovacs*, pointed out that "a State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims." [311] Other courts have followed Justice O'Connor's lead and have permitted claim priority over secured creditors for cleanup costs where "such actions were necessary to preserve the estate." [312] The court in *In re Environmental Waste Control, Inc.* [313] held that secured creditor's interests "must yield" to government cleanup expenses to prevent an "imminent environmental danger." [314] The proposal for an amendment to CERCLA and the Bankruptcy Code builds on these opinions and goes a step further by recommending that environmental claims have priority over all other claims, including claims on all of the corporation's assets, and applying to both pre- and post-petition hazardous waste remediation expenses. [315]

Creditors would be forced to internalize the potential for environmental damage when facing the possibility of claim subordination and they would be much more selective when choosing to finance corporations that deal with hazardous and toxic waste. [316] Critics argue that an environmental claim priority may reduce the chances of recovery for non-environmental creditors. [317] However, careful financing by creditors and passing along higher interest rates would offset this risk. [318] Careful financing would also drive out the most of the "marginal toxic-waste-producing firms" leaving only the more safety conscious corporations. [319] Another criticism is that it is not fair to require "innocent creditors" pay for cleanup costs since they did not cause the harm. [320] Commentators have responded to this contention by pointing out that creditors have extended credit to these risky operations voluntarily to make a profit and that it is therefore more equitable for these creditors to share the remediation costs. [321]

Creditors would also be forced to closely monitor corporations in which they have invested to guard against the possibility of bankruptcy and also to prevent potential CERCLA violations that would lead to government cleanup and recovery actions. [322] The Eleventh Circuit Court has noted that where creditors face potential liability, they not only would more thoroughly investigate the environmental policies of corporations they are financing, but they also would adjust their loan terms to reflect potential CERCLA liability to ensure careful handling of hazardous waste. [323] The court also noted that creditors would be encouraged to "monitor the hazardous waste treatment systems and policies of their debtors and insist upon compliance with acceptable treatment standards as a prerequisite to continued and future financial support." [324]

Amending CERCLA and the Bankruptcy Code to allow environmental claim prioritization would encourage creditors to actively seek to prevent corporations from even considering bankruptcy as a way to escape environmental obligations. [325] In order to protect their security interest, creditors also may assist corporations facing CERCLA liability, and possible bankruptcy, by providing additional loans, where they may not otherwise, to finance cleanup of existing hazardous waste sites. [326] This also would preclude many of the post-petition tactics noted in section II of this paper and it would help resolve the many conflicts currently brewing among the circuits and the bankruptcy courts. Careful financing decisions by lenders may dispose of many marginal and irresponsible corporations dealing in hazardous waste. Continued outside pressure by creditors even may help prevent evasion of CERCLA liability through bankruptcy, but it may not address situations involving subsidiary shells financed by powerful parent corporations. The following section addresses how amending CERCLA to allow the corporate veil to be pierced for environmental liabilities will help counter corporate parent use of bankruptcy to evade environmental obligations.

## 2. Amending CERCLA to Pierce the Corporate Veil

As indicated in section II of this paper, parent corporations often insulate themselves through the use of wholly owned subsidiary companies to handle risky operations, such as hazardous waste disposal, manufacturing or transportation. [327] Under the current veil piercing standard, set forth by the Supreme

Court in *Bestfoods*,<sup>[328]</sup> unless the courts find derivative liability or direct liability under CERCLA, the parent corporation will escape all environmental responsibility if its subsidiary files bankruptcy.<sup>[329]</sup> The parent corporations thus reap the benefits with very little risk when its subsidiary company seeks refuge from CERCLA liability in bankruptcy.<sup>[330]</sup> Amending section 107 of CERCLA to hold parent corporations liable for environmental obligations of their subsidiaries not only would prevent many bankruptcies of thinly capitalized subsidiary corporations, but it also would produce greater environmental responsibility and financial management by the parent.<sup>[331]</sup>

After *Bestfoods*, to receive protection under the corporate veil doctrine, parent corporations have had to distance themselves from their subsidiaries and play no part in the subsidiaries' environmental management policies or its facilities.<sup>[332]</sup> Amending CERCLA to make liability a certainty would reverse this tendency and encourage parent corporations to take active roles to ensure that their subsidiaries comply with environmental laws, remain solvent and handle hazardous waste in a safe manner.<sup>[333]</sup> Commentators also have noted that a parent corporation could reduce CERCLA liability through risk management by regularly monitoring the "environmental activities of its subsidiaries," ensuring the "implementation of prudent hazardous substance handling procedures at the subsidiary level," and "require environmental audits" of its subsidiary prior to any business or real estate purchases.<sup>[334]</sup> Amending CERCLA to provide for parent corporation liability of its subsidiaries for environmental claims would thus encourage greater risk management of subsidiaries and reduce the likelihood of solvent parent corporations from using bankruptcy as a means of escape through subsidiaries that are set up to take the fall.<sup>[335]</sup>

#### IV. CONCLUSION

Corporations have used a variety of tactics to evade environmental obligations through the use of the bankruptcy process. Many of these corporations have been illegally dumping hazardous wastes for a number of years before environmental agencies became involved. Once the agencies find the violations and seek injunctions under CERCLA or other state environmental laws to have the polluting company clean up its toxic mess, the company seeks refuge in bankruptcy. These companies have found that the chaos in the courts concerning the clash between the Bankruptcy Code and CERCLA have provided numerous ways to evade environmental obligations. Some solvent corporations have taken preemptive tactics to evade environmental liabilities through the use of subsidiaries and the corporate veil doctrine. Amending CERCLA and the Bankruptcy Act to prevent this evasion, as noted above, would seem to be the only real solutions to the problem.

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[1] Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601-9675 (2001); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901-6992k (2001).

[2] Bankruptcy Reform Act of 1978, 11 U.S.C. § 101-1330 (2001) (this Act replaced the Bankruptcy Act of 1898 which was repealed).

[3] *In re Chateaugay*, 944 F. 2d 997 (2d Cir. 1991); *In re National Gypsum*, 139 B.R. 397 (N. D. Tex. 1992); *Penn Terra Ltd. v. Dept. of Env'tl. Res.*, 733 F. 2d 267 (3d Cir. 1984).

[4] David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unasked Questions*, 13 Va. Env'tl. L. J. 185 (1994).

[5] The conflict between environmental laws and the federal Bankruptcy Act includes state environmental laws such as the Pennsylvania law examined in *Penn Terra Ltd. v. Dept. of Env'tl. Res.*, 733 F. 2d 267 (3d Cir. 1984), and federal environmental laws such as CERCLA and RCRA. This paper primarily focuses on environmental obligations under CERCLA.

[6] *In re Chateaugay*, 944 F. 2d at 1002; *In re National Gypsum*, 139 B.R. at 404; Stanley M. Spracker

& James D. Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 Bank. Dev. J. 85, 87 (1994/1995).

[7] Topol, *supra* note 4 at 185.

[8] Topol, *supra* note 4 at 228.

[9] *In re National Gypsum*, 139 B.R. at 404.

[10] *Voluntary Purchasing Groups v. Reilly*, 889 F. 2d 1380 (5th Cir. 1989).

[11] *Id.* at 1380.

[12] CERCLA § 106, 42 U.S.C. § 9606(a) (2001).

[13] *EPA's Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals*, reprinted in N.Y. Law J. at 54 (Oct. 15, 1996) (which defines an orphan share as "that share of responsibility which is specifically attributable to identified parties EPA has determined are: (1) potentially liable; (2) insolvent or defunct; and (3) unaffiliated with any party potentially liable for response costs at the site").

[14] Potential responsible parties other than the primary responsible party held liable as contributors under CERCLA's joint and several liability. *See also* CERCLA §§ 107, 113, 42 U.S.C. § 9607, 9613 (2001).

[15] Rachel M. White, *Please, Sir, I Want Some More: Can EPA Continue To Feed The Superfund Orphan Share?* 9 Vill. Envtl. L.J. 73 (1998).

[16] *See* EPA's Interim Guidance, *supra* at note 13.

[17] *United States v. Atlas Minerals & Chemical.*, 1995 U.S. Dist. LEXIS 13097 (E. D. Pa., 1995), *See also* William D. Evans Jr., *The Phantom PRP In CERCLA Contribution Litigation: EPA To The Rescue?* 26 Envtl. Rep. (BNA) No. 43 (March 8, 1996).

[18] Evans, *supra* note 17.

[19] Evans, *supra* note 17.

[20] EPA: *Public Hearings*, <<http://www.epa.gov/ocirpage/hearings/testimony/030598.htm>> (accessed Feb. 8, 2003).

[21] CERCLA 111(a)(2), 42 U.S.C. § 9611(a)(2001).

[22] Robert V. Percival, et. al., *Environmental Regulation: Law, Science, and Policy* 265 (3<sup>rd</sup> ed., Aspen L. & Bus. 2000).

[23] 42 U.S.C. § 9605(a)(8)(B) (2001) (discussing how priorities are assessed for the long term remediation and criteria for placement on the National Priorities List).

[24] White, *supra* note 15 at 77; 42 U.S.C. 9611-9612 (2001); I.R.C. 4661 (1986); I.R.C. 59A (1994) (environmental taxes); I.R.C. 4611 (1994) (petroleum taxes); I.R.C. 4661 (1994) (chemical taxes).

[25] 42 U.S.C. § 9607 (2001) (sets forth the potential responsible parties).

[26] *Id.* at § 9607(a)(1-4).

[27] *Id.* at § 9605(a).

- [28] *Id.* at § 9604(a) (the President has delegated his authority to the EPA for enforcement).
- [29] *Id.* at § 9604(a).
- [30] *Id.* at § 9606(a).
- [31] *Id.* at § 9607.
- [32] *Id.* at § 9622(a); H.R. Rep. No. 99-253, pt. 1, at 100 (1985) (reprinted in 1986 U.S.C.C.A.N. 2835, 2882).
- [33] 42 U.S.C. § 9601-9675 (2001); Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99- 499, 100 Stat. 1613 (1986); 42 U.S.C. 9613(f) section 113(f) ("any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title").
- [34] *In re Penn Cent. Transp. Co.*, 944 F.2d 164, 166 (3d Cir. 1991) ("But in 1980 Congress passed CERCLA, which imposed retroactive liability on both present and past owners of facilities where hazardous substances..."); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 732-33 (8<sup>th</sup> Cir.1986).
- [35] Courts have uniformly interpreted section 107 as a strict liability scheme: *See United States v. Monsanto Co.*, 858 F.2d 160, 167 (4<sup>th</sup> Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).
- [36] *O'Neil v. Picillo*, 883 F.2d 176, 178 (1<sup>st</sup> Cir. 1989); *American Cyanamid Co. v. O'Neil*, 493 U.S. 1071 (1990); *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732 n.3 (8<sup>th</sup> Cir. 1986).
- [37] *Picillo*, 883 F.2d at 178.
- [38] *In re Dant & Russell*, 853 F.2d 700, 702-03 (9th Cir. 1988) (Dant & Russell, Inc. filed for bankruptcy, leaving Burlington Northern to shoulder the cleanup costs alone estimated at \$10-30 million); *see also White, supra* note 15 at 86.
- [39] S. REP. NO. 989, 95th Cong., 2d Sess. 7 (1978) (reprinted in 1978 U.S.C.C.A.N. 5787, 5793).
- [40] 11 U.S.C. § 362(a) (2001).
- [41] *Id.* at § 726(a).
- [42] *Id.* at § 362; *Id.* at § 541.
- [43] Chapter 7, Liquidation, 11 U.S.C. § 701-784.
- [44] Chapter 11 or 13 Reorganization, 11 U.S.C. 1101-1174, 11 U.S.C. 1301-1330 (2001). Corporations or individuals may for bankruptcy under the Code. This paper focuses on the corporate use of bankruptcy under chapter 7 and 11.
- [45] 11 U.S.C. § 701 et seq. (2001).
- [46] *Id.* at § 702.
- [47] *Id.* at § 726.
- [48] *Id.* at § 727.
- [49] *Id.* at § 1101 et seq.

[50] *Id.* at §§ 301-03, 362.

[51] *Id.*

[52] *Id.* at § 11021-1129.

[53] *Id.* at § 1129.

[54] *Id.* at § 507.

[55] *In re Jensen*, 995 F. 2d 925 (9<sup>th</sup> Cir. 1993).

[56] *In re Torwico Elecs., Inc.*, 8 F.3d 146, 151 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1576 (1994); *In re CMC Heartland Partners*, 966 F.2d 1143, 1146-47 (7th Cir. 1992); *In re Chateaugay Corp.*, 944 F.2d 997, 1008-09 (2d Cir. 1991).

[57] *See supra* note 56.

[58] Topol, *supra* note 4 at 185.

[59] *Ohio v. Kovacs*, 469 U.S. 274 (1985); *Midatlantic National Bank v. New Jersey Dept of Env'tl. Protection*, 474 U.S. 494 (1986).

[60] Spracker, *supra* note 6.

[61] Catherine A. Kellett, *The Future of the Environmental Enforcement injunction after Ohio v. Kovacs*, 13 B.C. Env'tl. Aff. L. Rev. 397 (Spring 1986) (citing the Brief for the United States as Amicus Curiae Supporting Petitioner at 2); *Ohio v. Kovacs*, 469 U.S. 274 (1985).

[62] John W. Chapman, *Parent Corporation Liability Under Cercla: An Analysis Of The Supreme Court's Failures And Fortunes In Its Decision In United States v. Bestfoods*, 14 J. Land Use & Env'tl. Law 307 (Spring 1999) (regarding how state common law veil piercing interacts with CERCLA and bankruptcy).

[63] *Ohio v. Kovacs*, 469 U.S. 274 (1985) (although *Kovacs* was in reference to a state environmental law, it has been treated as the foundation for CERCLA issues).

[64] *Id.* at 278.

[65] *In re Kovacs*, 681 F. 2d at 454 (6<sup>th</sup> Cir. 1982). (William Kovacs was sued both as an individual and officer of several corporations in connection with the dumping at the Chem-Dyne site.).

[66] Brief for the United States, *Ohio v. Kovacs*, 469 U.S. 274 (1985)(No. 275) at 2-3; *Kovacs*, 469 U.S. at 276.

[67] Brief at 5.

[68] *Id.*

[69] *Kovacs*, 469 U.S. at 277.

[70] *Id.* at 277.

[71] *Id.* at 275.

[72] *Id.* at 283.

[73] *Id.*

[74] *Id.* at 286.

[75] Kellett, *supra* note 61 at 406 n. 147. (Kellett suggests that in chapter 7 bankruptcies, it may be possible to later recover from the polluter or its parent company by "piecing the corporate veil." See also Cahalane, *infra* note 125 at 277, 278.

[76] Katherine Simpson Allen, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 Vand. L. Rev. 1037, 1079 (May, 1985).

[77] *Id.* at 1078.

[78] *Id.*

[79] *Kovacs*, 469 U.S. at 286.

[80] *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991).

[81] *Id.* at 1005.

[82] *Id.* at 1000, 1001.

[83] *Id.* at 1000.

[84] *Id.*

[85] *Id.* at 1008.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] Jennifer A. Pasquarella, *In This Corner We Have the Bankruptcy Code's Discharge Provision and In This Corner, CERCLA, a Strict Liability Statute: In re Reading Company*, 9 Vill. Envtl. L. J. 561, 578 (1998).

[90] *Id.* at 578; *In re Jensen*, 995 F. 2d 925, 929, 930, 931 (9<sup>th</sup> Cir. 1993).

[91] *In re Chateaugay*, 944 F 2d 997 (2d Cir. 1991).

[92] *Jensen*, 995 F. 2d at 925.

[93] *Chateaugay*, 944 F. 2d at 1000, 1010; *Jensen*, 995 F. 2d at 931.

[94] *Jensen*, 995 F. 2d at 931.

[95] *United States v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn 1990) (followed by the 8<sup>th</sup> Circuit); *Sylvester Bros. Dev. Co. v. Burlington N. R.R.*, 133 B.R. 648 (D. Minn 1991).

[96] *Union Scrap*, 123 B.R. at 835.

[97] *Id.*

[98] Pasquarella, *supra* note 89 at 584.

- [99] *Union Scrap*, 123 B.R. at 838.
- [100] In re National Gypsum, 139 B.R. at 408 (referencing *Union Scrap*, 123 B.R. at 834-37).
- [101] *Id.*
- [102] *Id.*
- [103] *Id.*
- [104] In re Crystal Oil Company, 158 F.3d 291, 296 (5<sup>th</sup> Cir. 1998).
- [105] In re Penn Cent. Transp. Co., 944 F. 2d 164, 168 (3d Cir. 1991).
- [106] *Union Scrap*, 123 B.R. at 835.
- [107] *Penn. Cent.*, 944 F. 2d at 169.
- [108] *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3d Cir.1985).
- [109] *Penn. Cent.*, 944 F. 2d at 168 (no claim existed prior to the § 77 reorganization PCC to the new entity of Penn Central Transportation Company ("PCTC") because CERCLA had not been passed yet; CERCLA's passage created the right of action).
- [110] *Id.*
- [111] *Id. relying on Schweitzer v. Consolidated Rail Corp.*, 758 F. 2d 936 (3d Cir.1985).
- [112] In re Reading Co., 115 F.3d 1111, 1125 (3d Cir. 1997).
- [113] In re CMC Heartland Partners, 966 F. 2d 1143, 1146-47 (7<sup>th</sup> Cir. 1992).
- [114] In re Towico Electronics, 8 F.3d 146, 151 (3d Cir. 1993).
- [115] *In re CMC Heartland Partners*, 966 F. 2d at 1145, 1147.
- [116] *Id.* at 1145.
- [117] *Id.* at 1146.
- [118] In re Towico Electronics, 8 F.3d 146, 151 (3d Cir. 1993).
- [119] *Id.* at 151.
- [120] *Id.* at 148.
- [121] *Id.*
- [122] *Id.* at 147, 149.
- [123] *Id.* at 150.
- [124] *Id.* at 151.
- [125] Brian A. Cahalane, *CERCLA and the Fresh Start: Quelling the Eternal Conflict*, 4 Am. Bankr. Inst. L. Rev. 265 at 270 (1996).

- [126] Topol, *supra* note 4 at 194.
- [127] Spracker *supra* note 6 at 109.
- [128] Bankruptcy Code, 11 U.S.C. 554 (2001).
- [129] In re Polumbo, 271 F. Supp. 640, 643 (W. D. Va. 1967); *see also* In re Thomas, 204 F.2d 788, 792 (7th Cir. 1953).
- [130] Midatlantic National Bank v. New Jersey Dept. of Env'tl. Protection, 474 U.S. 494 (1986).
- [131] Spracker *supra* note 6 at 109.
- [132] Leonard J. Long, *Burdensome Property, Onerous Laws, And Abandonment: Revisiting Midlantic National Bank V. New Jersey Department Of Environmental Protection*, 21 Hofstra L. Rev. 63, 69 (Fall, 1992).
- [133] *Midatlantic National Bank*, 474 U.S. 494 (1986).
- [134] *Id.* at 507.
- [135] *Id.* at 506.
- [136] *Id.* at 507.
- [137] *Id.*
- [138] In re Smith-Douglass, Inc., 856 F.2d 12, 15 (1988) (noting that "Not surprisingly, the bankruptcy courts interpreting *Midlantic* have reached inconsistent results. Some courts have determined that the *Midlantic* exception applies only where there is an imminent danger to public health and safety.) *See, e.g.*, In re Purco, Inc., 76 Bankr. 523, 533 (Bankr. W.D. Pa. 1987); In re Franklin Signal Corp., 65 Bankr. 268, 271-72 (Bankr. D. Minn. 1986). Other courts have determined that *Midlantic* requires full compliance, prior to abandonment, with the applicable environmental law." *See* In re Peerless Plating Co., 70 Bankr. 943, 946-47 n. 1 (Bankr. W. D. Mich. 1987).
- [139] In re L.F. Jennings Oil Co., 4 F.3d 887 (10<sup>th</sup> Cir. 1993).
- [140] *In re Smith-Douglass*, 856 F.2d at 16.
- [141] *Id.* at 16.
- [142] *In re L.F. Jennings Oil Co.* 4 F.3d at 890.
- [143] *In re Peerless Plating Co.*, 70 B.R. at 943.
- [144] In re FCX, Inc., 96 B.R. 49, 55 (1989) (the court noted that there was a present and real possibility of public exposure to the pesticides that were buried on the property and allowed abandonment only if the debtor set aside funds for future cleanup).
- [145] Topol, *supra* note 4 at 196.
- [146] White, *supra* note 15.
- [147] Long, *supra* note 132 at 67. *See also* Topol, *supra* note 4 at 196 n. 59. (referring to In re T. P. Long Chem. Inc., 45 B.R. 278, 284-85 (Bankr. N.D. Ohio 1985). Where the debtor still maintained liability as a PRP under CERCLA even after abandoning land as a former owner. Nevertheless, *Topol* indicated that "because the bankruptcy case can usually be completed before the cleanup litigation is

even close to completion, the practical effect of abandoning land may be to avoid liability").

[148] Topol, *supra* note 4 at 197.

[149] 11 U.S.C. 503(b)(1)(A)(2001).

[150] *In re T.P. Long Chem.*, 45 B.R. at 285.

[151] *In re Dant & Russell, Inc.*, 853 F.2d 700, 709 (9<sup>th</sup> Cir. 1988) (The court held that pre-petition cleanup expenses by the government were not entitled to administrative priority).

[152] *In re T.P. Long Chem*, 45 B.R. at 285 (where approximately 90 drums containing various toxic substances became the property of the estate). The court held that the estate was liable for the drums and costs for cleaning up the drums by the EPA were an administrative expense.

[153] 11 U.S.C. 503(b), 507(a)(1)-(2), 1123(a)(1), 1129(a)(9)(A)(2001); Spracker, *supra* note 6 at 102; *In re Hemingway Transp., Inc.*, 126 B.R. 656 (D. Mass. 1991); *In re Kent Holland Die Casting & Plating, Inc.*, 125 B.R. 493 (Bankr. W.D. Mich. 1991); *In re Security Gas & Oil, Inc.*, 70 B.R. 786, 795 n.6 (Bankr. N.D. Cal. 1987); *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 286-87 (Bankr. N.D. Ohio 1985).

[154] 11 U.S.C. 507(a)(1)-(2), 1123(a)(1), 1129(a)(9)(A)(2001).

[155] *In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118, 122 (6<sup>th</sup> Cir. 1987) and *In re Peerless Plating Co.*, 70 B.R. 943, 948-49 (Bankr. W.D. Mich. 1987) (holding government costs were administrative expenses); *In re Dant & Russell, Inc.*, 853 F.2d 700, 708 (9<sup>th</sup> Cir. 1988) and *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F. 2d 137, 142 (3<sup>d</sup> Cir. 1985) (holding cleanup costs were general unsecured claims.).

[156] *In re Dant & Russell, Inc.*, 853 F.2d at 707.

[157] *Southern Ry. Co.* 758 F.2d at 142.

[158] *In re Dant & Russell, Inc.*, 853 F.2d at 707.

[159] *In re Chateaugay*, 944 F. 2d at 1010 (referencing the district court's findings.). The court in *Chateaugay* also noted that the same conclusions were reached in: *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 123-24 (6<sup>th</sup> Cir. 1987); *In re Peerless Plating Co.*, 70 Bankr. 943, 948-49 (Bankr. W.D. Mich. 1987); *In re Stevens*, 68 Bankr. 774, 783 (D. Me. 1987); *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4<sup>th</sup> Cir. 1988). *Chateaugay* did note that priority for the expense incurred would be determined on a case-by-case basis.

[160] *In re Wall Tube & Metal Products Co.*, 831 F.2d at 122.

[161] *In re T.P. Long Chem. Inc.*, 45 B.R. at 286.

[162] *In re Wall Tube & Metal Products Co.*, 831 F.2d at 123.

[163] *Kovacs*, 469 U.S. at 282-283.

[164] *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F. 2d 137, 141 (3<sup>d</sup> Cir. 1985).

[165] *Midatlantic National Bank v. New Jersey Dept. of Env'tl. Protection*, 474 U.S. 494 (1986).

[166] *Midatlantic*, 474 U.S. at 498 "The sole issue presented by these petitions is whether a trustee may abandon property under § 554 in contravention of local laws designed to protect the public's health and safety. New York is claiming reimbursement for its expenditures as an administrative expense. That question, however, like the question of the ultimate disposition of the property, is not before us."

[167] *In re Wall Tube & Metal Products Co.*, 831 F.2d at 122; Topol, *supra* note 4 at 201.

[168] *See* note 155.

[169] 11 U.S.C. 362(a)(1) (2001).

[170] *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1182 (5<sup>th</sup> Cir. 1986) (referencing H.R.Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6296-97.).

[171] "The Chemical Weapons Convention Implementation Act of 1998, part of the Omnibus Consolidated Emergency Supplemental Appropriations Act of 1999, amended the exception by, *inter alia*, combining subsections (b)(4) and (b)(5) into one subsection (b)(4) and expanding the scope of the exception to cover proceedings to obtain possession of property of the estate . . . or to exercise control over property of the estate otherwise stayed by 11 U.S.C. § 362(a)(3). *See* Pub. L. No. 105-277, § 603, 112 Stat. 2681, 2681-886 (1998); *see also* 3 Collier, *supra*, § 362.05[5], at 362-56 to 57 (discussing the 1998 amendments)." SEC v. Brennan, 230 F.3d 65 (2000); 11 U.S.C. § 362(b) (1994).

[172] 11 U.S.C. 362(b)(4) and (5)(2001).

[173] *Penn Terra, Ltd. v. Department of Environmental Resources*, 733 F. 2d 267 (3d Cir. 1984); *New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Nicolet, Inc.*, 857 F.2d 202 (3d Cir. 1988); *In re Commerce Oil Co.*, 847 F. 2d 291 (6<sup>th</sup> Cir. 1988); *In re Commonwealth Oil Refining Co.*, *supra* note 161; *United States v. Ilco, Inc.*, 48 B.R. 1016 (Bankr. N.D. Ala. 1985).

[174] *New York v. Exxon Corp.*, 932 F. 2d at 1023; *Nicolet, Inc.*, 857 F.2d at 209; *In re Commerce Oil Co.*, 847 F.2d at 295; *see also* *United States v. Mattiace Indus., Inc.*, 73 B.R. 816, 818 (E.D.N.Y. 1987) (holding that the pecuniary interest test did not apply to CERCLA cases). The court also held governmental actions under CERCLA to protect health, safety, and welfare of the public fell within the (b)(4) exception to the automatic stay.

[175] 932 F.2d 1020 (2d Cir. 1991).

[176] *Id.* at 1022.

[177] *Id.* at 1024.

[178] *Id.*

[179] 857 F.2d 202 (3d Cir. 1988).

[180] *Nicolet Inc.*, 857 F.2d at 210.

[181] *City of New York* at 1024, quoting *United States v. Seitles*, 106 Bankr. 36, 38-40 (S.S.N.Y. 1989).

[182] 44 B.R. 83 (Bankr. W.D. Mich. 1984).

[183] *Id.* at 83 (Bankr. W.D. Mich. 1984) (the court noted that a Chapter 11 debtor still must comply with the law and would bar state's injunction on the condition that the debtor convert to Chapter 7 within 90 days.)

[184] *Id.* at 88. *See also* *United States v. Johns-Manville Sales Corp.*, 13 Env'tl. L. Inst. 20310 (D.N.H. 1982) (the court barred a government cleanup injunction to compel cleanup where the action would require funds to be expended from the estate.). *See also* Kathryn R. Heidt, *The Automatic Stay in Environmental Bankruptcies*, 67 Am. Bank. L. J. 69, 111 (Winter 1993).

[185] *Penn Terra Limited v. Department of Environmental Resources*, 733 F. 2d 267 (3d Cir. 1984).

[186] *Id.* at 270.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Penn Terra* was decided prior to 362(b)(5)'s merger with 362(b)(4). *Id.* at 267.

[191] *Id.* at 270.

[192] *Id.* at 278.

[193] *Id.* at 273.

[194] *Id.* at 278.

[195] *United States v. Wheeling-Pittsburgh Steel Corp.*, 818 F.2d 1077, 1086 (3d Cir. 1987); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1186-87 (5<sup>th</sup> Cir. 1986); *United States v. Hubler*, 117 B.R. 160, 165 (Bankr. W.D. Pa. 1990); *United States v. ILCO*, 48 B.R. 1016, 1024 (Bankr. N.D. Ala. 1985).

[196] *Penn Terra*, 733 F. 2d at 278.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] 11 U.S.C. § 105(a) (2001); *In re Security Gas & Oil, Inc.*, 70 B.R. 786, 795 n.6 (Bankr. N.D. Cal. 1987).

[201] 11 U.S.C. § 105(a) (2001). *See also* *In re Security Gas & Oil, Inc.*, 70 B.R. at 792.

[202] *Penn Terra*, 733 F.2d at 273.

[203] 70 B.R. 786, 795 n.6 (Bankr. N.D. Cal. 1987).

[204] *Id.* at 795.

[205] *Id.* at 795, 796.

[206] *Id.* at 796 (referencing the Supreme Court's *Midatlantic* decision).

[207] *Id.* at 796.

[208] *Heidt*, *supra* note 184 at 129; 28 U.S.C. 959(b)(2002); *see also* *Spracker*, *supra* note 6 at 120 (noting that when balancing the equities, court's tend to lean in the direction of protecting the public from harm).

[209] Annette T. Crawley, *Note, Environmental Auditing and the "Good Samaritan" Doctrine: Implications for Parent Corporations*, 28 Ga. L. Rev. 223 (1993).

[210] *United States v. Bestfoods*, 524 U.S. 51 (1998).

[211] *Bestfoods*, 524 U.S. at 60. (the parent corporation controls the stock of the subsidiary company).

[212] Lucia Ann Silecchia, *Pinning The Blame & Piercing The Veil In The Mists Of Metaphor: The Supreme Court's New Standards For The CERCLA Liability Of Parent Companies And A Proposal For Legislative Reform*, 67 Fordham L. Rev 116, 131 (October 1998).

[213] Phillip I. Blumberg, *Accountability Of Multinational Corporations: The Barriers Presented By Concepts Of The Corporate Juridical Entity*, 24 Hastings Int'l & Comp. L. Rev. 297, 309 (Spring 2001);

[214] *P. F. Collier & Son Corp. v. F.T.C.*, 427 F. 2d 261, 268 (6<sup>th</sup> Cir. 1970); *United States v. Firestone Tire & Rubber Co.* 518 F. Supp. 1021, 1039 (D.C. Ohio, 1981).

[215] *SEC v. Elmas Trading Corp.*, 620 F. Supp. 231, 234 (D. Nev. 1985); *Town of Brookline v. Gorsuch*, 667 F.2d 215 (1<sup>st</sup> Cir. 1982); *Capital Tel. Co. v. FCC*, 498 F.2d 734, 738-39 (D.C. Cir. 1974) (applied the "modified piercing" doctrine to ensure that the underlying statutory policies were not circumvented through manipulation of the corporate structure).

[216] *SEC v. Elmas Trading Corp.*, 620 F. Supp. at 235. See also Mary Jane Angelo, et. al. *Exalting the Corporate Form Over Environmental Protection The Corporate Shell Game and the Enforcement of Water Management Law In Florida*, 17 J. Land Use & Env't. Law 89 (Fall 2001) (highlighting the use of corporate shells to evade Florida environmental laws).

[217] *United States v. Cordova*, 113 F. 3d 572, 580 (1997).

[218] *United States v. Bestfoods*, 524 U.S. 51, 60 (1998).

[219] *Id.*

[220] *Id.* at 60, 64.

[221] *Id.* at 57.

[222] *Id.* at 56.

[223] *Id.* at 57.

[224] *Id.*

[225] *Id.*

[226] *Id.* at 58.

[227] *Id.* at 61.

[228] *Id.* at 63.

[229] *Id.* at 64.

[230] *Id.*

[231] *Id.*

[232] *Id.* at 66, 67.

[233] *Id.* at 65, 66. the Supreme Court also cited *Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5<sup>th</sup> Cir. 1991) cert. denied, 502 U.S. 1004 (1991) ("CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act"), *United States v. Kayser-Roth Corp.*, 910

F.2d 24, 26 (1 Cir. 1990) ("a person who is an operator of a facility is not protected from liability by the legal structure of ownership").

[234] *Bestfoods*, 524 U.S. at 68, 70.

[235] *Id.* at 71.

[236] *Id.* at 72.

[237] *Bestfoods v. Aerojet-General Corp.*, 173 F. Supp. 2d 729 (W. D. Mich. 2001).

[238] *United States v. Bestfoods.*, 524 U.S. 51 (1998).

[239] *United States v. Union Corp.*, 2003 U.S. Dist. Lexis at 1190 (E. D. Penn. 2003).

[240] 2003 U.S. Dist. Lexis 1190 (E. D. Penn. 2003).

[241] *Id.* at 1206.

[242] *Id.* at 1207.

[243] Catherine Ann Hilbert, *United States v. Bestfoods: Parent Corporation Liability Under CERCLA*, 24 Del. J. Corp. L. 919, 932 (1999); Silecchia, *supra* note 212 at 132.

[244] *United States v. TIC Inv. Corp.*, 866 F. Supp. 1173 (ND Iowa 1994).

[245] *Id.* at 1183.

[246] *Id.* at 1183.

[247] Hilbert, *supra* note 243 at 934.

[248] Silecchia, *supra* note 212 at 132.

[249] Silecchia, *supra* note 212 at 132 (referencing Dale A. Oesterle, *Viewing CERCLA as Creating an Option on the Marginal Firm: Does it Encourage Irresponsible Environmental Behavior?* 26 Wake Forest L. Rev. 39 (1991)).

[250] *United States v. TIC Inv. Corp.*, 866 F. Supp. 1173 (N.D. Iowa 1994); *See also* Mark E. McKane, *Comment, Operator Liability for Parent Corporations Under CERCLA: A return to Basics*, 91 NW. U. L. Rev. 1642, 1648 (1997).

[251] Silecchia, *supra* note 212 at 179.

[252] Mark T. Story, *Special Section: 2001: A Legal Perspective: The "Corporate Veil": Preserving It (And Going Around It) In Environmental Matters*, 65 Tex. B. J. 28 (Jan 2002).

[253] 11 U.S.C. 502(e)(1)(B)(2001); *In re Charter Co.*, 862 F.2d 1500, 1504 (11<sup>th</sup> Cir. 1989); *In re Amatex Corp.*, 110 B.R. 168, 169-70, 172-73 (Bankr. E.D. Pa. 1990).

[254] 11 U.S.C. 502(c)(2001).

[255] *In re National Gypsum*, 139 B.R. at 404, 408, note 28 (noting estimation used in CERCLA claims in bankruptcy in the following cases: *United States v. Hardage*, 733 F. Supp. 1424, 1439 (W.D. Okl. 1989); *United States v. A & F Materials Co. Inc.*, 578 F. Supp. 1249, 1259 (S.D. Ill. 1984); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 211-12 (W.D. Mo. 1985)).

- [256] *In re National Gypsum*, 139 B.R. at 408 n. 29.
- [257] *In re Allegheny Intl., Inc.*, 126 B.R. 919, 923 (W. D. Pa. 1991).
- [258] 126 B.R. 919, 923 (W. D. Pa. 1991).
- [259] *Id.* at 924.
- [260] *Id.*
- [261] *Id.* (stating "Creation of a trust to be expended on contingent claims is a frequently used mechanism for insuring that such funds are properly disbursed. *See, e.g., In re Johns-Manville Corp.*, 68 Bankr. 618, 625-26 (Bankr. S.D.N.Y. 1986) *aff'd.*, 78 Bankr. 407 (S.D.N.Y. 1987) *aff'd.*, 843 F.2d 636 (2d Cir. 1988); *In re A.H. Robbins Co.*, 88 Bankr. 742 (E.D. Va. 1988); *aff'd.*, 880 F.2d 694 (4<sup>th</sup> Cir. 1989))."
- [262] 138 B.R. 10 (Bankr. D. Del. 1992).
- [263] *Id.* at 14.
- [264] *Id.* at 11.
- [265] Francis E. Goodwyn, *Claims Estimation and the Use of the "Cleanup Trust" in Environmental Bankruptcy Cases*, 9 Am. Bankr. Inst. L. Rev 769, 812 (Winter 2001).
- [266] Kellett, *supra* note 61 at 438.
- [267] *Ohio v. Kovacs*, 469 U.S. 274, 284 (1985).
- [268] 11 U.S.C. 326(b)(4).
- [269] *United States v. Troxler Hosiery Co., Inc.*, 41 B.R. 457 (D. N.C. 1984), *aff'd*, 796 F.2d 723 (4<sup>th</sup> Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).
- [270] Jeffrey S. Theuer, *Aligning Environmental Policy And Bankruptcy Protection: Who Pays For Environmental Claims Under The Bankruptcy Code?* 13 T.M. Cooley L. Rev. 465, 491 (1996) (citing *In re Van Ripper*, 25 B.R. 972 (Bankr. W.D. Wis. 1982); *In re Alan I. W. Frank Corp.*, 19 B.R. 41 (Bankr. E.D. Pa. 1982); *Johnson v. Lindsey*, 16 B.R. 211 (Bankr. M.D. Fla. 1981); *In re James*, 10 B.R. 2 (Bankr. W.D. N.C. 1980)).
- [271] Spracker, *supra* note 6 at 469 (citing *In re Commercial Oil Serv., Inc.*, 58 B.R. 311, 315-16 (Bankr. N.D. Ohio 1986), *aff'd*, 88 B.R. 126 (N.D. Ohio 1987); *In re Charles George Land Reclamation Trust*, 30 B.R. 918, 923-26 (Bankr. D. Mass. 1983)).
- [272] Janette Brimmer, *Environmental Issues in Bankruptcy: An Overview*, 3 Wis. Env'tl. L.J. 159, 170 (Summer 1996). *See also* Spracker, *supra* note 6 at 469.
- [273] Spracker, *supra* note 6 at 469.
- [274] Brimmer, *supra* note 272 at 170.
- [275] *Id.* (selling contaminated land is frequently used in the abandonment context). *See also* the Brownfield Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. 107-118, CERCLA Section 107(q).
- [276] Brownfield Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. 107-118, CERCLA Section 107(q).

[277] Dolly Hoffman & Jeffery R. Seaman, *A Pragmatic Solution to a Complex Delemma: A Fundamental Approach to Resolving the Conflict between CERCLA and the Bankruptcy Code*, 4 Am. Bankr. Inst. L. Rev. 243, 246 (Spring 1996).

[278] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[279] Spracker, *supra* note 6 at 123.

[280] Hoffman, *supra* note 272 at 260.

[281] *Id.* at 261.

[282] *See generally* Black, *infra* note 286 at 620.

[283] 40 C.F.R. 264.148, 265.148 (2002).

[284] 40 C.F.R. 280.110 (2002).

[285] N.J. Stat. Ann. 13:1K-6 & 13:1K-8 (West 2002).

[286] Benjamin J. Richardson, *Mandating Environmental Liability Insurance*, 12 Duke Env. L. & Pol'y F. 293, 320 (Spring, 2002) (recommending mandatory insurance for hazardous waste sites and noting that the CERCLA's section 108 financial responsibility provision, that applies to cargo ships and generators and transporters of hazardous substances, do not cover all entities that fall under CERCLA. Richardson also notes that section 108's financial responsibility provision "is generally not associated with the controversial hazardous waste site remediation requirements of the Act"). *See also* L. DeWayne Layfield, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 Tex. L. Rev. 1237, 1247 (May 1990) (suggesting CERCLA's section 108 financial responsibility provision is inadequate and remains undefined).

[287] 11 U.S.C. 362(a)(2001).

[288] 274 F.3d 846 (2001).

[289] *Id.* at 866.

[290] *Id.* at 865.

[291] *Id.* at 866.

[292] Steven W. Black, Comment, *The Fact and Fiction of Financial Responsibility for Hazardous Waste Management*, 17 Ecology L.Q. 581-620 (1990). (recommending that Congress increase the financial responsibility requirements in CERCLA section 108 to all entities involved with hazardous waste).

[293] *In re Eagle-Picher Inds. Inc.*, 144 B.R. 765 (Bankr S. D. Ohio 1992) and 131 F. 3d 1185 (6<sup>th</sup> Cir. 1997) (suggesting direct notification of environmental agencies is preferable). The court noted that even though the EPA missed the bar date for filing an environmental claim, the corporation could still be liable.; Spracker, *supra* note 6 at 125, (listed several considerations that a chapter 11 PRP should consider when listing possible environmental claims on a reorganization schedule. An amendment to CERCLA requiring notification to state agencies may remove the ability the PRP from choosing to notify or not notify an agency of its bankruptcy filing).

[294] La. Rev. Stat. Ann 30:2281 (West 2000); Me. Rev Stat Ann. Title 38:1371(West 2001); Conn. Gen. Stat. 22a-452a (West 2002); Mass. Gen. L. ch. 21E, 13 (West Supp. 2000); N.J. Stat. Ann. 58:10-23.11(f) (2002); Tenn. Code Ann. 68-212-209 (1992); *See also* Johnathan Remy Nash, *Environmental*

*Superliens and the Problem of Mortgage-Backed Securitization*, 59 Wash. & Lee L. Rev. 127 (Winter 2002). See Table 1 Summary of State Superlien Provisions at 152, for an excellent breakdown and comparison of state superlien statutes.

[295] Nash *supra* at 176 n. 189. 11 U.S.C. 9607(l)(3)(2002).

[296] 11 U.S.C. 9607(l)(3)(2002).

[297] Mass. Gen. L. ch. 21E, 13 (1992) (all property except residential); N.J. Stat. Ann. 58:10-23.11(f) (2002) (all property except certain residential).

[298] 194 N.J. Super. 136 (1984).

[299] *Id.* at 141 (where the court gave priority lien status for cleanup of hazardous waste over the city's pre-existing tax lien).

[300] *Id.* at 146, 147.

[301] Nash, *supra* note 288 at 158; See also Topol, *supra* note 6 at 226.

[302] Nash, *supra* note 288 at 158.

[303] *Id.* at 186.

[304] *Id.*; See also Topol, *supra* note 6 at 225, 226.

[305] Environmental claims priority has been recommended by a number of commentators. See generally Topol, *supra*, note 6; Cahalane, *supra* note 125; Spracker, *supra* note 6; Hoffman, *supra* note 277; Brimmer, *supra* note 272.

[306] Proposals to allow environmental exceptions for piercing the corporate veil have been recommended by a number of commentators. See generally Blumberg, *supra* note 213; Hilbert, *supra* note 243; Silecchia, *supra* note 212; Angelo, *supra* note 216; Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 Iowa J. Corp. L. 479 (Spring 2001) (recommending changes in veil piercing in the tort context).

[307] See Cahalane, *supra* note 125 at 284.

[308] *Id.*

[309] *In re T. P. Long Chemical, Inc.*, 45 B.R. at 287.

[310] *In re Better-Brite Plating, Inc.*, 105 B.R. 912, 918 (E. D. Wisc. 1989) (Permitting priority status for cleanup costs over secured creditors. [vacated on other grounds in 136 B.R. 526 (Bankr. N.D. Iowa 1991)]).

[311] *Kovacs*, 469 U.S. at 286.

[312] *In re Better-Brite Plating, Inc.*, 105 B.R. at 918; *In re T.P. Long Chem*, 45 B.R. at 286; *In re Mowbray Engineering Co. Inc.*, 67 B.R. at 35 (M. D. Ala. 1986) (allowing government priority for its cleanup expenses over secured creditors in the sale of the debtors property where EPA was standing in the shoes of the Trustee to preserve the estate).

[313] 125 B.R. 546 (N. D. Ind. 1991).

[314] *Id.* at 552.

[315] Topol, *supra* note 4 at 227 (recommending an amendment to section 507 of the Bankruptcy Code to allow for protection for certain "innocent" creditors). Other commentators have recommended more limited approaches for claim prioritization. *See* Cahalane, *supra* note 125 at 284 (recommending priority only over the debtors property where the debtor is the actual polluter); Hoffman, *supra* note 277 at 260. (recommending priority over only unsecured creditors).

[316] Susan J. Zook, *Superiority Status: The Solution to the Collection of Cercla Response Costs*, 46 Wash. U. J. Urb. & Contemp. L. 291, (Summer 1994); *See also* Topol, *supra* note 4 at 215; *See also* Cahalane, *supra* note 125 at 284.

[317] Topol, *supra* note 4 at 215.

[318] *Id.*

[319] *Id.*, (quoting David G. Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created By Running Covenants, Products Liability, and Toxic-Waste Cleanup*, Law & Contemp. Probs. at 119, 159-71 (Spring 1987)).

[320] Robert Funsten & Alejandro Hernandez, *The Toxic Waste Generator in Bankruptcy: Should Environmental Cleanup Costs Be Given a Priority?* 6 Stan. Env'tl. L.J. 108, 113 (1986-87).

[321] Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 Yale L.J. 1143, 1149 (1978); *See also* Topol, *supra* note 4 at 215.

[322] Topol, *supra* note 4 at 215; *See also* John P. Morgan, *Lender Liability: Civil Liability Regimes For Environmental Harm*, 2 ILSA J. Int'l & Comp. L. 139 at 152 (Fall 1995) (also noting that creditors must be careful not to be too involved in the corporation's activities or they may face liability). *See also dicta* in *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 (11<sup>th</sup> Cir. 1990) *rehearing* at 911 F.2d 742 (11th Cir. Ga. 1990), *and later proceeding* at 821 F. Supp. 707 (1993).

[323] *Fleet Factors Corp.*, 901 F. 2d at 1558.

[324] *Id.* at 1558.

[325] *See Security Industrial Bank*, 459 U.S. 70 at 78-82 (1982) (holding that section 552 of the Bankruptcy Code should apply prospectively to avoid constitutional Takings Clause issues.); *See also* *In re Heldor Indus., Inc.*, 131 B.R. 578, 586 (1991).

[326] *See* Cahalane, *supra* note 125 at 284.

[327] *See supra* notes 203-249 and accompanying text.

[328] *Bestfoods*, 524 U.S. 51 (1998).

[329] Ronald G. Aronovsky & Lynn D. Fuller, *Liability Of Parent Corporations For Hazardous Substance Releases Under CERCLA*. 24 U.S.F. L. Rev. 421, 422 (Spring 1990).

[330] Aron M. Bookman, *Transcending Common Law Principles Of Limited Liability Of Parent Corporations For The Environment*. 18 Va. Env'tl. L.J. 555, 568 (1999).

[331] *Id.* at 607.

[332] Silecchia, *supra* note 210 at 179.

[333] Gary Allen, *Refining The Scope Of CERCLA's Corporate Veil-Piercing Remedy*. 6 Stan. Env'tl. L.J. 43, 75 (1986) (recommending that: "Congress could either define a parent corporation as a corporation owning over 50% of a subsidiary, or create a series of presumptions of ownership along the following

lines: 1) If the corporation owns over 50% of the subsidiary's voting stock, the court shall irrebuttably presume that the corporation is the parent; 2) If the corporation owns 40-50% of the subsidiary, the court shall presume the corporation is the parent, but the corporation can rebut the presumption by clear and convincing evidence; 3) If the corporation owns 25-40% of the subsidiary, the court shall presume that the corporation is the parent, but the corporation may rebut the presumption by a preponderance of the evidence; or 4) If the corporation owns less than 25% of the subsidiary, the court shall presume that the corporation is not the parent, but the plaintiff may rebut the presumption by clear and convincing evidence. The '50% plus rule' has the advantage of being clear and the presumption approach has the advantage of preventing clever manipulations to avoid the '50% plus' rule.").

[334] Aronovsky, *supra* note 321 at 468. (This comment was written prior to the *Bestfoods* decision by the Supreme Court. The author did not believe an amendment to CERCLA was necessary, and indicated that if the parent took the above necessary precautions it may avoid liability. After *Bestfoods*, it is more likely that such actions would be seen as derivative and the parent could be held liable.).

[335] See Topol, *supra* note 4.