Dumping Waste, Discharging Debts:  
**Ohio v. Kovacs**  
(Kovacs II)  
105 S. Ct. 705 (1985)

INTRODUCTION

One of the notable purposes of bankruptcy is "that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." This "fresh start" policy is embodied in section 727 of the Bankruptcy Reform Act of 1978, which permits debtors to discharge their pre-bankruptcy debts. Although discharge is intended to serve both private and public interests, it can sometimes conflict with important public goals.

In **Ohio v. Kovacs** (Kovacs II), the United States Supreme Court addressed for the first time the growing conflict between governmental efforts to clean up hazardous waste sites and the ability of debtors to

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1. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (emphasis deleted).
2. 11 U.S.C. § 727 (1982). Subsection (b) provides in part:
   Except as [otherwise] provided . . . , a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case . . . .
4. 105 S. Ct. 705 (1985). Kovacs' bankruptcy spawned two separate suits involving Kovacs and the State of Ohio. The first (Kovacs I), dealt with the applicability of the automatic stay provision of the Bankruptcy Code (11 U.S.C. § 362 (1982)) to a state court proceeding initiated by the State of Ohio on September 13, 1980. In that action, Ohio sought to determine Kovacs' employment status and income in order to recover part of his post-petition earnings. Kovacs subsequently obtained an order from the bankruptcy court staying the state court action by Ohio for the duration of the bankruptcy proceedings. The United States District Court for the Southern District of Ohio upheld the order, and the Sixth Circuit Court of Appeals subsequently affirmed the lower court rulings that the proceedings by Ohio were subject to the automatic stay. 681 F.2d 454 (6th Cir. 1982). The United States Supreme Court, however, vacated the judgment of the court of appeals and remanded the case to that court to consider whether the automatic stay issue had become moot. 459 U.S. 1167 (1983). The court of appeals, waiting until after the Supreme Court's decision on the discharge of Kovacs' debt, dismissed the appeal under the automatic stay provision because the dispute over the stay became moot upon the discharge of the debt. 755 F.2d 484, 485 (6th Cir. 1985). Kovacs I is discussed in this Note only as it bears on the decision in Kovacs II.
discharge their debts in bankruptcy. Writing for a unanimous Court, Justice White concluded that respondent Kovacs' obligation to clean up a hazardous waste site "had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy." Kovacs II is perhaps most noteworthy, though, for the issues which the Court, because of the facts of the case and the arguments presented by the State of Ohio, never had to address. Kovacs II was the subject of considerable analysis even before the Supreme Court's decision; commentaries since the decision have continued to analyze its importance. This Note analyzes the Court's decision against the background of the facts and arguments in Kovacs II, focusing on strategies for reconciling Kovacs II with state and federal efforts to clean up hazardous waste sites.

I

HISTORY OF THE CASE

William Kovacs was a chief executive officer of Chem-Dyne Corporation which, along with a chain of related businesses, engaged in the management of industrial and hazardous wastes. Chem-Dyne operated a waste management facility in Hamilton, Ohio. In 1976, the State of Ohio began an enforcement action in state court against Chem-Dyne, Kovacs, and others. Ohio alleged that the defendants had violated the laws of the state by causing water pollution and a public nuisance. The dispute was resolved on July 18, 1979 by a stipulation and judgment entry. The judgment entry was personally signed by William Kovacs both as an individual and on behalf of Chem-Dyne. It required, among other things, that the defendants (1) refrain from causing any further air or water pollution; (2) bring no additional industrial wastes onto the Hamilton site; (3) remove all industrial wastes from the site within twelve months; and (4) pay $75,000 to the Ohio Department of Natural Resources as compensation for injury to wildlife.

In January of 1980, Ohio moved in state court for the appointment

5. 105 S. Ct. at 711.
9. The state court, in granting a preliminary injunction, found that defendants had placed residues of toxic pesticides in state waters. Muchnicki, Issues Before the Supreme Court in Kovacs II, HAZ. WASTE REP. [TRENDS & ANALYSES], Nov. 1984, at 2. Several fish kills on the Great Ohio River were attributed to pollution from Chem-Dyne's facility in Hamilton. Id.
of a receiver for Chem-Dyne and Kovacs. The motion was grounded on Kovacs' alleged failure to proceed with the cleanup required by the judgment entry. The State asked the court to appoint the receiver to carry that judgment into effect, as provided by state law. On February 1, 1980, the court of common pleas granted the State's motion. The court appointed a receiver for all non-exempt property and assets of Kovacs and the related business entities, and directed the receiver to carry out the cleanup of the Chem-Dyne site. In addition, the court ordered Kovacs "to cooperate fully with the receiver" in the performance of the cleanup.

On July 17, 1980, Kovacs filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Subsequently, however, Kovacs requested and obtained an order from the bankruptcy court to convert to a liquidation proceeding under Chapter 7 of the Code, and he was adjudicated a bankrupt on September 2, 1980. The State responded by filing a motion in state court to determine the debtor's post-petition earnings and assets, with the aim of requiring that part of Kovacs' income be applied to the unfinished task of cleaning up the Chem-Dyne facility. This motion began the portion of the litigation known as Kovacs I.

The State initiated Kovacs II on October 20, 1980, when it sought in bankruptcy court a declaration that Kovacs' obligation under the judgment entry to clean up the waste at the Chem-Dyne site could not be discharged in bankruptcy. The thrust of Ohio's argument was that Kovacs' obligation was not subject to discharge under section 727 of the Bankruptcy Code because that section makes dischargeable only debts and claims. According to Ohio, the debtor's affirmative obligation was

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10. Ohio law provides for the appointment of a receiver "after judgment, to carry the judgment into effect." OHIO REV. CODE ANN. § 2735.01 (Page 1981).
11. Kovacs I, 681 F.2d at 455.
12. Id.
13. Kovacs' switch from reorganization (Chapter 11) to liquidation (Chapter 7) occurred after he determined that he would be unable to obtain the requisite approvals by environmental agencies of a reorganization plan. Brief of Respondent at 3, Kovacs II. See 11 U.S.C. § 1126 (1982) (requires acceptance of reorganization plan by holders of a claim or interest); id. § 1129 (requires confirmation of reorganization plan by Bankruptcy Court).
15. 105 S. Ct. at 707.
17. See Kovacs II, 29 Bankr. 816, 817 (Bankr. S.D. Ohio 1982). The distinction between a "claim" and what could be called a "nonclaim" is essential to an understanding of Kovacs II. The advantage of having a "claim" against a debtor is that it provides a party with "creditor" status, see 11 U.S.C. § 101(9) (1982) (defining "creditor" in part as an "entity that has a claim against the debtor"), and enables the creditor to share in the distribution of the bankruptcy estate, see id. § 726 (providing for distribution of the estate based on claims against the estate). The disadvantage of having a claim is that the claim, as a debt of the bankrupt individual, is dischargeable in bankruptcy. See supra note 2 and accompanying text. Thus, if the bankruptcy estate is insufficient to satisfy the claim, the individual debtor is freed from any further
neither a debt\textsuperscript{18} nor a claim\textsuperscript{19} within the meaning of the Bankruptcy Code. Rather, the State argued, Kovacs' obligation under the judgment entry did not amount to a monetary obligation because it did not afford the State a right to payment as an alternative remedy.\textsuperscript{20} The bankruptcy court rejected Ohio's contentions on the grounds that the State had "itself treated its rights under the Judgment Entry as a right to payment, and in no way is it suggested that right amounts to anything other than a right to payment."\textsuperscript{21}

On appeal, the United States District Court for the Southern District of Ohio affirmed. Its decision was based on the "law of the case" doctrine; the court held that it was bound by the court of appeals decision in \textit{Kovacs I}.\textsuperscript{22} The Court of Appeals for the Sixth Circuit affirmed, but on different grounds.\textsuperscript{23} The court noted that Ohio responded to Kovacs' failure to perform the Chem-Dyne cleanup by appointing a receiver for Kovacs' assets and attempting to discover Kovacs' post-petition income.\textsuperscript{24} Echoing the earlier decision of the bankruptcy court as well as its own decision in \textit{Kovacs I}, the court of appeals concluded that Ohio was seeking a money payment from Kovacs,\textsuperscript{25} an obligation which was dischargeable under section 727 of the Bankruptcy Code.\textsuperscript{26}

obligation to the creditor. By the same token, a "nonclaim" does not entitle a party to share in the bankruptcy estate, but it has the advantage of not being dischargeable in bankruptcy. Therefore, if Ohio did not have a "claim" against Kovacs, it would be entitled to enforce the cleanup obligation against him after bankruptcy.

\textsuperscript{18} "Debt" is defined as "liability on a claim." 11 U.S.C. § 101(11) (1982).
\textsuperscript{19} 11 U.S.C. § 101(4) (1982) defines "claim" as a:
\begin{itemize}
  \item [(A)] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or
  \item [(B)] right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.
\end{itemize}
\textsuperscript{20} 29 Bankr. at 819.
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} 717 F.2d 984, 987 (6th Cir. 1983). In \textit{Kovacs I}, the Court of Appeals held that Ohio "was seeking what in essence amounted to a money judgment against Kovacs." 681 F.2d at 456. The district court found that holding conclusive on the issue before it in \textit{Kovacs II}.
\textsuperscript{23} By the time \textit{Kovacs II} came before the court of appeals, the Supreme Court had already vacated the appellate court's decision in \textit{Kovacs I}. 459 U.S. at 1167. The "law of the case" doctrine therefore no longer applied. 717 F.2d at 987.
\textsuperscript{24} 717 F.2d at 987.
\textsuperscript{25} \textit{Id.} at 987-88.
\textsuperscript{26} The court did not speculate as to whether Kovacs' obligation would have been exempted from discharge under section 523, \textit{see infra} notes 62-67 and accompanying text, because Ohio made no such argument before the bankruptcy court, 717 F.2d at 988. The court did note, however, that had Ohio sought a money penalty for the environmental damage Kovacs had caused, the penalty "might have been exempted from discharge" under section 523 of the Code. \textit{Id.}
II
THE SUPREME COURT OPINION

A. The Substantive Issues

In Kovacs II, the Supreme Court addressed two substantive arguments presented by Ohio, neither of which it found persuasive. First, the State argued that it did not have a "claim" against Kovacs because his violation of a state statute was not a "breach of performance" as that term is used in the Bankruptcy Code's definition of a claim.\(^{27}\) Ohio took the position that "breach of performance" meant breach of a commercial contract only.\(^{28}\) The Court rejected that construction on two grounds. First, the Court observed that Ohio had conceded that Kovacs' obligation to pay the State $75,000 for injury to wildlife was a claim within the meaning of section 101(4) of the Bankruptcy Code.\(^{29}\) Inasmuch as that obligation and the obligation to clean up the Chem-Dyne facility both arose from breaches of Ohio law, the Court saw no reasonable basis for distinguishing the two.\(^{30}\) Second, the Court found in the legislative history of the Bankruptcy Code that Congress desired a broad definition of the term "claim."\(^{31}\)

The Court next addressed Ohio's contention that Kovacs' breach of his affirmative obligation did not give rise to an alternative right to payment.\(^{32}\) Ohio insisted "there exists no right to payment which may be made by Kovacs or received by the State as an alternative to performance of the environmental cleanup mandated by the court."\(^{33}\) The Court, however, found Ohio's actions more persuasive than its arguments. The Court placed considerable weight on the State's decision to request the appointment of a receiver for Kovacs' non-exempt assets. As the Court noted, the State might instead have either prosecuted him for violations of Ohio's environmental laws or initiated civil or criminal contempt.

\(^{27}\) See supra note 19.
\(^{28}\) See 105 S. Ct. at 708.
\(^{29}\) See id.
\(^{30}\) Id. at 708-09.
\(^{31}\) Id. at 709 & nn.3-5. For example, a proposed definition of "claim" was described as allowing "all obligations of the debtor, no matter how remote or contingent . . . to be dealt with in the bankruptcy case." S. REP. No. 989, 95th Cong., 2d Sess. 21, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5808. A broad definition of "claim" serves at least two purposes. First, it effectuates the "fresh start" purpose of the Bankruptcy Code because the individual debtor's liability on a claim is dischargeable under the Code. See supra notes 2, 18. Second, it gives potential creditors the greatest access to the estate in order to satisfy the unmet obligations of the debtor because a "claim" is a prerequisite to a share in the estate. See supra note 17.

\(^{32}\) If Ohio had a right only to an equitable remedy for Kovacs' breach, and no right to payment, the equitable remedy would not be a "claim." See 11 U.S.C. § 101(4)(B), supra note 19.

\(^{33}\) Brief of Petitioner at 35.
proceedings against him. With a receiver in control of the site, however, Kovacs "was disabled . . . from personally taking charge of and carrying out the removal of wastes from the property." The Court, quoting the decisions of both the bankruptcy court and the Sixth Circuit Court of Appeals, approved their conclusion that Kovacs' obligation had been reduced to an obligation to pay money. The Court stated that "[w]hat the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs." As the Court pointed out, the State's counsel had admitted as much at oral argument. The Court concluded: "On the facts before it, and with the receiver in control of the site, we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy."

In reaching that conclusion, the Court was careful to distinguish Kovacs II from the opinion of the Third Circuit Court of Appeals in Penn Terra Ltd. v. Department of Environmental Resources. Penn Terra involved the automatic stay provision of the Bankruptcy Code, which led the court to address legal questions similar to those in Kovacs II. In Penn Terra, the Third Circuit Court of Appeals held that an action to enforce the debtor's obligation to rectify violations of environmental statutes was not an effort to obtain a money judgment, even though compliance would require expenditure of money. The Supreme Court distinguished the two cases, pointing out that in Penn Terra "there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt."

B. Issues Not Decided

The Court emphasized the narrow scope of its decision by pointing to five specific issues it did not decide. First, the Court dismissed any

34. See 105 S. Ct. at 710.
35. Id.
36. Id. at 709 & n.9.
37. Id. at 710.
38. Id.
39. Id.
40. Id. at 711.
42. The automatic stay does not apply to "the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(5) (1982) (emphasis added).
43. Penn Terra Limited filed for Chapter 7 bankruptcy subsequent to entering into a consent order and agreement to bring its coal surface mines into compliance with state environmental protection statutes. 733 F.2d at 269-70.
44. Id. at 275. The court noted that "[a]n injunction which does not compel some expenditure or loss of monies may often be an effective nullity." Id. at 278.
45. 105 S. Ct. at 711 n.11.
suggestion that bankruptcy could shield a debtor from prosecution for violations of environmental laws or for criminal contempt. Second, the Court added that a debtor's obligation to pay a fine or monetary penalty for a violation of state law is not dischargeable in bankruptcy when the fine or penalty is imposed prior to bankruptcy.

The third issue involved how the duty of the bankruptcy trustee would be different if Kovacs had filed for bankruptcy before a receiver had been appointed. The Court hypothesized that if the Chem-Dyne site had a positive net value, the trustee would sell it. The buyer would then assume the obligation to perform the cleanup. If, on the other hand, the costs of cleanup were greater than the value of the property, "the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." It should be noted, however, that the ability of the trustee to abandon property that is burdened by hazardous waste contamination recently has been restricted by the Court's decision in Midlantic National Bank v. Department of Environmental Protection.

Fourth, the Court restricted its holding to the debtor's affirmative obligation to remove waste from the site and to pay for that cleanup. The injunction against further pollution of the Chem-Dyne site was not covered by the holding. Finally, the Court stressed that anyone in possession of the Chem-Dyne site must continue to obey the environmental laws of the State.

C. The O'Connor Concurrence

In a brief concurring opinion, Justice O'Connor sought to assuage the concerns of Ohio and amici that the Kovacs II precedent would

46. Id. at 711.
47. Id. The Court relied on section 523(a)(7), one of the nine specific exceptions to the discharge of individual debts. See infra text accompanying note 66.
48. The trustee is the representative of the bankruptcy estate. 11 U.S.C. § 323(a) (1982). The trustee in a Chapter 7 case is required, inter alia, to "reduce to money the property of the estate," 11 U.S.C. § 704(1) (Supp. II 1984), to "be accountable for all property received," id. § 704(2), and to "investigate the financial affairs of the debtor," id. § 704(3).
49. The receiver at the Chem-Dyne site, appointed before Kovacs' bankruptcy, had the duty to carry out the cleanup. See supra notes 10-11 and accompanying text.
51. 106 S. Ct. 755 (1986). In Midlantic, the Court held "that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." Id. at 762. Justice Powell delivered the opinion of the Court. Id. at 757-63. Justice Rehnquist, joined by Chief Justice Burger, Justice White, and Justice O'Connor, dissented. Id. at 763-68. For an analysis of Midlantic, see the Note in this issue of the Ecology Law Quarterly.
52. 105 S. Ct. at 711.
53. Id. at 711-12.
54. For example, the United States argued that "the decision below implicates the national commitment to a safer environment by encouraging offenders to file for bankruptcy, and
seriously impede the enforcement of environmental laws at both the state and national level. Justice O'Connor observed that the relative priority of claims to the assets of a bankrupt's estate is generally determined by state law. States can therefore give their claims for environmental cleanup priority over unsecured claims by elevating the former to "the status of statutory liens or secured claims." Justice O'Connor also suggested that the Court's holding would improve the position of the states when the debtor in a Chapter 7 proceeding is a corporation. Noting that under state law a corporation generally dissolves once it transfers its assets to the trustee, Justice O'Connor observed that "the State's only recourse in such a situation may well be its 'claim' to the prebankruptcy assets."

III
ANALYSIS

The significance of Kovacs II is difficult to assess for three reasons. First, it is arguable that a holding in Ohio's favor would have impeded efforts to clean up hazardous waste sites as much or more than may the actual holding. Second, Kovacs II leaves a major question unsettled: Was the fact that Kovacs had been dispossessed of the Chem-Dyne site by the appointment of a receiver determinative of the Court's holding? Finally, the impact of Kovacs II on efforts to clean up hazardous waste sites depends on the availability of alternative methods for discouraging bankruptcy and recovering cleanup costs. This Section examines each of these issues in turn.

As Justice O'Connor pointed out in her concurring opinion, Ohio's argument that it did not have a "claim" against Kovacs was useful only against an individual debtor. An individual, unlike a corporation, can be expected to have some income after bankruptcy. Therefore, a party with a right to an equitable remedy could, in effect, gain access to that income if the right to an equitable remedy falls outside the statutory

thereby excuse themselves from performing orders that require them to abate the health hazards they have created." Brief for the United States as Amicus Curiae Supporting Petitioner at 2.

55. 105 S. Ct. at 712 (O'Connor, J., concurring).

56. Id. A corporation generally does not automatically dissolve upon entering Chapter 7 bankruptcy. In some states, the board of directors of the corporation may adopt a resolution of dissolution after the corporation has been adjudged bankrupt. See, e.g., CAL. CORP. CODE § 1900(b) (Deering Supp. 1986); OHIO REV. CODE ANN. § 1701.86(D) (Page Supp. 1984). But see MICH. COMP. LAWS ANN. § 450.1801(2) (West 1973) (providing for dissolution of a corporation by order of the bankruptcy court once the corporation's assets have been wholly disposed in bankruptcy proceedings). The corporation may continue to exist for purposes of winding up its affairs, but generally cannot do any business during the winding-up period. See, e.g., MASS. GEN. LAWS ANN. ch. 155, § 51 (West 1970); OHIO REV. CODE ANN. § 1701.88(A) (Page Supp. 1984).

57. 105 S. Ct. at 712.
definition of a claim.\textsuperscript{58}

Such a victory is not without its price, though. As Justice O'Connor and others\textsuperscript{59} have noted, had the Supreme Court in \textit{Kovacs II} adopted Ohio's reasoning, the State would come away empty-handed in a similar proceeding against a corporate debtor. Typically, the corporation would be dissolved,\textsuperscript{60} and the State, without a "claim," would not share in the distribution of the corporation's assets.\textsuperscript{61}

Nevertheless, Ohio may have had no better argument against the discharge of Kovacs' responsibilities. Although section 523(a) of the Bankruptcy Code provides nine exceptions to discharge of an individual's debts, only two exceptions are plausible in the context of \textit{Kovacs II}. One exception applies to debts "for willful and malicious injury by the debtor to another entity or to the property of another entity."\textsuperscript{62} Although Kovacs' conduct after issuance of the judgment entry arguably caused injury "to the property of another entity,"\textsuperscript{63} the inquiry does not end there. The \textit{injury} must be willful, meaning "deliberate or intentional."\textsuperscript{64} That standard, coupled with the practice of strictly construing the exceptions to discharge against the creditor and in favor of the debtor,\textsuperscript{65} narrows the exception.

The second possible exception would be of even less avail in \textit{Kovacs II} than the first. The second exception applies "to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."\textsuperscript{66} With issues of construction weighted in favor of the debtor, it is difficult to characterize Kovacs' cleanup obligation as a fine, penalty, or forfeiture. This is particularly true because the obligation arose from the judgment entry, which absolved Kovacs of liability for any prior violations of the State's environmental statutes.\textsuperscript{67}

Because of the limitations of the specific exceptions to discharge in section 523(a), Ohio's line of argument (focusing on the definition of a
"claim") may still prove to be the most attractive one to creditors seeking to enforce the cleanup duties of a bankrupt individual. Whether and under what circumstances such creditors will succeed is difficult to predict. The confusion arises from the weight which the Court appeared to put on the appointment of a receiver. Would Ohio have prevailed in Kovacs II had it not dispossessed Kovacs of the Chem-Dyne site?

In a bankruptcy court decision handed down less than one month after the Supreme Court's decision in Ohio v. Kovacs, the answer plainly was "no." The bankruptcy court in United States v. Robinson held that the debtor's obligation to restore marshlands was within the Bankruptcy Code's definition of a claim. The United States attempted to distinguish the case from Kovacs II on the grounds that Robinson, unlike Kovacs, had not been dispossessed by a receivership. In theory, at least, Robinson was capable of personally fulfilling his obligation. The court, however, chose to extend rather than distinguish the Kovacs II holding. The court admitted that it "[could not] find the de facto money judgment that existed in Kovacs," but noted that there was no evidence that, as a practical matter, Robinson would be able to restore the marsh without expense to the estate. The court left room for a different holding if the necessary expenditure were incidental to the obligation, rather than directly related to it.

Robinson provides some initial evidence that the lower courts will construe the definition of a "claim" in favor of individual debtors, much as they have done with the exceptions to discharge under section 523(a). If that is the case, the door left open by the Supreme Court in Kovacs II may soon be closed by the lower courts.

To what extent will such a broad application of the fresh start policy in favor of individuals like Kovacs conflict with the goal of cleaning up America's hazardous waste sites? Although a rigorous answer to that

69. Id. at 139. The defendant in Robinson illegally excavated and filled marshlands on property which he owned. Subsequently, he failed to comply with a court order to restore the marshlands, choosing instead to file for bankruptcy under Chapter 7. Id. at 137-38. The United States as plaintiff argued, as Ohio did in Kovacs II, that the defendant's obligation to restore the salt marsh was not a "claim" within the meaning of the Bankruptcy Code. Id. at 138.
70. Id. at 138.
71. Id. at 139.
72. Id. This qualification may be all but meaningless when applied to an affirmative obligation to remedy damage to the environment. It is difficult to imagine such an obligation, whether it be cleanup of a hazardous waste site, reclamation of a surface mine, or restoration of a marsh, that would not involve "direct" rather than solely "incidental" expenditures.
73. Although estimates vary considerably, between 2000 and 4000 hazardous waste sites may eventually be placed on the Superfund National Priorities List, thereby qualifying for Superfund cleanup. The cost to the federal program alone could reach $39 billion. Reauthorization of Superfund: Hearings Before the Subcomm. on Commerce, Transportation
question is beyond the scope of this Note, the potential for conflict with this important public goal is worth mentioning briefly. The ability to use bankruptcy as a shield against attempts to recover cleanup costs may (1) decrease the incentive for individuals to carry out existing obligations to respond to contamination at hazardous waste sites and (2) shift the burden of paying for toxic cleanup to solvent private parties, as well as to the states and the federal government.

Several options are available within the framework of the Bankruptcy Code to reduce the potential conflict, although none will eliminate it. One alternative is to impose fines or penalties on individuals for environmental violations whenever possible, thereby taking advantage of the nondischargeability of fines and penalties under the Code.\footnote{See supra text accompanying notes 47, 66. This approach requires foresight because the fines or penalties must be imposed prior to bankruptcy.} This approach has some serious limitations. First, the strategy of imposing penalties for statutory violations does not solve the entire problem of reaching post-bankruptcy assets. Some parties will be liable for cleanup even though they will not have violated the penalty provisions of the statute. Thus, the post-bankruptcy assets of these parties cannot be reached through the penalty strategy. Second, fines and penalties are of little direct use in cleaning up toxic wastes unless they can be used to pay the costs of cleanup. Although appropriations to the federal Superfund include amounts equivalent to the penalties imposed under that program,\footnote{42 U.S.C. § 9631(b)(1)(D) (1982).} similar provisions for state cleanup funds are the exception\footnote{At least three states attempt to channel some penalties into cleanup. California's Hazardous Substance Account receives all fines and penalties assessed for failure to file an annual report on hazardous waste management activities. CAL. HEALTH & SAFETY CODE § 25330(c) (West 1984). Minnesota's environmental response, compensation, and compliance fund also receives some civil penalties. MINN. STAT. ANN. § 115B.20(4) (West Supp. 1986). These include penalties for improper use of a closed hazardous waste disposal facility, id. § 115B.16(4), and a maximum $20,000 per day penalty for failure to take a response action to abate "an imminent and substantial danger" to human health or the environment, id. § 115B.18(1). Under Montana law, recoveries of punitive damages for failure to provide remedial action at a toxic waste site are deposited in an environmental quality protection fund. MONT. CODE ANN. §§ 75-10-704(3), 75-10-715(2) (1985), reprinted in ENV'T REP. (BNA) 1231:0181-82.} rather than the rule. Finally, even when penalties can be applied to the cost of cleanup, the amount of the penalty may bear little or no relationship to that cost.\footnote{For example, 42 U.S.C. § 9606(b) (1982) provides for a fine of up to $5000 per day for failure to comply with an order to abate "an imminent and substantial endangerment to the public health or welfare or the environment," id. § 9606(a). On its face, the penalty need bear no relation to the ultimate costs of remediating contamination at a site.}

A second option is to pursue the debtor's cleanup obligation as a claim against the estate when bankruptcy does occur. While this ap-

proach does not attempt to circumvent the discharge of the debtor’s obligations, it may minimize the shift in the burden of paying for cleanup.\textsuperscript{78} Moreover, the recent Supreme Court decision in the \textit{Midlantic} case suggests that an environmental cleanup obligation under state law may achieve \textit{de facto} status as a priority claim against the estate by virtue of the trustee’s obligation to comply with state law rather than abandon the property.\textsuperscript{79} The \textit{Midlantic} decision, however, applies only to cases in which the contaminated land is part of the estate for which the trustee is responsible. If the contaminated property did not belong to the debtor or was removed from the debtor’s control prior to bankruptcy, the debtor’s cleanup obligation is simply a claim against the estate, to be satisfied in relation to the size and relative priority\textsuperscript{80} of all other claims against the estate.

\section*{CONCLUSION}

It may be difficult to picture a toxic polluter as an “honest but unfortunate debtor”\textsuperscript{81} deserving of a fresh start under the Bankruptcy Code. Nevertheless, in enacting the Bankruptcy Code, Congress intended to allow individuals to shed their debts and start anew, with only limited exceptions.

The Supreme Court’s decision in \textit{Ohio v. Kovacs} reinforces that fresh start policy, but leaves some troubling issues unresolved. In particular, the facts of the case and the Court’s opinion leave uncertain the future of the “nonclaim” argument used by Ohio. With alternatives available for recovering cleanup costs from the estate and reaching a debtor’s income after bankruptcy, it is unlikely, though, that \textit{Kovacs II} will create serious conflicts with hazardous waste cleanup. Nevertheless, state and federal officials understandably may be confused as to whether they should enforce an individual’s cleanup obligation as (1) a nondischargeable claim against the debtor, (2) a claim against the estate, or (3) a “nonclaim” against the individual’s post-petition earnings. Both \textit{Kovacs II} and \textit{Robinson} indicate that the first two options are preferred. The issue as to the best strategy, however, is by no means resolved. With the increasing scope and expense of hazardous waste cleanup, as well as other remedial environmental programs, the Supreme Court will probably have an opportunity in future bankruptcy cases to clarify its decision in \textit{Kovacs II}. Clarification certainly is in order.

\textit{Richard Allan}

\textsuperscript{78} Of course, this approach also shifts the burden to the debtor’s other creditors to the extent that their share in the estate is reduced.

\textsuperscript{79} See \textit{supra} note 51 and accompanying text.

\textsuperscript{80} See \textit{supra} text accompanying note 55.

\textsuperscript{81} See \textit{supra} note 1 and accompanying text.