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Police and Regulatory Power vs. Pecuniary Interests: The Bankrupt Hazardous Waste Site Owner Faces the Music. United States v. Nicolet, Inc., 857 F.2d 202 (3d Cir.1988)

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NOTE

POLICE AND REGULATORY POWER vs. PECUNIARY INTERESTS: THE BANKRUPT HAZARDOUS WASTE SITE OWNER FACES THE MUSIC. *UNITED STATES v. NICOLET, INC.*, 857 F.2d 202 (3d Cir. 1988)

INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[1] created a sweeping liability scheme in order to reclaim the environment and protect the public health, safety, and welfare. CERCLA provides that all current owners and operators[2] of a facility,[3] all past owners and operators who were associated with a facility at the time of a disposal of hazardous waste, and all generators, transporters, and persons who arranged for disposal of hazardous waste are potentially liable for a wide range of response[4] costs.[5] A critical issue in the development of CERCLA liability is whether a potentially liable party can, by filing for voluntary bankruptcy, escape a suit by the government for response costs. The United States Environmental Protection Agency (EPA) estimates that over the next 50 years, up to 30 percent of the firms owning or operating waste disposal facilities will petition for bankruptcy.[6] Many of these firms are likely to seek shelter from the enforcement of environmental laws by application of the automatic stay provision of the Bankruptcy Code.[7]

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1. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 26 U.S.C. §§ 4611-4672 (1988), and at 42 U.S.C. § 6911(a), §§ 9601-9675 (1982 & Supp. V 1987)). *See also*, Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675 (Supp. V 1987)).

2. Bankruptcy does not exclude a party from being defined as an "owner or operator." *See*, 42 U.S.C. § 9601(20)(A):

> (20)(A) The term "owner or operator" means . . .
> (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy . . . or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility . . . immediately beforehand.

3. "Facility" defined at 42 U.S.C. § 9601(9) as:

(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. . . .

4. "Response" defined at 42 U.S.C. § 9601 (25) as: "remove, removal, remedy, and remedial actions, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto."

5. CERCLA, 42 U.S.C. § 9607(a)(1)-(4).

6. U.S General Accounting Office, Hazardous Waste, Environmental Safegaurds Jeopardized When Facilities Cease Operating 18 (1986).

7. A "stay" is a suspension of all actions which have been brought or could have been brought against the debtor before the petition for bankruptcy. 11 U.S.C. § 362(a) (1988). *See infra* note 19. A stay "ensure[s] that the assets of a debtor are not reduced or disturbed and [protects] the bankruptcy court's jurisdiction over the debtor and his property." United States v. Jones & Laughlin Steel Corp., 804 F.2d 348, 350 (6th Cir. 1986).

In order to avoid this potential escape from enforcement of environmental laws, Congress included in the Bankruptcy Reform Act of 1978[8] an exception to the automatic stay provision when a governmental unit institutes an action within the scope of its police or regulatory powers.[9] This note will discuss a recent Third Circuit Court of Appeals case, *United States v. Nicolet*,[10] which adjudicated the issue of a bankruptcy stay in light of an action by the federal government to recover costs expended in response to hazardous waste releases.

FACTS

In 1962, Nicolet, Inc. (Nicolet) purchased a tract of property in Ambler, Pennsylvania, from a subsidiary of Turner & Newall, PLC (T & N), a British corporation. Two large asbestos-laden waste piles existed on the property when Nicolet purchased the tract. Unable to reach an agreement to clean up the waste with Nicolet, the EPA entered the property and began to remediate the waste piles itself in March 1984. The EPA has spent $1 million in removal and remediation costs to clean up the hazardous waste at the site and estimates an additional $300,000 will be required to finish the site remediation.[11]

On May 30, 1985, the United States filed suit against Nicolet pursuant to section 107(a) of CERCLA[12] in the District Court for the Eastern District of Pennsylvania. The United States sought recovery of both past and future costs incurred by the EPA during response to the hazardous waste at the site. Nicolet joined T & N as a third party defendant alleging T & N was liable for response costs sought in the CERCLA action or, alternatively, for contribution or indemnity. The United States eventually amended the complaint and named T & N as an original defendant in the CERCLA action. T & N was joined as a past owner or operator through the actions of a subsidiary who owned and operated the site until 1962.

Two days after the government amended its complaint to add T & N as a defendant, Nicolet filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code[13] in the Bankruptcy Court for the

8. Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326 (1988)).

9. 11 U.S.C. §§ 362(b)(4)-(5); *see infra* note 22.

10. 857 F.2d 202 (3d Cir. 1988).

11. *Id.* at 203. The court refused to make a distinction between past and future expenses and decided the case "on the premise that only expenses for past activities are at issue." *Id.* at 207.

12. CERCLA, 42 U.S.C. § 9607(a)(1)-(4) (1982 & Supp. V 1987), creates an action for recovery of costs expended by the EPA in response to the release or threatened release of a hazardous substance into the environment.

13. Under a Chapter 11 bankruptcy the court reorganizes the property of the debtor so that creditors are treated equally and the debtor remains in business. 11 U.S.C. §§ 1101-1129 (1988). If the debtor cannot operate under the reorganization, the debtor may file for Chapter 7 bankruptcy under which the assets are completely liquidated and distributed to the creditors. 11 U.S.C. §§ 701-728 (1988).

Eastern District of Pennsylvania. The district court trying the CERCLA action took judicial notice of the bankruptcy provision and placed the suit in civil suspense on September 1, 1987, pursuant to the automatic stay provision of the Bankruptcy Code.[14] The district court did not sever T & N before placing the suit in civil suspense. The United States moved the court to reconsider the suspense order, arguing that the action was not properly stayed because the CERCLA suit was an exercise of governmental police and regulatory power within the meaning of the exception to the stay provision.[15]

After considering the arguments, the district court vacated the order of civil suspense ruling that the CERCLA suit was indeed an action by a governmental unit to enforce such governmental unit's police or regulatory power.[16] The case was transferred to the trial calender for adjudication. Nicolet and T & N appealed the removal of the stay to the Third Circuit Court of Appeals.

On appeal, Nicolet contended that the CERCLA suit was an attempt to collect money damages and therefore not an exertion of regulatory or police power by the government. Nicolet argued that the purpose behind the exception is to allow equitable or injunctive proceedings to continue in order to abate an ongoing hazard. Nicolet further asserted that an injunctive purpose is absent in a suit such as this when the hazard is abated and only the liability for clean-up costs is at issue. T & N argued that Nicolet was an indispensible party and therefore if the stay should be reinstated, proceedings against T & N should also be suspended.

The Court of Appeals, after a lengthy discussion of jurisdiction,[17] ruled that the action by the United States was indeed an exercise of its regulatory authority and ordered the suit to proceed to trial. The court did not reach T & N's arguments on appeal.[18]

BACKGROUND

The Bankruptcy Code

The automatic stay provision of the Bankruptcy Code provides protection for the insolvent party by imposing an automatic stay on the commencement or continuation of proceedings which could have been

14. United States v. Nicolet, Inc., No. 85-3060 (E.D. Pa. filed Sept. 1, 1987).

15. *See infra* note 22.

16. United States v. Nicolet, Inc., 81 Bankr. 310 (E.D. Pa. 1988).

17. Usually the stay of a civil proceeding is interlocutory (not final) and therefore not subject to appellate review. *Nicolet*, 857 F.2d at 203. However, the *Nicolet* court ruled that when a bankruptcy stay is at issue, the usual rules of jurisdiction will be relaxed and the non-final issue of a stay will be heard. *Id.* at 207. *See*, Federal Interlocutory Appeals Act, 28 U.S.C. § 1292(b) (1982 & Supp. V 1987).

18. *Nicolet*, 857 F.2d at 210.

brought or were brought against the debtor before insolvency.[19] The stay applies to almost all types of actions or proceedings that may be brought against the debtor.[20] The stay is intended to provide the debtor with a "breathing spell" so that it may properly reorganize its assets according to the Bankruptcy Code. A stay is also intended to protect the creditors' interests by forcing an orderly disposition of the debts, rather than an "unfair race to the courthouse."[21]

The governmental regulatory and police power exceptions to the automatic stay are found in sections 362(b)(4)-(5) of the Bankruptcy Code.[22] However, no proceeding intended to enforce a money judgment is exempt from the stay provisions.[23] Therefore, before ordering the stay of a governmental action, a court must determine whether the actions are in fact an attempt to enforce a money judgment; and if not, whether the government's actions fall within the regulatory or police power.[24] The vast majority of litigation in this area has concerned the collision of state

19. 11 U.S.C. § 362(a) (1988). The relevant subsections of § 362(a) provide:
Except as provided in subsection (b) of this section, a [bankruptcy] petition . . . operates as a stay, applicable to all entities of—
(1) the commencement or continuation . . . of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before the commencement of the case under this title.

20. R. Aaron, Bankruptcy Fundamentals, § 501 (1984).

21. *Nicolet*, 857 F.2d at 207; *see* S. Rep. No. 989, 95th Cong., 2d Sess., 54-55, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5840-41 [hereinafter S. Rep. No. 989]; H.R. Rep. No. 595, 98th Cong., 2d Sess., 340, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6296-97 [hereinafter H.R. Rep. No. 595].

22. 11 U.S.C. § 362(b)(4)-(5) (1988). The relevant subsections of § 362(b) provide:
The filing of a [bankruptcy] petition . . . does not operate as a stay— . . .
(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.
For a general discussion of police and regulatory actions not stayed by the automatic stay provision, *see*, Johnson & O'Leary, *Automatic Stay Provisions of the Bankruptcy Act of 1978*, 13 N.M.L. Rev. 599, 609-10 (1983).

23. 11 U.S.C. § 362(b)(5) specifically exempts the enforcement of "money judgment[s]" from the automatic stay exception. The enforcement of a money judgment is stayed in order to prevent the government from gaining preferential access to the debtors assets to the detriment of all other creditors in the bankruptcy proceeding. *See* S. Rep. No. 989, *supra* note 21, at 5838; H.R. Rep. No. 595, *supra* note 21, at 6299. Thus, once damages are fixed by the trial court against Nicolet, the government would have to pursue collection of these damages in bankruptcy court, as a judgment creditor, along with all other creditors.

24. *See* Penn Terra Ltd. v. Dep't of Envtl. Resources, 733 F.2d 267, 272 (3d Cir. 1984).

environmental laws and the Bankruptcy Code. Therefore federal courts, including the *Nicolet* court, necessarily look to these cases for guidance.

Money Judgment versus Regulatory Enforcement

The Bankruptcy Code provides no definition of enforcement of a "money judgment" as used in subsection 362(b)(5). Generally a money judgment is a "final order, decree or judgment of a court by which a defendant is required to pay a sum of money in contrast to a decree or judgment of equity in which the court orders some other type of relief."[25]

In *Penn Terra Ltd. v. Department of Environmental Resources*[26] the Third Circuit Court of Appeals held that an action by the state of Pennsylvania to compel a debtor corporation to comply with an agreement to clean up hazardous wastes was exempt from the automatic stay provision of the Bankruptcy Code.[27] Given that Congress did not provide a definition of "money judgment" in the Bankruptcy Act, the court in *Penn Terra* used the "commonly accepted usage" test[28] to determine the definition. The court found that a money judgment consists of two elements: "1) an identification of the parties for and against whom the judgment is entered; and 2) a *definite* and *certain* designation of the amount which plaintiff is owed by defendant."[29] Provisions for the enforcement of a money judgment are not a necessary element.

The court pointed out that the "mere entry" of a money judgment is not affected by a bankruptcy stay as long as the "proceedings are related to that governments regulatory or police powers."[30] But the court did not end its analysis here. The court further reasoned that in order to avoid "artful pleading [by the government] that depends on form rather than substance" the court must determine whether the actual intent of the suit is to obliquely achieve "what a money judgment was traditionally intended to accomplish and no more."[31] That is, if the government is really protecting its pecuniary interest rather than asserting its police or regulatory power, a money judgment is, in effect, the relief sought. Therefore, the exception to the automatic bankruptcy stay would not apply.

25. Black's Law Dictionary 907 (5th ed. 1979).

26. 733 F.2d 267.

27. The bankruptcy court in *In re* Penn Terra, Ltd., 24 Bankr. 427, 433 (W.D. Pa. 1982), reasoning that a money judgment was any judgment, including an injunction, requiring the immediate or future expenditure of money, ruled that the suit was seeking a monetary judgment and therefore exempt.

28. 733 F.2d at 275. The commonly accepted usage test "look[s] to legal custom and practice to determine what was *traditionally* understood to be recovery for money damages." *Id.* (emphasis in original).

29. *Id.* (emphasis in original).

30. *Id.*

31. *Id.* at 275-76.

The *Penn Terra* court also noted that whether a remedy would compensate for past harms resulting in injuries already suffered, or alternatively, compensate to protect against future harms, is an important factor in determining whether a "money judgment" is actually being sought.[32] The court finally held that the suit by the government would not lead to the state receiving any money, and therefore no oblique attempt at a money judgment existed. Rather, the money would be spent to pay private contractors to clean up the waste site.[33] The court further held that because the amount of money necessary for the clean-up was not determined, the action could not be an enforcement of a money judgment.[34] The *Nicolet* court found the precedent of *Penn Terra* compelling although the facts are distinguishable. *Penn Terra* dealt with an order to clean up an existing hazard. In contrast, *Nicolet* dealt with the assessment of liability for a hazard already substantially eliminated.

The Fifth Circuit Court of Appeals agreed with the *Penn Terra* rationale in *In re Commonwealth Oil Refining Co.*[35] In *Commonwealth Oil* the court concluded that an action to enforce compliance with the Resource Conservation and Recovery Act of 1976 (RCRA) was not stayed by bankruptcy reorganization because the action was not an attempt to enforce a money judgment, "notwithstanding the fact that [the debtor] will be forced to expend funds in order to comply."[36]

In contrast, the Supreme Court held in *Ohio v. Kovacs*[37] that a state court injunction requiring the payment of money to clean up a polluted site was a debt under provisions of the Bankruptcy Code.[38] Kovacs was the CEO of a company which operated a hazardous waste disposal site. The State of Ohio sued Kovacs and the company for violation of state

32. *Id.* at 277. If the ultimate goal is the recoupment of the past damages, rather than true injunctive relief to abate future conduct or harm, the action may loose the necessary color of a regulatory or police power action.

33. *Id.* at 275. *Nicolet* is distinguishable in that any judgment would assess damages payable to the government, not a private contractor.

34. *Id. Cf.*, United States v. Johns-Manville Sales Corp., 13 Envt'l L. Rep. 20310 (D. N.H. 1982) (EPA order requiring debtor to remove asbestos from property was "expenditure of substantial sums" and therefore ultimately the enforcement of a money judgment captured by the stay provisions of the Bankruptcy Code).

35. 805 F.2d 1175 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

36. *Id.* at 1184. The *Commonwealth Oil* court also concluded that "[t]he language of these exceptions is unambiguous—it does not limit the exercise of police or regulatory power to instances where there can be shown imminent and identifiable harm or urgent public necessity." *Id. See also*, Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 503-04 (1986) ("It is clear from the legislative history that one of the purposes of this exception is to protect public health and safety.")

37. 469 U.S. 274 (1985).

38. *Kovacs* was a Chapter 7 bankruptcy case. The Bankruptcy Code section concerning automatic stays under Chapter 7 is comparable in effect to 11 U.S.C. § 362(a), (b) (1988). *See*, Bankruptcy Act of 1978, 11 U.S.C. §§ 101(4), 523(a) (1988).

environmental laws. Kovacs consented to a judgment to clean up the site. Kovacs did not clean up the site and the State of Ohio took possession of the property and began to remediate the hazardous conditions. However, before the site could be remediated, Kovacs filed for personal bankruptcy. The State of Ohio sued, seeking a declaration that the obligation to clean up the site (now the State only sought money, not performance) was not a debt or a "liability on a claim" dischargeable under the Bankruptcy Code.[39] The Supreme Court ruled that the debt was a money damage and therefore dischargeable under the Bankruptcy Code.

The Supreme Court distinguished *Penn Terra* on the grounds that *Penn Terra* was an attempt to enforce the police powers of the state, while *Kovacs* was a clean-up order reduced to a money judgment.[40] That is, *Kovacs* was the true enforcement of a money judgment. The Supreme Court noted that in *Penn Terra* the State had not seized any property. Therefore the state had not approached the actual enforcement of a judgment. The *Kovacs* Court further stated that the automatic stay provision does not apply to the enforcement of regulatory statutes, but the enforcement of a money judgment "by seeking money from the bankrupt . . . is another matter."[41] Thus, because Kovacs had been dispossessed of his property, the only way he could satisfy the judgment was through the payment of money.

The *Kovacs* decision obscures the issue by implying that the remediation of a current hazard cannot be forced if the state takes possession of the property.[42] However, the application of *Kovacs* to a case such as *Nicolet* is dubious. In *Kovacs,* the Supreme Court was determining whether a debt was dischargeable, not whether liability could be fixed. *Kovacs* raises the point that even when the government is successful in a CERCLA suit to establish liability, the judgment for damages is ultimately subject to the bankruptcy court proceedings. Nicolet argued that under *Kovacs,* because a CERCLA suit will ultimately lead to liability in bankruptcy court, such a suit is an attempt to collect damages and therefore is subject to an automatic stay.

The Supreme Court further obscured the issue of bankruptcy stays in

39. *See* 11 U.S.C. § 101(4) (1988).

40. 469 U.S. at 283 n.11.

41. *Id.* Nicolet unsuccessfully attempted to use *Kovacs* to prove that the action was one to enforce a money judgment. Brief of Appellant Nicolet at 14-15, United States v. Nicolet, Inc., 857 F.2d 202 (3d Cir. 1988) (No. 88-1079 & 88-1110).

42. The *Nicolet* court chose not to discuss the *Kovacs* decision. Perhaps this was necessary to set a clear, strong precedent. Alternatively, *Nicolet* is distinguishable in that the government is only seeking to establish liability, rather than enforce a money judgment, and these are clearly two different proceedings, as the *Nicolet* court recognized. The main criticism of *Kovacs* is that it failed to adequately decide whether a clean-up order is the equivalent of a money judgment. Thorne, *Automatic Stay; Section 362,* 3 Bankr. Dev. J. 181, 194 (1986).

Midlantic National Bank v. New Jersey Dep't of Environmental Protection.[43] *In Midlantic,* the Quanta Resources Corporation was sued to clean up waste oil treatment facilities in New York and New Jersey. Quanta tried to clean up the site under a Chapter 11 bankruptcy but was financially unable to perform the reclamation. Quanta subsequently filed for a Chapter 7 liquidation. Midlantic National Bank, trustee of Quanta's estate, sought to abandon the property under section 554 of the Bankruptcy Code.[44] If Midlantic could abandon the site, it would not have to clean it up. The Supreme Court noted that the abandonment section of the Bankruptcy Code was qualified by the state's power to protect the public's health and safety.[45] This ruling was in direct opposition to a statement (albeit dictum) in *Kovacs* that implied a trustee could legally abandon a polluted property back to the prior owner, who would then have to comply with the state environmental law "to the extent of his or its ability."[46]

The Court in *Midlantic* did not explain this earlier statement in *Kovacs.* Thus, in *Midlantic,* the Court refused to allow the trustee to abandon the property and the expense of clean-up. The trustee is therefore forced to comply with the state environmental laws to the detriment of the estate and the other creditors. Justice Rehnquist, in dissent, argued that such a ruling would, in effect, put the state's interest in protecting the public "fisc" or treasury ahead of the interests of the other creditors of the estate.[47]

The *Nicolet* court took note that the government made no attempt to seize property in order to satisfy the judgment. Thus, the court reasoned that the suit at issue was only an attempt to fix liability, an action properly excepted from the automatic stay. The court further reasoned that the government was not seeking compensation for private wrongs, but rather exercising its "explicit mandate"[48] under CERCLA to redress environmental wrongs. Citing deterrence as one reason for this broad mandate, the court concluded the government was not pursuing any pecuniary interest.[49]

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43. 474 U.S. 494 (1986).

44. 11 U.S.C. §554(a) (1988) states that: "after notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Thus, if Midlantic could abandon the property, it could in effect relieve itself of the liability of cleaning up the property.

45. *Midlantic,* 474 U.S. at 507 (Rehnquist, J., dissenting). The Court found support for this interpretation in the automatic stay exceptions of 11 U.S.C. §362(a) (1988). Justice Rehnquist disagreed, reasoning that if Congress had wanted such an exception to apply to abandonment, Congress would have explicitly enacted the exception. *Id.* at 513. *See also,* United States v. Price, 688 F.2d 204 (3d Cir. 1982) (holding that an injunction which may force payment of money is not necessarily a money judgment if the state was seeking to prevent future harm).

46. *Kovacs,* 469 U.S. at 284 n. 12.

47. *Midlantic,* 474 U.S. at 516 (Rehnquist, J. dissenting).

48. *Nicolet,* 857 F.2d at 209.

49. *Id.* at 210.

Police or Regulatory Power versus Pecuniary Interest of the Government

Once the issue of whether the action is designed to enforce a money judgment is settled, a court must determine whether the government is bringing suit under the color of its regulatory or police powers in accordance with subsections 362(b)(4)-(5) of the Bankruptcy Code. To be exempt, the power exerted by the government must be related to the health and safety of the public and not the pecuniary interest of the government.[50] Defendants often assert that the government is in fact protecting its pecuniary interests rather than protecting the health, safety, and welfare of the public.[51]

However, environmental reclamation is of such great importance that generally environmental enforcement procedures are bluntly labeled as regulatory or police power actions.[52] Indeed, the explicit congressional intent found in the legislative history of the Bankruptcy Code to exempt enforcement of environmental laws seems dispositive of this issue. The Supreme Court noted this congressional intent in *Midlantic:*

> Between 1973 and 1978, some courts had stretched the expanded automatic stay to foreclose States' efforts to enforce their antipollution laws, and Congress wanted to overrule these interpretations in its 1978 revision.[53]

Under CERCLA the government may take many measures to protect the public from dangers associated with hazardous wastes. The government may: seek injunctive relief, seek fines or penalties,[54] or clean up itself and seek recovery of costs from responsible parties.[55] Cost recovery

50. *See,* Missouri v. United States Bankruptcy Court, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied,* 454 U.S. 1162 (1982) (if impetus is pecuniary interest, action stayed); Illinois v. Electric Utilities, Inc., 41 Bankr. 874 (N.D. Ill. 1984) ("[362(b)(4)] insulates states from automatic stay provision when they attempt to protect their citizens from environmental hazards.") *See,* 124 Cong. Rec. H11089, *reprinted in* 1978 U.S. Code Cong. & Admin. News 6555-45, remarks of Rep. Edwards:

> [section 362(b)(4)] is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor.

Cf., Nat'l Labor Relations Bd. v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981) (holding that government suit can be an enforcement proceeding without deciding whether the primary purpose is the government's pecuniary interest).

51. *See, e.g., Penn Terra,* 733 F.2d 267 (1984).

52. "No more obvious exercise of a State's power to protect the health, safety, and welfare of the public can be imagined." *Id.* at 274. *See also,* Brock v. Morysville Body Works, Inc., 829 F.2d 383, 388 (3d Cir. 1987); United States v. Mattiace Indus. Inc., 73 Bankr. 816, 819 (E.D. N.Y. 1987); United States v. Standard Metals Corp., 49 Bankr. 623 (D. Colo. 1985); United States v. ILCO, Inc., 48 Bankr. 1016 (N.D. Ala. 1985); United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077 (3d Cir. 1987).

53. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 504 (1986).

54. CERCLA, 42 U.S.C. §§ 9606(a)-(b) (1982 & Supp. V 1987).

55. CERCLA, 42 U.S.C. § 9607(a) (Supp. V 1987).

actions are an integral part of the enforcement scheme of CERCLA. In fact, CERCLA could not operate if costs were not recovered. One of the primary goals of CERCLA and the Superfund Amendments and Reauthorization Act of 1986[56] (SARA) is to sustain the Superfund.[57] Therefore, an action taken with the intention of carrying out such a goal consistent with CERCLA must necessarily be a police or regulatory power.

The court in *United States v. Mattiace Industries, Inc.*,[58] was faced with a CERCLA suit to recover funds expended in the clean-up of a hazardous waste site. The *Mattiace* court concluded that CERCLA was "clearly enacted to protect the health, safety, and welfare of the public."[59] The court reasoned that the deterrence effect of strict CERCLA enforcement necessarily makes the statute regulatory.[60] This has been the unanimous conclusion of all courts considering whether a CERCLA suit is truly in the interests of the government's pocket or the public's safety.[61] The *Nicolet* court followed the general precedent and ruled that a CERCLA cost-recovery action was not pecuniary in nature.

ANALYSIS

The Court's Reasoning

The court acknowledged Nicolet's arguments (that the stay exceptions apply only when the state seeks purely injunctive relief to prevent future harm) were "rational and not all that inconsistent with the [statute]."[62] However, the court was compelled by the legislative history and the broad mandate of CERCLA to rule that a suit for determination of liability in a CERCLA 107(a) action was a regulatory action within the meaning of the stay exception.

The court first looked to the Bankruptcy Act's legislative history to determine whether the suit was a regulatory or police power action. The court found language in the legislative history that explicitly named environmental statute actions as excepted from the stay:

> where a governmental unit is suing a debtor to stop violation of a fraud, environmental protection, consumer protection, safety, or sim-

56. 42 U.S.C. §§ 9601-9675 (Supp. V 1987).

57. Comment, *Federal Common Law of Contribution Under the 1986 CERCLA Amendments*, 14 Ecology L.Q. 365, 379-80 (1987).

58. 73 Bankr. 816 (E.D. N.Y. 1987).

59. *Id.* at 819. The court went further in this generalization in stating that a CERCLA suit, "whether for injunctive relief or for recovery of costs, damages, and penalties" are brought to protect the public health, safety, and welfare. *Id.*

60. *See e.g.*, United States v. Standard Metals Corp., 49 Bankr. 623, 625 (D. Colo. 1985) (deterrence effect of strict enforcement of Clean Water Act makes government actions for fines regulatory in nature and therefore exempt from the automatic stay).

61. *See*, United States v. ILCO, Inc., 48 Bankr. 1016, 1024 (N.D. Ala. 1985); United States v. Mackay, No. 85-H-823-S (N.D. Ala. 1985).

62. *Nicolet*, 857 F.2d at 208.

> ilar police or regulatory laws, *or attempting to fix damages for violation of such a law,* the action or proceeding is not stayed under the automatic stay.[63]

This express intent would at first glance seem to settle the issue. However, the court realized that despite the blunt language in the legislative history, the action must still be an action "related to the government's police or regulatory power"[64] in order to meet the statutory test. Thus, the court turned to its decision in *Penn Terra* to find support that "efforts to rectify harmful environmental sites are obvious exercises of the state's police power to protect the health, safety and welfare of the public."[65]

The *Nicolet* court also addressed Nicolet's assertion that the action was in fact an enforcement of a money judgment as prohibited by the Bankruptcy Code. The court again went to *Penn Terra,* noting that in that case the court determined that the "paradigm" or pattern for such a proceeding is an attempt to seize the debtor's property.[66] In *Nicolet,* the action included no attempt to seize the debtor's property in order to enforce a judgment. In fact, in the *Nicolet* case, liability has not even been established; the CERCLA litigation in the district court will establish liability.

The court also cited cases in other areas of law that allowed a governmental agency to pursue an action in light of bankruptcy up to the point of enforcement of a judgment for damages.[67] The court in *National Labor Relations Board v. Edward Cooper Painting*[68] applied a pecuniary interest/public policy interest balancing test to determine whether exemption from the automatic stay was proper. The test balances the gov-

63. *Id.,* (emphasis in original), *citing,* S. Rep. No. 989, *supra* note 21 at 5838; H.R. Rep. No. 595, *supra* note 21 at 6299. *See also,* S. Rep. 989, *supra* note 21 at 5838, H.R. Rep. 595, *supra* note 21 at 6299: "paragraph (5) [of subsection 362(b)] makes clear that the exception extends to permit an injunction to enforce a money judgment, but does not extend to permit enforcement of a money judgment." *See also,* Penn Terra Ltd. v. Dep't of Envtl. Resources, 733 F.2d 267, 272 (3d Cir. 1984).

64. *Nicolet,* 857 F.2d at 208; *see Penn Terra,* 733 F.2d 267 at 275.

65. *Nicolet,* 857 F.2d at 208; *Penn Terra,* 733 F.2d at 274 ("No more obvious exercise of the State's power to protect the health, safety, and welfare of the public can be imagined." *See also,* United States v. Wheeling-Pittsburgh Steel Corp., 818 F.2d 1077, 1086-87 (3d Cir. 1987) (ruling that severe financial straits and bankruptcy do not operate as a stay to enforcement of a consent decree under the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987)).

66. *Nicolet,* 857 F.2d at 209; *Penn Terra,* 733 F.2d at 275; *see also,* Black's Law Dictionary 510 (5th ed. 1979) ("Execution upon a money judgment is the legal process of enforcing the judgment, usually by seizing and selling the property of the debtor").

67. EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986), *cert. denied,* 479 U.S. 910 (1986) (EEOC not precluded from bringing suit for backpay damages under Title VII); Nat'l Labor Relations Bd. v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986) (NLRB not prohibited from issuing Order for backpay damaged because of bankruptcy); United States v. Mattiace Indus., Inc., 73 Bankr. 816 (E.D. N.Y. 1987); United States v. Standard Metals Corp., 49 Bankr. 623 (D. Colo. 1985) (suit seeking damages for violation of settlement agreement under the Clean Water Act of 1977, 33 U.S.C. 1251-1387 (1982 & Supp. V 1987), within police power exception to automatic stay provision).

68. 804 F.2d 934.

ernment's actual pecuniary interest in the debtor's property against the government's obligation and interest in protecting the public's safety and welfare. When the government is pursuing the action primarily because of its pecuniary interest, the action cannot be properly stayed.[69]

The *Nicolet* court determined that the government action was regulatory in nature because the CERCLA mandate that the EPA take the "appropriate environmental response action to protect public health and the environment from the dangers posed by [hazardous] sites"[70] outweighed any financial interest. According to *Nicolet*, because CERCLA further states that response cost liability is mandated in the quest to abate hazards and deter future pollution,[71] a suit for response costs up to and including the entry of a monetary judgment must be a regulatory action within the meaning of the Bankruptcy Code.[72]

The government admitted it was precluded from seeking an enforcement of any money judgment it obtained in the CERCLA action.[73] However, the district court may now assess damages against Nicolet and T & N. If both are found partially liable, the government may sue T & N for the entire judgment.[74]

Analysis of the Court's Reasoning

The *Nicolet* court reached a necessary and logical conclusion. If the

69. *Id.* at 942. *See infra* note 70 and accompanying text.

70. H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17, 17-18, *reprinted in* 1980 U.S. Code Cong. & Admin. News, 6119, 6119-20, as *cited in Nicolet*, 857 F.2d at 209. In fact, *Nicolet* seems to be the perfect example that the government often has both pecuniary interests and interests in the health and welfare of the public. That is, the government must protect the economic viability of the Superfund in order to protect the health and welfare of society. Thus, although the government has both pecuniary and health and welfare interests, the health and welfare interests appear to be primary and paramount.

71. 42 U.S.C. § 9607(a) (Supp. V 1987).

72. *Nicolet*, 857 F.2d at 210. Enforcement of a money judgment is specifically precluded from the exception to the automatic stay provision in 11 U.S.C. § 362(b)(5) (1988) of the Bankruptcy Act. *See supra* note 22.

73. *Nicolet*, 857 F.2d at 207.

74. Ultimately the government is probably seeking a money judgment from T & N. Although the government could have sued T & N alone for liability, to recover the entire expense quickly (and avoid the problem that T & N may only be partially liable) a suit against Nicolet was prudent. CERCLA imposes a scheme of joint and several liability whereby any party found partly liable is liable for the whole judgment. United States v. Bliss, 667 F.Supp. 1298, 1313-14 (E.D. Mo. 1987); United States v. Wade, 577 F.Supp. 1326, 1338 (E.D. Pa. 1983); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808-810 (S.D. Ohio 1983). Congress expressly endorsed joint and several liability in SARA, 42 U.S.C. § 9613(f) (Supp. V 1987). *See* H.R. Rep. No. 253, 99th Cong., 2d Sess. 59, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2841. The liable parties can then seek contribution from each other in a separate suit after the government has been reimbursed. If T & N were held liable to the government for the entire cost of clean-up, it would be virtually impossible for T & N to recover contribution from Nicolet given Nicolet's bankruptcy.The government's plan apparently worked; in the end, Nicolet settled with the government and T & N, unable to settle, was left holding the bag in the § 107 action. United States v. Nicolet, Inc., 712 F. Supp. 1193, 1195-96 (E.D. Pa. 1989).

court had found that a stay was appropriate, an unacceptable burden would be placed on the Superfund and an already struggling CERCLA would be all the more crippled. By ignoring the conflicting case law and analyses, the court went straight to the ultimate issues: congressional intent, environmental reclamation, and owner culpability.

An exception to the stay is necessary for many other reasons. For instance, if the EPA did not have confidence it could pursue costs in court, the EPA may become reticent to spend scarce Superfund monies in many cases. Alternatively, if bankruptcy stays are allowed, the EPA may be forced to seek cooperation with reticent polluters more aggressively, thus undermining negotiation, creating more litigation, and slowing the reclamation process. This would leave potentially harmful sites unreclaimed for longer periods of time.

However, the court may have weakened the precedential authority of *Nicolet* by ignoring some of the more difficult issues in a case such as this.The first issue not adequately addressed by the court is the non-regulatory nature of CERCLA. The Bankruptcy Reform Act of 1978 was passed before CERCLA existed. In 1978, environmental protection laws were almost purely injunctive in nature. Aside from occasional penalties, these environmental laws exclusively control *future* behavior.[75] The stay exception was drafted with this type of environmental statute in mind. CERCLA is a different type of animal. CERCLA, rather than forming future behavior in order to protect the environment, addresses *past* behavior to remedy existing hazardous situations.[76] Admittedly, CERCLA does control future behavior through deterrence, but this effect is indirect. Most pollution to which CERCLA is applicable already exists. CERCLA is primarily designed to address past actions, and the Superfund must be sustained with monies from responsible parties to address existing pollution, rather than future pollution.

In many ways CERCLA is more like a criminal liability statute rather than a traditional civil liability environmental statute. It is doubtful that Congress could foresee an environmental statute like CERCLA when it passed the Bankruptcy Reform Act of 1978.[77] Therefore, the court should carefully address Congress' intent when applying the Bankruptcy Reform Act to CERCLA. Was Congress intending to apply the automatic stay exception under all circumstances to statutes which set financial responsibility? The legislative history supports this conclusion. However, the

75. Clean Water Act, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. V 1987); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (1982 & Supp. V 1987); Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6991 (1982 & Supp. V 1987).

76. However, CERCLA does seek to control future behavior through deterrence.

77. CERCLA was rushed through Congress at the end of a lame duck session with little debate. United States v. Aceto Agricultural Chemical Corp., 872 F.2d 1373, 1380 n. 8 (8th Cir. 1989).

effect of an exception to the automatic stay on other creditors and the structured bankruptcy process cannot be ignored.

As already noted, one of the necessary objectives of CERCLA is to sustain the Superfund with monies from polluters. However, this need does not necessarily outweigh all other interests in every case. Interested parties not mentioned in *Nicolet* are the third-party creditors of Nicolet. There has been some movement in Congress to make debts to the government the highest priority in bankruptcy actions.[78] If this comes to bear, hazardous waste site owners will have difficulty securing loans and equipment to operate and the already difficult industry of hazardous waste disposal will be further burdened. Therefore, the courts must look honestly at the interests of the government and the interests of the free market. Ultimately, the balance must be decided by Congress. However, courts in the meantime should not ignore the counterbalancing interests in cases such as this.[79]

When the hazard is already abated, as in *Nicolet*, the ultimate issue is money; whether that money is needed to further protect citizens' health and safety is another question. The government's true pecuniary interest should not automatically outweigh all other interests. The goal of the Bankruptcy Code exceptions to the automatic stay is not enforcement of environmental laws at all costs. Rather the Code recognizes that all creditors must have an equal chance to reclaim their investments. Until Congress explicitly decides the balance between the interests of the government and the interests of the free market, the policies in the Bankruptcy Code should not be ignored. Congress must explicitly act in the bankruptcy/

78. *E.g.*, H.R. 2767, 98th Cong., 1st Sess. (1983) provided:

> Any claim of the United States, a State, or a political subdivision for the costs of removal or remedial action taken under [section 104 or 107 for which a debtor is liable] . . . shall have priority over all other classes of claims against such debtor, without regard to whether such claims are secured.

The EPA may attempt in the future to assert in bankruptcy court that clean-up damages have a first priority because they are "administrative expenses" which are necessary to preserve the estate. Bankruptcy Code, 11 U.S.C. §§ 503(b)(1)(A), 507(a)(1)(1988). That is, they are necessary to preserve the estate because of the duty of the polluter (debtor) to clean up the hazardous waste. Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 Vand. L. Rev. 1037, 1059, 1059-61 (1985) (authored by Katherine Simpson Allen). *See generally*, K.R. Heidt, *Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor's Assets in Toxic Waste Bankruptcies*, 40 Rutgers L. Rev. 819 (1988).

79. *See, e.g., In re* Quanta Resources Corp., 739 F.2d 912, 921 (3d Cir. 1984) (the court must "balance the relative weight of the state [environmental] and federal [bankruptcy] policies."); *See also*, Ohio v. Kovacs, 469 U.S. 274 (1985). Although the *Kovacs* case is questionable precedent, the *Nicolet* court may have been mistaken not to acknowledge that in some circumstances the interests of the debtor outweigh the ultimate pecuniary interests of the government. On the other hand, it is arguable that the interests served by environmental laws always outweigh the interests served by the Bankruptcy Act. *See, In re Quanta*, 739 F.2d at 921.

CERCLA arena to prevent courts from relying on fickle legislative history to solve these disputes in the future.[80]

CONCLUSIONS

The court in *Nicolet* reached a reasonable and necessary conclusion when it granted an exception to the automatic stay provision of the Bankruptcy Act. Environmental reclamation is such a strong social policy that it would seem absurd to allow a polluter to escape liability with bankruptcy. A suit such as *Nicolet* must be considered, as it properly was by the *Nicolet* court, in two contexts. First, public health and safety must be considered when analyzing a bankruptcy stay in an environmental proceeding. Second, the purely legal issue of whether a CERCLA section 107 suit is a suit seeking a money judgment must be determined. The potentially competing interests of environmental laws and the Bankruptcy Code must be considered. In future litigation, not all decisions will favor both of these contexts. Explicit action by Congress is necessary to balance these potentially competing interests. Only then will costly and time consuming litigation such as *Nicolet* be stopped.

DOUGLAS L. HAYES

80. Legislative history is arguably a dangerous device on which to hinge a ruling because "it must be assumed that what the Members of the House and Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few representatives, or even a committee report, said it said." United States v. Taylor, ___ U.S. ___, 108 S.Ct. 2413 (1988) (Scalia, J., concurring). *See*, Artesian Water Co. v. Government of New Castle County, 851 F.2d 643, 648 (3rd Cir. 1989), in which the Third Circuit stated that legislative history, because of the complex enactment process, "furnishes at best a sparse and unreliable guide to the statute's meaning." *Id.* (discussing CERCLA).