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Environmental Protection and Bankruptcy Rehabilitation: Toward a Better Compromise

Timothy W. Hoffman†

INTRODUCTION

Since the late 1960's, Americans have become increasingly concerned with the protection of the environment.1 Congress has responded to this concern by enacting federal legislation addressing such diverse issues as energy conservation,2 the protection of endangered species,3 air4 and water5 pollution, worker safety,6 and noise pollution.7 At the same time, Americans are increasingly sensitive to economic disruption, particularly that caused by the convergence of high inflation and high unemployment. Congress addressed these economic problems in part by enacting the Bankruptcy Reform Act of 1978 (BRA),8 commonly referred to as the Bankruptcy Code. The liberal


reorganization provisions of the Bankruptcy Code have helped many businesses maintain economic stability, preserving many private sector jobs.\footnote{The Bankruptcy Code has made reorganization for troubled businesses a more attractive alternative than did earlier bankruptcy law in several respects. First, corporate officers need no longer give way to the trustee automatically upon filing the bankruptcy petition. The Bankruptcy Code provides for the reorganization debtor to remain in possession of the business. \textit{11 U.S.C. §§ 1104, 1107} (1982). Second, reorganizing debtors no longer need to allege insolvency in order to qualify for the protection and relief of the Bankruptcy Code. \textit{See infra} notes 35-104 and accompanying text. Third, a stay against actions adversely affecting the debtor and his estate has been made automatic upon the filing of the petition. \textit{11 U.S.C. § 362} (1982). The stay has also been extended to cover more proceedings against the debtor. \textit{Id. See also} \textit{Kennedy, Automatic Stays Under the New Bankruptcy Law}, 12 \textit{U. Mich. J.L. Ref.} \textit{3, 10-24} (1978). In addition, those proceedings specifically excepted from the automatic stay may nonetheless be enjoined at the discretion of the bankruptcy judge, who has the broad authority to issue any order appropriate to carry out the provisions of the Bankruptcy Code. \textit{11 U.S.C. § 105} (1982).} 

Unfortunately, where environmental goals and bankruptcy law conflict, the Bankruptcy Code does not adequately provide for the inclusion of environmental values in the bankruptcy process. Specifically, the Bankruptcy Code omits the requirement of pre-Code bankruptcy law that businesses be legally insolvent before seeking protection in the bankruptcy courts.\footnote{See \textit{infra} notes 34-37 and accompanying text.} This omission makes bankruptcy an oftentimes attractive business option that can be used for purposes other than rehabilitation. Upon the filing of the bankruptcy petition, most proceedings against the debtor or the debtor's estate are automatically stayed. This wideranging protective provision of the Code provides a virtually claim-proof refuge for any business that files.

For example, upon filing, a bankruptcy debtor would be insulated from private suits claiming violations of the Clean Air or Clean Water Acts or from suits alleging environmental torts. Although the Bankruptcy Code exempts from the automatic stay some government actions, because the bankruptcy courts are in disagreement as to the exemption's reach, some government suits to enforce environmental laws may also be thwarted.

This Comment suggests a solution to this conflict and proposes a workable compromise between the goals of environmental protection and business rehabilitation. Part I provides a brief introduction to bankruptcy law and to the specialized bankruptcy courts, with their formidable array of judicial powers. The discussion points out some important protective devices triggered by the filing of a bankruptcy petition. Part II focuses on the change made by the 1978 Code that allows solvent business debtors to file a reorganization petition and avail themselves of the Code's protections. It recommends a judicial compromise preserving early access to bankruptcy proceedings (\textit{i.e.}, early
enough to avert financial trouble) but preventing abuse by solvent debtors. Part III discusses the impact of the automatic stay upon environmental litigation brought by both public and private parties and suggests methods of preventing the automatic stay from interfering with environmental protection. Finally, Part IV illustrates, through the use of a hypothetical case, the wide range of circumstances in which the goals of bankruptcy reorganization and environmental protection can clash. It demonstrates the need to strike a new balance between the competing policies.

I

INTRODUCTION TO BANKRUPTCY LAW

Bankruptcy law in the United States developed in a haphazard fashion with changes occurring largely in response to dramatic political or economic events. As a result, the pre-Code Bankruptcy Act became a complicated and confusing piece of legislation. In 1970 Congress, with an eye toward simplifying and modernizing the process, began an extensive review of the bankruptcy system. Eight years later, Congress' efforts culminated in the enactment of the Bankruptcy Reform Act of 1978, commonly referred to as the Bankruptcy Code.

The Bankruptcy Code delineates two types of proceedings: liquidation and reorganization. In a liquidation case, the debtor's non-exempt property is sold, and the proceeds are distributed among creditors based on their relative priorities. The debtor is then "discharged" from some of these debts, regardless of whether the proceeds of the estate are sufficient to satisfy the creditors' claims in their entirety. By contrast, reorganization or rehabilitation proceed-

13. For a comprehensive treatment of the extensive legislative wrangling behind the passage of the BRA, see Klee, Legislative History of the New Bankruptcy Law, 28 DEPAUL L. REV. 941 (1979).
15. Chapter 7, 11 U.S.C. §§ 701-728 (1982), and Chapter 11, id. §§ 1101-1129, specify provisions for liquidation and reorganization, respectively.
16. An individual debtor may exempt certain property from the estate, such as his or her interest in a residence, car, household furnishings, and tools of his or her trade. Id. §§ 522(b), (d). Business debtors, however, are not allowed to claim exempt property. Id. § 522(b).
17. Id. § 726.
18. Not all debts are dischargeable in bankruptcy, id. § 523, and not all debtors are eligible to receive a discharge. Id. §§ 727, 1141(d)(3).
19. Id. § 727.
ings, by focusing on the debtor's future viability, seek to avoid the financial disaster of a liquidation and salvage the debtor as a going concern.20 Most potential environmental-bankruptcy conflicts will arise during reorganization proceedings; operating businesses may seek to avoid their environmental responsibilities by taking advantage of the bankruptcy court's reorganization protections. The bulk of the Comment's discussion focuses, therefore, on bankruptcy reorganizations.

Businesses seeking to reorganize in bankruptcy must proceed under the provisions of Chapter II of the Bankruptcy Code.21 A business initiates the bankruptcy process by filing a bankruptcy petition with the appropriate bankruptcy court.22 The filing of the petition creates an estate comprised of all of the debtor's legal and equitable interests in property at the time the petition is filed.23 The filing of the petition gives rise to an automatic stay of most proceedings or actions which adversely affect the debtor or property of the estate.24 The automatic stay serves as the Bankruptcy Code's fundamental debtor-protection device, and it is this provision that makes bankruptcy attractive to solvent and insolvent debtors alike.25

Reorganization is accomplished by adjusting the debtor's debt obligations and equity interests in a "plan of reorganization."26 The plan

20. The report accompanying the House version of the bankruptcy legislation stated:
   The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. . . . If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.


22. Id. §§ 301-303. Chapter 7 liquidation and Chapter 11 reorganizations may both be involuntarily initiated by creditors. Id. § 303.

23. Id. § 541. The estate also includes all interests of the debtor and the debtor's spouse in community property, certain prior interests of the debtor recovered by the court, and inheritances, property settlements, and life insurance benefits vesting in the debtor within 180 days after the filing of the bankruptcy petition. Id.

24. Id. § 362(a). See infra notes 105-108 and accompanying text. The automatic stay is subject to limited exceptions. 11 U.S.C. § 362(b) (1982). See infra notes 113-129 and accompanying text. In addition, the court may grant a creditor relief from the stay upon a showing of cause. 11 U.S.C. § 362(d)(1) (1982). See infra notes 140-147 and accompanying text.

25. See infra notes 54-57 and 105-08 and accompanying text. The automatic stay may also benefit certain creditors by preventing a race for the debtor's assets. All creditors are forced to wait for the bankruptcy court to determine their legal share in the debtor's assets.

26. 11 U.S.C. § 1121-29 (1982). The debtor is given 120 days to draft and submit the plan. Id. § 1121(b). If the 120 day period lapses and is not extended by order of the court, the other parties to the proceeding become eligible to submit a plan. Id. § 1121(c).
details the treatment to be given to each class of creditors and holders of equity interest in the debtor's property, who then vote whether or not to accept the plan. Even if some creditor classes reject the plan, the bankruptcy court is authorized to confirm the plan over their objections. Confirmation by the court makes the provisions of the plan binding on all participants and operates as a discharge of the debtor's obligations.

The bankruptcy judge presides over a court of expanded powers and jurisdiction and thus plays a key role throughout the bankruptcy process. The Bankruptcy Code grants the bankruptcy court the powers of a court of equity, law, and admiralty. In addition, and more importantly, the bankruptcy courts have pervasive jurisdiction—the authority to exercise jurisdiction over all civil proceedings that arise in, or are related to, any case before the court. Consequently, the bankruptcy court adjudicates a diverse range of civil proceedings, bound together merely because they are somehow related to a pending bankruptcy. As a result, environmental proceedings involving a bankruptcy petitioner may be decided or stayed by a specialized bankruptcy court possessing a mandate to facilitate rehabilitation but having little competence to decide non-bankruptcy matters.

II REORGANIZATION BY SOLVENT BUSINESS DEBTORS

The new eligibility requirements of Chapter 11 create a significant area of conflict between environmental protection and bankruptcy law by allowing solvent debtors to file for reorganization. Prior to the enactment of the Bankruptcy Code, a reorganization petitioner had to

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27. *Id.* § 1123. For ease of administration, the creditors and equity interest holders are broken down into classes. *Id.* § 1122.
28. *Id.* § 1126.
29. *Id.* § 1129. This is a complicated process known as “cramming the plan down” on the dissenting classes. For an extensive discussion of the process, see Klee, *All You Ever Wanted To Know About Cram Down Under the New Bankruptcy Code*, 53 AM. BANKR. L.J. 133 (1979).
32. *Id.* § 1471(b). The legitimacy of any such exercises of the bankruptcy court's pervasive jurisdiction has been brought into question by a recent Supreme Court case. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). See infra notes 64-67 and accompanying text.
33. During the Congressional hearings on the BRA, it was argued that a specialized bankruptcy bar would lead to a specialized body of law, narrow in scope and impervious to the outside influence of social and legal change. *See Bankruptcy Act Revision: Hearings On H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 8-9 (1977) (Statement of Simon Rifkind).
34. The Bankruptcy Act contained two separate chapters for business rehabilitation depending upon the type of ownership: Chapter X (Corporate Reorganization), Bankruptcy Act Amendments of 1938, Pub. L. No. 75-696, §§ 101-276, 52 Stat. 840, 883-905 (repealed
allege insolvency. The burden of proof on this issue was on the petitioner to show either that its liabilities exceeded its assets or that it was unable to pay debts as they matured. The Bankruptcy Reform Act of 1978 omitted the insolvency requirement.

A. Advantages of Bankruptcy to Solvent Debtors

A solvent business can now file a bankruptcy petition and avail itself of the Bankruptcy Code's powerful provisions designed for the protection of "failing" or "financially distressed" businesses. The primary protection afforded the debtor is the automatic stay of most legal actions previously filed against the debtor's estate. Filing also protects the debtor against the collection of punitive damages, and the bankruptcy court may estimate contingent and unliquidated claims for purposes of allowance. Finally, the bankruptcy trustee or debtor-in-possession may reject executory contracts and unexpired leases, and recover some pre-petition and post-petition transfers of property.

35. "See infra notes 77-84 and accompanying text.
36. In re U.S.A. Motel Corp., 450 F.2d 499, 501 (9th Cir. 1971). The Bankruptcy Act had two separate tests of insolvency. A business debtor was deemed insolvent, and thus eligible for protection in bankruptcy, if its liabilities exceeded its debts, or if it was unable to pay its debts as they came due. Under the more lenient standard of the latter test a business debtor could qualify for protection in bankruptcy if a bad turn of events rendered its cash flow insufficient to meet the business' current obligations when due. 6 COLLIER ON BANKRUPTCY ¶ 4.14[2] (J. Moore 14th ed. 1978). For a more detailed discussion of these two tests, see id. and cases cited therein.
37. See infra notes 77-84 and accompanying text.
40. See infra notes 105-08 and accompanying text. The stay also is applied to actions against the debtor not filed until after the filing of the bankruptcy petition but which are based on a pre-petition cause of action. On the other hand, the automatic stay does not bar actions based on post-petition conduct of a reorganizing debtor while carrying on its business. See infra notes 148-70 and accompanying text.
41. See infra notes 58-59 and accompanying text.
42. 11 U.S.C. § 502(c) (1982).
43. Id. § 365.
44. Id. §§ 547-49.
Omission of the insolvency requirement thus offers businesses a convenient way to delay, and in some cases avoid, their obligations.

B. The Manville Case

Manville Corporation’s recent Chapter 11 filing demonstrates the magnitude of the loophole created by the statutory insolvency omission. Manville, formerly Johns-Manville Corporation, is the world’s largest miner, processor, manufacturer, and supplier of asbestos and products containing asbestos. Prior to filing for reorganization, Manville was one of thirty industrial companies on the Dow-Jones Industrial Index and reported net income in 1981 of 60.3 million dollars on sales exceeding two billion dollars. Manville filed for reorganization because it is facing approximately 11,000 asbestos health lawsuits brought by approximately 15,550 individual plaintiffs. Since 1981, several plaintiffs have received large punitive damage awards. A private study commissioned by Manville estimated that the company faces an additional 32,000 suits over the next twenty years. Based on an average cost of forty thousand dollars per case, excluding appeals, Manville contended that without bankruptcy protection, the financial burden of the lawsuits would cripple the company.

The Bankruptcy Code, by deleting the insolvency requirement, makes the many attractive provisions of bankruptcy law available to Manville and to other businesses which are presently solvent but faced with substantial future claims. Prior to the enactment of the Code,
such prospective financial distress would have been insufficient to allow these companies to obtain protection in bankruptcy.

1. The Automatic Stay

The automatic stay which arose upon the filing of the bankruptcy petition operated to suspend most actions against Manville and the property of Manville's estate.\textsuperscript{54} Foremost among these actions are asbestos personal injury suits—the primary source of Manville's prospective financial difficulties. Although the primary expense attributed to these lawsuits is the payment of settlements and adverse judgments, the bankruptcy court hearing the Manville case has not permitted the lawsuits to proceed to judgment while reserving payment until after adoption of the reorganization plan.\textsuperscript{55} Because Manville's reorganization case may take many years to complete, many asbestos health plaintiffs will die before their claims are adjudicated unless the bankruptcy court grants relief from the automatic stay later in the proceedings.\textsuperscript{56} Remaining plaintiffs may be pressured to accept low settlements proposed by Manville's plan of reorganization or to consent to the appointment of a special master to estimate their claims.\textsuperscript{57}

2. Punitive Damages

In addition to the benefits provided by the automatic stay, Manville's position as a bankruptcy debtor will probably insulate it from liability for adverse punitive damage awards. Bankruptcy courts generally bar punitive damage claims in reorganization cases.\textsuperscript{58} In most bankruptcies, such claims do not serve the purpose of punishing tort claims. Roughly one month prior to Manville's filing, UNR Industries, Inc. filed a similar Chapter 11 petition. Like Manville, UNR is a defendant in an estimated 17,000 asbestos health lawsuits. In re UNR Industries, Inc., 29 Bankr. 741, 743 (Bankr. N.D. Ill. 1983). Bankruptcy protection from tort claimants is not a new idea. Preceding both Manville and UNR was In re White Motor Credit Corp., 23 Bankr. 276 (Bankr. N.D. Ohio 1982), rev'd on other grounds sub nom., White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983). The debtor in White Motor filed to reorganize in bankruptcy partly because of its position as a defendant in approximately 160 product liability lawsuits. \textit{Id.} at 277.

\textsuperscript{54} See \textit{infra} notes 105-12 and accompanying text.
\textsuperscript{55} Matter of Johns-Manville Corp., 26 Bankr. 405, 419 (Bankr. S.D.N.Y. 1983) (also refusing to extend the automatic stay to cover non-debtor codefendants in the asbestos health litigation).
\textsuperscript{56} The deaths of some plaintiffs will undoubtedly make it difficult for their estates to recover on their claims against Manville. Proving causation in asbestos injury cases, where the latency period is long, is a high hurdle for a plaintiff to overcome. \textit{See} Note, \textit{DES Cases and the Move Toward New Tort Remedies}, 49 UMKC L. REV. 245 (1981). The death of the plaintiff, and other potential witnesses, may make this hurdle insurmountable.
\textsuperscript{57} See \textit{infra} notes 60-68 and accompanying text.
\textsuperscript{58} Matter of GAC Corp., 681 F.2d 1295, 1301 (11th Cir. 1982) (disallowing punitive damage claim in a Chapter X proceeding under the Bankruptcy Act). \textit{See also} In re Oahu Cabinets Ltd., 12 Bankr. 160, 165 (Bankr. D. Hawaii 1981) (late payment fees in the nature of a penalty not enforced by court in a Chapter 11 reorganization). \textit{See generally} In re
the insolvent debtor; rather, they punish other creditors by reducing the size of the estate available to satisfy their claims. Because Manville is not insolvent, however, the Bankruptcy Court might refuse to apply the common law rule barring punitive damage claims.

3. **Liquidation of Contingent Claims**

Manville may also seek to benefit from bankruptcy by obtaining a court ordered estimation of all tort claims pending against it. The Bankruptcy Code provides that contingent or unliquidated claims may be estimated for purposes of allowance if the fixing or liquidation of such claims would unduly delay the closing of the bankruptcy case. Manville may have believed that the use of a special master to estimate each asbestos health claim would save litigation expenses and result in lower damage awards than if the cases were tried before individual civil juries.

The availability of a special master with jurisdiction over state claims is uncertain at this time because a plurality of the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* held that the broad grant of jurisdiction to the bankruptcy courts by the BRA violates Article III of the federal Constitution. This constitutional infirmity was caused by the BRA’s failure to grant bank-

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Tastyeast, Inc., 126 F.2d 879, 881 (3d Cir. 1942) (bankruptcy court is essentially a court of equity and will therefore not enforce a penalty).

59. *GAC Corp.*, 681 F.2d at 1301. In a reorganization case the objective is to salvage the business as a going concern. Inclusion of claims for punitive damages will jeopardize the rehabilitation effort by placing the debtor even deeper into the hole of financial distress. In addition, the reorganization requires the cooperation of creditors, 11 U.S.C. § 1126 (1982), in compromising their claims, *id.* § 1123; the inclusion of claims for punitive damages, if substantial, might make it more difficult for the creditors to agree on the plan of reorganization. *Id.* §§ 1126, 1129.

60. Allowance is the process by which the bankruptcy court recognizes the validity of claims so that only those creditors with legitimate claims may share in the distribution of the estate. *See generally* 11 U.S.C. § 502 (1982).

61. *Id.* § 502(c).

62. Although it is within the power of the bankruptcy judge to estimate the amount of contingent or unliquidated claims, in situations where the issues raised are complex and foreign to the bankruptcy court, the usual course of conduct is to appoint an expert or panel of experts with responsibility for determining whether a claim should be allowed and, if so, to set the amount. *See, e.g.*, In re White Motor Credit Corp., 23 Bankr. 276 (Bankr. N.D. Ohio 1982) *rev’d sub nom.* White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983). The bankruptcy court’s power to appoint these “special masters” is derived from 11 U.S.C. § 105 (1982) and 28 U.S.C. § 1481 (Supp. V 1981). Rule 513 of the Bankruptcy Rules of Procedure requires that such appointments be conducted pursuant to Rule 53 of the Federal Rules of Civil Procedure covering the use of masters.


64. *Id.* at 87. The judgment of the plurality was joined by two other justices who chose to limit the decision to the particular facts before the Court—a state court lawsuit for breach of contract and warranty which had been brought before the bankruptcy court only because one party was a debtor in bankruptcy. *Id.* at 91-92 (Rehnquist, J., concurring).
ruptcy judges life tenure and an irreducible salary while essentially granting them jurisdictional authority tantamount to the district courts. The courts have reached different conclusions as to the impact of *Northern Pipeline* on the bankruptcy process, although they agree that the bankruptcy courts no longer have independent jurisdiction over bankruptcy cases. Some bankruptcy courts have gone so far as to hold that even the district courts lack jurisdiction over bankruptcy cases. The only Circuit Court of Appeals to face this issue has disagreed. In *White Motor Corp. v. Citibank, N.A.*, the debtor obtained a bankruptcy court order appointing a special master to help resolve approximately 160 products liability cases in which the debtor was a defendant. On appeal, the district court vacated the order appointing the special master. The district court held that, in light of *Northern Pipeline*, the bankruptcy court was prohibited from delegating to a special master matters over which the bankruptcy court itself had no jurisdiction. The Sixth Circuit reversed, holding that, under an interim rule adopted after *Northern Pipeline*, the district courts make a general referral of all bankruptcy cases to the bankruptcy courts; therefore, the district courts retain original jurisdiction over bankruptcy cases and the jurisdiction of the bankruptcy courts is derivative.

65. 28 U.S.C. §§ 153(a), 154 (1982); U.S. CONST. art. III, § 1. To prevent its decision from wreaking havoc on the bankruptcy system, the Court made its holding prospective and stayed its effect until October 4, 1982, giving Congress an opportunity to remedy the constitutional problem. 458 U.S. at 88. When Congress failed to act, the Court extended the stay until December 24, 1982. 103 S. Ct. 199 (1982). When Congress again failed to act, the Court allowed the stay to expire without remedy. 103 S. Ct. 662 (1982).

66. *See, e.g.*, Matter of Seven Springs Apartments, Phase II, 33 Bankr. 458 (Bankr. N.D. Ga. 1983); In re Conley, 26 Bankr. 885 (Bankr. M.D. Tenn. 1983); Winters Nat’l Bank & Trust v. Schear Group, 25 Bankr. 463 (Bankr. S.D. Ohio 1982). In general, these cases interpret *Northern Pipeline* as holding the Bankruptcy Code jurisdictional provision, 28 U.S.C. § 1471 (1982), unconstitutional in its entirety, even that portion that purports to grant original jurisdiction over bankruptcy cases in the district courts. Section 1471 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

67. 704 F.2d 254 (6th Cir. 1983).

68. The special master would conduct evidentiary hearings and then submit recommendations as to the disposition of the cases to the bankruptcy court. *Id.* at 255.


70. *Id.* at 279.

71. *For a copy of the interim rule as adopted in the Sixth Circuit, see the appendix to White Motor*, 704 F.2d at 265-67.

72. *Id.* at 256.

73. *Id.* at 263.
An act of Congress may soon solve the bankruptcy courts' jurisdictional problems. In the wake of the *Northern Pipeline* decision, much pressure has been brought to bear on Congress to reconstitute the bankruptcy courts.\(^7^4\) The two main proposals are either (1) to upgrade the bankruptcy courts to Article III status or (2) to have the district courts handle bankruptcy matters with the bankruptcy courts acting as special masters to the district courts and magistrates.\(^7^5\) If either of these alternatives is chosen, jurisdiction over bankruptcy matters will ultimately reside in an Article III court. At that time the estimation provisions would again become applicable to claims that arise solely under state law, and Manville and other similarly-situated businesses may again seek to utilize this advantageous provision.\(^7^6\)

**C. Re-instituting an Insolvency Requirement**

As the Manville case illustrates, Congress has made the protective provisions of the Bankruptcy Code available to solvent businesses. Manville-type situations may be only the beginning of environmental-bankruptcy conflicts. Recent years have seen a dramatic rise in tort litigation over the legal and illegal disposal of hazardous wastes. Solvent companies, faced with the threat of substantial tort liability, may follow the example set by Manville and file to reorganize in bankruptcy. Those advantages sought by Manville—a suspension of all pending law suits, judicial estimation of all lawsuits, and freedom from punitive damage awards—would also be available to hazardous waste debtors.

Businesses may also make use of the insolvency loophole for purposes other than frustration of pending tort claims. Depending on how the automatic stay provision is interpreted and applied by a particular court, business debtors may be able to frustrate other environmental laws and regulations, such as those protecting wildlife and wilderness or authorizing eminent domain suits.

1. **Reasons for the Omission**

Surprisingly, neither the structure of the Bankruptcy Code nor its legislative history gives any explanation for the omission of the insolvency requirement. Structurally, the old Bankruptcy Act had separate sections delineating who could be a debtor\(^7^7\) and the required contents

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74. See, e.g., Vihon, *Update on the Northern Pipeline Case*, 87 COM. L.J. 553 (1982).
75. Id. at 553-554.
76. In those cases where the claim to be estimated arises in tort, the estimation process may be subject to objection on the grounds that it violates the tort claimant's right to a trial by jury. U.S. CONST. amend. VII. See 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 2301-2322 (1971).
of a reorganization petition. The Bankruptcy Code only contains a provision for defining who may be a debtor. With the exception of the insolvency requirement, which was omitted, the elements of the reorganization petition contents section of the Bankruptcy Act were either deleted because they were rendered obsolete by the structure of the Bankruptcy Code or incorporated into other sections of the Code.

The legislative history of the Bankruptcy Code also fails to explain why the insolvency requirement was omitted. The legislative process began in 1970 with Congress’ creation of the Commission on the Bankruptcy Laws of the United States. In 1973 the Commission filed its findings and recommendations along with a draft bill. This bill was quickly followed by a similar bill drafted by the National Conference of Bankruptcy Judges. Both proposed bills closely resembled the final structure of the Bankruptcy Code; each omitted the insolvency requirement in business reorganization cases. In the hearings that followed the official submission of the competing bills, Congress never discussed the omission.

The courts are unlikely to read an insolvency requirement directly

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80. See id. § 521. Of the eight petition requirements of section 130 of Chapter X (Corporate Reorganization) of the Bankruptcy Act, four were included in section 521(1) of the Bankruptcy Code, two were rendered obsolete, and only the allegation of insolvency and an expression of the petitioner’s desire that a plan be effected were omitted. Id. See Official Bankruptcy Form No. 8.
81. Pub. L. No. 91-354, 84 Stat. 468 (1970). Prior to the commencement of the bankruptcy reform process, a comprehensive study by the Brookings Institute pointed out the many problems with the system existing at that time. The insolvency requirement for reorganization cases was not listed as one of these problems. See D. STANLEY & M. GIRTH, BANKRUPTCY PROBLEMS, PROCESS, REFORM (1971).
82. See I & II REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 137, 93rd Cong., 1st Sess. (1973). Part I contains the Commission’s findings and recommendations, and Part II contains the proposed statute with comments. Neither the findings and recommendations nor the comments to the proposed statute explain or even acknowledge the omission of the insolvency requirement.
83. Both bills are reprinted with comments in Bankruptcy Act Revision: Hearings On H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess., app. 1, at 1-332 (1975). The primary areas of disagreement concerned the Commission’s proposals to create a Bankruptcy Administration in the executive branch of the federal government and to consolidate the Bankruptcy Act’s Chapters X and XI into one comprehensive chapter.
84. In the Senate the competing bills were introduced as S. 235 and S. 236. See I, II, & III Bankruptcy Reform Act: Hearings On S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975). In the House of Representatives the competing bills were introduced as H.R. 31 and H.R. 32. See 1-4 Bankruptcy Act Revision: Hearings On H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. & App. (1975-76). As these bills were revised and reintroduced new hearings were held. See Bankruptcy Reform Act of 1978: Hearings On S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977); Bankruptcy Act Revision: Hearings On H.R. 8200
into the Bankruptcy Code. When construing a statute, courts abide by a strong presumption that Congress intended what it enacted, and generally, they will not fill in a statutory omission unless its absence serves as a “clear corruption” of the statute. Because the primary purpose of Chapter 11 is to rehabilitate financially distressed businesses, allowing a solvent debtor to file under Chapter 11 does not constitute a “clear corruption” of the statute. Congress may have intended debtors to have access to bankruptcy at an earlier time than they did under the Bankruptcy Act. In some cases such early access might be essential to the success of the ensuing rehabilitation.

2. Judicial Solutions

Although the courts are probably precluded from directly reading an insolvency requirement into the Bankruptcy Code, they can limit access to the Bankruptcy Code by exercising their broad powers of equity. The courts can exclude unworthy debtors from protection under the Bankruptcy Code by requiring that all Chapter 11 petitions be filed in good faith. The Bankruptcy Code contains a requirement that Chapter 11 plans of reorganization be proposed in good faith, but contains no similar provision that Chapter 11 petitions be filed in good faith. Drawing from cases decided under the old Bankruptcy Act, however, the courts have read a good faith requirement into section 1112(b) of the new Code, which provides for the conversion or dismissal of a Chapter 11 case for cause. If a court finds that the debtor lacks the requisite good faith, it can either dismiss the petition outright or convert the case into a Chapter 7 liquidation.


89. 11 U.S.C. § 1129(a)(3) (1982). This determination is not made until the plan has been drafted, voted on by the creditors and equity security holders, and presented to the court for confirmation. In almost all cases, this point will be reached only at the expense of much time and effort; therefore, it is an inappropriate time to pass judgment on the question of whether the debtor is worthy of protection in bankruptcy.
90. See, e.g., Tucker v. Texas American Syndicate, 170 F.2d 939 (5th Cir. 1948); International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Local No. 886 v. Quick Charge, 168 F.2d 513 (10th Cir. 1948).
91. 11 U.S.C. § 1112(b) (1982). Even though this section requires a party in interest to move for dismissal, one court has ruled that a petition may be dismissed for lack of good faith sua sponte. In re Coram Graphic Arts, 11 Bankr. 641 (Bankr. E.D.N.Y. 1981).
92. If a court held that a solvent debtor filed its bankruptcy petition in bad faith and
No court has yet held that it is bad faith for a solvent debtor to file a petition to reorganize in bankruptcy; however, a court might reach such a conclusion under the case law established by the good faith doctrine. In the absence of a statutory definition of good faith, the courts have fashioned rough guidelines on a case by case basis. The common theme of precedent under both the old Bankruptcy Act and the Bankruptcy Code is that it is not good faith for a debtor to file a Chapter 11 petition for a fraudulent or improper purpose.

Because Chapter 11 provisions exist for so many different purposes and benefit such divergent groups, it is difficult to determine what constitutes an improper purpose. In spite of this difficulty, the courts have found a lack of good faith where the debtor filed a petition in bankruptcy to avoid liability under a state court judgment; where the sole reason for filing the Chapter 11 petition was to take advantage of a bankruptcy court’s power to determine local real estate tax liability without pre-payment of the tax by the debtor; where the debtor created and organized a new business and filed for bankruptcy in order to stay foreclosure actions on property possessing favorable low interest liens; and where the debtor, a two day old corporation, desired a stay to prevent foreclosure and gain time to market the assets of the corporation, rather than to rehabilitate the business. In each of these cases the debtor apparently placed the business in bankruptcy not because of need, but rather for tactical business purposes, and in each case, the

ordered the case converted to a Chapter 7 liquidation, the debtor would undoubtedly move to have the petition dismissed for cause. 11 U.S.C. § 707 (1982). Cases decided upon such motions generally do not favor the debtor in the absence of agreement by the trustee and creditors. See, e.g., In re Blue, 4 Bankr. 580 (Bankr. D. Md. 1980) (test for dismissal is whether the dismissal would be in the best interests of the creditors); In re Pagnotta, 22 Bankr. 521 (Bankr. D. Md. 1982) (denying debtor’s motion for dismissal of its voluntary Chapter 7 petition because the debtor had enjoyed the benefit of the Bankruptcy Code’s protective provisions for 280 days). The possibility that an improperly filed Chapter 11 petition for reorganization may be converted to a Chapter 7 liquidation upon a finding of bad faith should discourage some solvent debtors from seeking refuge under the Bankruptcy Code.

93. In most cases the successful rehabilitation of a financially distressed business will serve many purposes because it will benefit many different groups. Society retains the benefits of the business’ production. Federal, state, and local governments continue to receive tax revenues. The business’ employees avoid joining the ranks of the unemployed. The creditors receive a greater payment on their claims than they would under a Chapter 7 liquidation, and finally, the stockholders’ investment may be salvaged and may continue to produce a return.

94. Zeitinger v. Hargadine-McKittrick Dry Goods Co., 244 F. 719 (8th Cir.), cert. denied, 245 U.S. 667 (1917) (petition dismissed because bankruptcy was filed to avoid state court ordered accounting to determine liability under prior judgment); In re Felder, 39 F. Supp. 453 (E.D.S.C. 1941) (petition dismissed where husband and wife in control of debtor corporation were attempting to avoid liability for fraud under a prior state court judgment).

A court refused to play host to the debtor's questionable business dealings.

A court could impose a _per se_ rule that solvent businesses filing to reorganize in bankruptcy do so in bad faith. As the above cases indicate, the Bankruptcy Code's protections are reserved for those truly in need of relief. Solvency, by definition, implies a lack of immediate need. A test based strictly on a debtor's current financial status, with the burden of proof on the debtor, would help to alleviate abuse of the Bankruptcy Code's provisions by businesses without legitimate needs.

A strict rule, however, might be too harsh in its application. Many potential bankruptcy debtors can foresee impending financial distress before they become legally insolvent, and in some instances, early access to bankruptcy could make the difference between the success or failure of the ensuing rehabilitation attempt. Such a business may have a legitimate need for the protection bankruptcy provides, but it would nonetheless be excluded from filing by a strict rule requiring present insolvency.

The solution proposed here is a more flexible rule strictly applied. The rule should allow business debtors to establish their need for protection by predicting a very high probability of legal insolvency. Such predictions should not be allowed to extend unduly into the future\(^98\) and should be subject to very close scrutiny.\(^99\) Indications that the business may have ulterior motives for seeking protection in bankruptcy should weigh against acceptance of its petition.\(^100\) During this

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98. The language restricting the time span of financial projections is necessarily vague because businesses vary so widely. For many businesses financial projections more than one or two years into the future can not be made with much confidence due to the unpredictability of today's economy. Some businesses, however, may be able to make substantially longer projections of future bankruptcy due to such things as the undertaking of a large-scale capital improvement project or the existence of long-term binding contracts. In this latter group, the problems experienced by Westinghouse Corporation in the mid-1970's with its long-term uranium contracts come quickly to mind. _See generally_ J. STEWART, _THE PARTNERS_ 152-201 (1983), which discusses the Westinghouse situation at length.

99. Admittedly, the door is left open for some bankruptcy courts to apply this new rule loosely. If predictions of financial distress are stretched unrealistically into the future, however, the rule will be rendered ineffective. If this occurs, idealistic notions of flexibility and fairness may ultimately have to give way to ministerial line-drawing, and the rule should be changed to provide for a fixed limit on the term of these financial projections. A period of one to two years might be reasonable.

100. Recall that the court, in disposing of reorganization petitions filed in bad faith, has the option of dismissing the case or converting it to a Chapter 7 liquidation. _See supra_ notes 91-92 and accompanying text. It is important that this option remain a deterrent to bad faith petitions. If the rule proposed here is adopted by expanding on the judicially-imposed good faith requirement of section 1112(b), the deterrent value of the court's conversion option will be preserved. On the other hand, if the proposed rule is implemented by an amendment to the Bankruptcy Code, the provision for some similar mechanism should be included to deter bad faith petitions. Otherwise, solvent debtors will have little to lose by trying to hide in bankruptcy.
initial review of a petition, the court should operate under a strong presumption that a solvent business debtor is motivated by bad faith. Accordingly, the burden of proving a good faith need for reorganization should be placed on the debtor. By contrast, the present policy requires a party in interest to challenge the business debtor's worthiness to reorganize in bankruptcy. Adoption of this rule would send a strong message to the business sector that the bankruptcy courts are no longer available as a device for solvent companies to avoid environmental regulations or liability for environmental wrongdoing.101

As with most other rules of law, the rule proposed here will not always make it clear whether or not a business debtor is eligible for protection in bankruptcy. For example, at the time Manville filed its petition to reorganize in bankruptcy, it was an extremely healthy company.102 It premised its need on a financial projection stretched twenty years into the future. Although twenty years is a long time, the extended latency period of asbestos-related diseases makes such long-range financial predictions of future liabilities more accurate than a financial prediction of comparable length based primarily on variable economic trends. That Manville will face a large number of tort claims in the next twenty years is not disputed. The crucial issue in determining Manville's need for reorganization is whether the expense of disposing of these claims will bankrupt the company. Resolution of this issue is certainly within the realm of the bankruptcy court's expertise. If the court determines that the company will not become insolvent, or has failed to fulfill its burden of proof on the issue of insolvency, it should dismiss the petition or convert the case to a Chapter 7 liquidation.103

101. For a discussion of how bankruptcy can be used by a business to evade some types of environmental regulation, see infra notes 105-170 and accompanying text.
102. See supra note 47 and accompanying text.
103. The aspect of the Manville case that arouses the most emotion from observers is the plight of the asbestos health claimants. On paper they are simply creditors, much like a money lender or supplier of goods on credit, when in actuality they are individuals suffering debilitating and potentially fatal personal injuries. In many of these cases, the injury may have been foreseen by Manville and could have been avoided, but was not. See Affidavit of Charles H. Roemer, In re Johns-Manville Corp., Nos. 82 B 11656 to 82 B 11676 (Bankr. S.D.N.Y. filed Aug. 26, 1982), in support of the allegation that Manville was informed of the dangers of asbestos but refused to take steps to protect the asbestos workers. Admittedly, this Comment has been concerned with the nonhumanistic aspects of the Manville case. Even if the proposed rule were strictly applied, Manville might qualify for protection in bankruptcy. In that case the asbestos health claimants' suffering would be magnified by the bankruptcy problems noted earlier. See supra notes 54-62 and accompanying text.

This raises the question whether Manville-type cases should be handled outside of the bankruptcy process. Extraordinary cases sometimes require extraordinary solutions. The resolution of this issue, however, is beyond the scope of this Comment. The objective here is to show the existence of the insolvency loophole and the manner in which it conflicts with environmental values. The solutions proposed here are aimed at this narrow problem and not at the broader problems raised by the Manville case.
The publicity surrounding the Manville case has opened the door for widespread abuse of the bankruptcy process. The word is out that business debtors need not be insolvent in order to qualify for protection under Chapter 11. The courts can close this door by requiring a good faith need for bankruptcy protection before accepting a Chapter 11 petition. The broad definitions of insolvency used under the Bankruptcy Act—liabilities exceeding assets or an inability to pay debts as they mature—could serve as a safe harbor in most cases to give worthy debtors an opportunity to effect a successful rehabilitation. In those cases where a business can not meet either of these definitions and therefore bases its petition on financial projections, the court should closely scrutinize the projections and motives of the debtor. The adoption of this reform would provide a more equitable balancing of the interests of claimants, like the asbestos health litigants in the Manville case, with the interests of a troubled business. At the same time, it would insure that solvent business debtors will not abuse the bankruptcy process at the expense of the environment.

III

THE AUTOMATIC STAY

The Bankruptcy Code’s automatic stay provision provides a second area of conflict between environmental protection and bankruptcy law. The filing of any bankruptcy petition automatically stays all private environmental suits, whether pursuant to common law tort causes of action or the private rights of action under many environmental statutes, as well as some government suits. The stay provides unnecessarily broad protection to bankruptcy debtors and significantly obstructs the pursuit of environmental goals. The law should be amended in order to strike a better balance between environmental and bankruptcy policies.

The filing of the bankruptcy petition gives rise to an automatic stay of most actions which adversely affect the debtor or property of

104. See supra note 36.

105. Proceedings stayed include:

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;

2. the enforcement against the debtor or against property of the estate, of a judgment obtained before the commencement of the case;

3. any act to obtain possession of property of the estate;

4. any act to create, perfect, or enforce any lien against property of the estate;

5. any act to create, perfect, or enforce against property of the debtor any lien secur[ing] a claim that arose before the commencement of the case;

6. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case.

the estate.\textsuperscript{106} The automatic stay is designed to protect the debtor by giving him a “breathing spell” from the “financial pressures that drove him into bankruptcy.”\textsuperscript{107} Additionally, the automatic stay assures that those creditors quickest to take legal action will not be unduly preferred over those that are more patient.\textsuperscript{108}

Proceedings to which the automatic stay applies remain subject to the stay until the property at issue is no longer property of the bankruptcy estate,\textsuperscript{109} the bankruptcy case is terminated,\textsuperscript{110} or the bankruptcy court grants relief from the stay for cause.\textsuperscript{111} The bankruptcy court can soften this rule by granting relief from the stay to allow a proceeding to continue until resolved but stay the enforcement of any judgment. By allowing adjudication of claims in this way, a court can often strike a workable compromise between a claimant’s interest in speedy adjudication and society’s desire to prevent business failures.\textsuperscript{112}

\textbf{A. The Exception for Government Actions}

The broad scope of the automatic stay is subject to limited exceptions.\textsuperscript{113} The most important of these for the purpose of environmental goals is section 362(b)(4) of the Code, which exempts “the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power”

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\textsuperscript{106} Id. The broad jurisdiction given the bankruptcy courts allows the automatic stay to reach actions in both state and federal courts. For a discussion of possible problems with this reach in some instances, see \textit{supra} notes 64-65 and accompanying text. For an in-depth discussion of the automatic stay, see Kennedy, \textit{supra} note 9, at 3.

\textsuperscript{107} Property of the estate is broadly defined as all legal and equitable interests of the debtor in property as of the date the bankruptcy petition is filed as well as inheritances, property settlements, and life insurance benefits vesting in the debtor within 180 days of the filing of the petition. 11 U.S.C. § 541 (1982).


\textsuperscript{109} Id. \textit{supra} note 20, at 340, \textit{reprinted in} 1978 \textit{U.S. Code Cong. & Ad. News} at 6297. This serves the bankruptcy goal of equality of distribution.


\textsuperscript{111} Id. § 362(c)(2).

\textsuperscript{112} Id. § 362(d)(1).

\textsuperscript{113} Such a course of action is desirable in a case like that involving the Manville Corporation where the time periods required for the asbestos health litigation and the bankruptcy reorganization are both very lengthy. Unfortunately, the Manville court chose not to allow adjudication of the claims. Matter of Johns-Manville Corp., 26 Bankr. 405, 418-19 (Bankr. S.D.N.Y. 1983) (lifting of stay sought as alternative relief by asbestos litigation codefendants).

\textsuperscript{113} These exceptions affect only the automatic nature of the § 362(a) stay. They in no way interfere with a court’s alternate equitable power to enjoin the action in question upon motion of the bankruptcy trustee or a party in interest. \textit{See} 11 U.S.C. § 105 (1982); 28 U.S.C. § 1471(e) (Supp. V 1981). The general view is that such injunctions may only issue when the enjoined proceeding would threaten the assets of the estate. \textit{See} In re Tucson Yellow Cab Co., Inc., 27 Bankr. 621, 623 (Bankr. 9th Cir. 1983).
from the stay provision.\footnote{114} At first glance, the public\footnote{115} enforcement of any environmental regulation appears to fall within this exception. While the language of the Senate and House reports which accompanied their respective versions of the bankruptcy legislation support that interpretation,\footnote{116} the plain words of the statute may not be a clear expression of Congressional intent because of the circumstances surrounding enactment of the Bankruptcy Code.

The Bankruptcy Code was enacted in the waning days of the 95th Congress. As the end of the session approached, major disagreements between the Senate and House bills remained, and the proponents of bankruptcy reform went to great lengths to reach a compromise.\footnote{117} During this hectic period Senator Dennis DeConcini, Chairman of the Subcommittee on Improvements in Judicial Machinery, and Representative Don Edwards, floor manager of the House bill, made identical floor statements narrowing the scope of the section 362(b)(4) exception in order to attract additional votes:

This section 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 or property of the estate.\footnote{118}

These statements are an important guide to interpreting the legislative intent behind the Bankruptcy Code. Although courts generally find statements of individual legislators of dubious value when constru-

\footnote{114} 11 U.S.C. § 362(b)(4) (1982). The Code also exempts from the automatic stay enforcement of nonmoney judgments obtained by a governmental unit to enforce its police or regulatory power. \textit{Id.} § 362(b)(5).

\footnote{115} As opposed to "private" enforcement by individuals or public interest groups. \textit{See infra} text accompanying notes 132-39.

\footnote{116} The House Report states:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment.


ing statutes, the circumstances under which the Bankruptcy Code was passed make these statements an exception to the rule. Indeed, one bankruptcy judge has publicly stated that the floor statements of Senator DeConcini and Representative Edwards are the most accurate expressions of Congress' intent.120

Despite their importance, these floor statements leave open the question of whether the section 362(b)(4) exception to the automatic stay applies to actions by government agencies which were neither undertaken for pecuniary reasons, nor to protect the public health or safety, i.e., "general welfare" regulations. The first clause of the statement clearly excepts from the automatic stay those government actions to protect the public health and safety. Just as clearly, the second clause excludes from this exception actions by the government to protect its pecuniary interests. Together, the statements can be read in two ways. Either the only government actions excepted from the automatic stay are those to protect the public health and safety, or the only government actions not excepted from the automatic stay are those to protect the government's own pecuniary interests. The susceptibility of many public environmental suits to the automatic stay depends on which interpretation prevails. "General welfare" regulations would encompass such environmental objectives as protection of endangered species, preservation and expansion of parks and wilderness areas, preservation of wild and scenic rivers, and enforcement of the aesthetic requirements of the Clean Air Act.

Courts applying the section 362(b)(4) exception have reached three different and inconsistent conclusions. Some courts have read the statute literally, without regard to the intent of the legislative history, and have held that the automatic stay does not apply to any governmental exercise of its police or regulatory power.121 Other courts have interpreted the floor statements to except from the automatic stay only those government actions intended to protect only the public's health and

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120. Speech by Hon. Jacob Dim, Bankruptcy Judge, D. Minn., at Commercial Law League of America Midwest District Fall Meeting in Minneapolis (Sep. 14-16, 1979), reprinted in 85 CoM. L.J. 41 (1980). Judge Dim points out that the reports of the Senate and House Judiciary Committees were written about versions of the Act prior to adoption, whereas the floor statements correspond to the language finally adopted. Accord Klee, supra note 13, at 957-58.

121. E.g., NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981) (summary judgment to allow NLRB to enforce its decision ordering debtor to reinstate with back pay two employees who had been discriminatorily discharged); Commodity Futures Trading Comm'n v. Incomco, Inc., 649 F.2d 128 (2d Cir. 1981) (appellant can maintain an action against the debtor for refusing access to books and records); In re Tauscher, 7 Bankr. 918 (Bankr. E.D. Wis. 1981) (Secretary of Labor can continue proceedings to fix penalties against the debtor for labor violations but is stayed from enforcing the penalties).
safety. Still other courts have read the floor statements to except all government proceedings designed to further the broader purpose of protecting the public's health, safety, and welfare, leaving government proceedings to protect merely pecuniary interests within the reach of the automatic stay.

Those cases in which the courts made no reference to the floor statements of Senator DeConcini and Representative Edwards were not well reasoned. The floor statements cannot be overlooked because they were used to drum up the additional votes needed to pass the Bankruptcy Code. At the very least, those statements must be read to limit the automatic stay exception to those proceedings in which the government was not seeking to protect a pecuniary interest. That clarification was necessary because, if read literally, section 362(b)(4) would allow governmental units to proceed against debtors for any reason, including a purely pecuniary one.

The interpretation of the floor statements most consonant with environmental goals excepts from the automatic stay any police power or regulatory action that is intended to benefit the public health, safety, and welfare, provided that action does not protect or further a pecuniary interest of the government. Senator DeConcini and Representative Edwards are likely to have intended this interpretation for two reasons.

First, both the Senate and House reports evince an intent to prevent a debtor in bankruptcy from using the automatic stay to frustrate legitimate government regulation. The House Report mentions with disapproval two examples where the automatic stay, as it operated under the Bankruptcy Act, frustrated important "general welfare" regulations. The first was a case in which the stay prevented Maine from closing down a debtor's industrial plant which was polluting a river in violation of state environmental regulations. In the second case, Nevada was prevented from obtaining an injunction against an individual acting in violation of state consumer protection laws. Coupled with

123. E.g., Missouri v. U.S. Bankruptcy Court for E.D. of Arkansas, 647 F.2d 768, 775-77 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) (alternative holding that state court appointment of receiver to operate insolvent grain elevators is not excepted from automatic stay because such action was not primarily for the benefit of public health, welfare, morals, or safety); Donovan v. TMC Industries Ltd., 20 Bankr. 997 (Bankr. N.D. Ga. 1982) (granting the Secretary of Labor an injunction against the debtors' sale or transport of goods produced in violation of Fair Labor Standards Act).
124. See supra notes 117-18 and accompanying text.
126. Id. at 175, reprinted in 1978 U.S. CODE CONG. & AD. News at 6135. Although the Senate Report does not mention similar examples, it does mirror the House Report with
both reports’ broad descriptions of the reach of section 362(b)(4), these examples indicate that the original intent of both the House and Senate bills was to except from the automatic stay all regulatory actions intended to protect the public’s health, safety, and welfare. Had Senator DeConcini and Representative Edwards intended a drastic deviation from this original broad objective, they probably would have stated that fact in less ambiguous terms than those found in their floor statements.

Second, the most sensible reading of the floor statements is that Senator DeConcini and Representative Edwards meant only to clarify that not every government action was excepted from the automatic stay. A literal reading of section 362(b)(4) and the Senate and House reports would allow governmental units an exception from the stay to pursue purely pecuniary actions against the debtor, giving the government a substantial and very unfair advantage over nongovernment creditors. The inequity of such a reading of section 362(b)(4) suggests the floor statements were intended only to cure inaccurate interpretations.

This reading of the floor statements places neither the government nor the worthy Chapter 11 debtor at a substantial disadvantage. It permits the government to place all citizens within the scope of its laws. Activities that violate environmental standards may lead to irreparable environmental injury if the regulations are not enforced. Regulation of this type, therefore, takes on an urgency not present in the protection of mere pecuniary interests. At the same time, if the government proceeding will have an unduly detrimental effect on the Chapter 11 debtor or its estate, the court retains discretion to grant a stay regardless of the section 362(b)(4) exception to the automatic stay. This interpretation also diminishes the attractiveness of bankruptcy to bad faith solvent debtors who wish merely to avoid forced compliance with environmental rules and regulations by filing a bankruptcy petition.
B. Actions By “Private Attorneys General”

The language of section 362(b)(4) expressly limits the exception to actions brought by “governmental units.” Although Congress intended this term to be liberally construed,\(^\text{132}\) the Code’s definition of governmental unit, though broad, has been interpreted to exclude private action in any form.\(^\text{133}\) In *Matter of Revere Copper & Brass, Inc.*,\(^\text{134}\) the bankruptcy court adhered to the Code’s literal definition and ruled that a private environmental group seeking to enforce a statutory regulation does not fall under the section 362(b)(4) exception to the automatic stay for governmental units.\(^\text{135}\) The court rejected the argument that private environmental groups, proceeding under the citizen suit provision of the Clean Water Act,\(^\text{136}\) were acting on behalf of the government as “private attorneys general” and thus were within the Code’s definition of governmental unit.\(^\text{137}\) Should *Revere Copper & Brass* be followed, private suits enforcing public statutes and regulations will be automatically stayed, while an identical enforcement suit by a governmental unit would be excepted from the automatic stay.\(^\text{138}\)

Congress could easily solve this anomaly by amending the Code’s definition of governmental unit to include private attorneys general acting under citizen suit provisions of federal and state legislation. Congress’ primary consideration in determining which actions to exempt from the automatic stay was the objective of the suit, not the identity of the prosecuting party. Section 362(b)(4) was enacted in environmental regulations or to avoid liability to private parties. *See supra* notes 35-53 and accompanying text.


\(^{133}\) “Governmental unit” is defined as “United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.” 11 U.S.C. § 101(21) (1982).

\(^{134}\) 29 Bankr. 584 (Bankr. S.D.N.Y. 1983).

\(^{135}\) Id. at 588.


\(^{137}\) 29 Bankr. at 588.

recognition of the social importance of unimpeded health, safety, and public welfare regulation. The very existence of citizen suit provisions demonstrates that Congress intends that the enforcement of particular regulations should not depend entirely on the diligence of administrative agencies. Thus, extending the section 362(b)(4) exception to private attorneys general, proceeding when the responsible government agency chooses not to prosecute, would further Congress’ primary purpose in enacting section 362(b)(4). Should such an amendment be enacted, or *Revere Copper and Brass* be reversed or not followed, bankruptcy courts would retain discretion to impose a stay, regardless of the section 362(b)(4) exception, if the proceeding would threaten the assets of the estate.139

C. The Bankruptcy Court’s Discretion to Lift the Automatic Stay

A narrow interpretation of the scope of the section 362(b)(4) exception, together with the Code’s strict definition of governmental unit, may allow solvent businesses to avoid environmental regulations by filing for unnecessary reorganizations under Chapter 11, thereby invoking the automatic stay. If such filings occur, environmental litigants subject to the automatic stay, both public and private, will need to move bankruptcy courts to lift those stays. The Bankruptcy Code provides that relief from the automatic stay shall be granted upon a showing of cause.140 Relief is individualized, however, granted or withheld on the basis of the facts of each case.141 Because the bankruptcy court sits in equity,142 it must consider the effects of the automatic stay on both parties and balance potential injuries when fashioning relief.143

Case law to date is silent on what constitutes cause sufficient to justify granting environmental litigants relief from the automatic stay. In non-environmental cases, cause for relief has been found where the automatic stay was not necessary to protect the debtor or to prevent a creditor from gaining an unfair advantage,144 to avoid unnecessary delay,145 and to further the administration of justice and convenience of the parties.146

The primary concern of the bankruptcy court is maximization of assets for creditors. Thus, the environmental litigant seeking relief

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139. *See supra* note 113.
from the automatic stay should downplay any financial burdens the requested relief would have on the debtor or bankruptcy estate. A court will look with disfavor upon a motion for relief from the automatic stay if substantial litigation expenses or a substantial money judgment are the likely result. The environmental litigant should thus stress the regulatory, rather than monetary, goal of its lawsuit and emphasize the public importance and environmental urgency of prompt resolution. The bankruptcy court should grant relief from the automatic stay in cases where the equities of these urgent regulatory interests outweigh the potential financial burden on the debtor or estate.

D. Timing of Actions Subject to Stay

The automatic stay applies only to an action or proceeding that "was or could have been commenced before the commencement" of the bankruptcy case. When the conduct at issue occurred after the filing of the debtor's petition, the automatic stay and automatic stay exceptions are inapplicable. A party suing the debtor for post-petition conduct must look instead to the provisions of 28 U.S.C. § 959. This seldom-used provision allows a bankruptcy trustee or other manager of the debtor's property to be sued without leave of the bankruptcy court for any acts committed while carrying on the debtor's business. In addition, section 959 requires that the business must be operated according to the requirements of state law.

A few characteristics of section 959 are worth noting. First, the conduct of the debtor that is at issue must be connected with the continued operation of the debtor's business. Difficulties may sometimes arise in distinguishing between operation of the debtor's business and mere preservation of the debtor's estate. Second, section 959 makes no distinction between public and private litigants. Private groups and individuals, while denied the section 362(b)(4) exception to the automatic stay, may bring lawsuits under 28 U.S.C. § 959. Third, section 959 only expressly requires the trustee to operate the business in accordance with state laws. One bankruptcy court has suggested that vio-

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147. The environmental litigant should point out that the court can always stay those aspects of any judgment that would unduly interfere with the bankruptcy case. See 11 U.S.C. § 105 (1982). But see In re Tucson Yellow Cab, Inc., 27 Bankr. 621, 623 (Bankr. 9th Cir. 1983) (abuse of discretion to issue stay pursuant to 11 U.S.C. § 105 where the enjoined proceedings would not threaten the assets of the estate).


149. This necessarily includes those cases where the debtor remains in possession of the property. 28 U.S.C. § 959(a) (1976). See also 11 U.S.C. §§ 1101(1), 1107 (1982).


151. Id. § 959(b) (Supp. V 1981).

152. See 1 COLLIER ON BANKRUPTCY ¶ 12.3611 (J. Moore 14th ed. 1974); 2 id. ¶ 23.20.

153. See supra notes 132-39 and accompanying text.
lations of federal law are not actionable.\textsuperscript{154} Any such distinction would be extremely superficial, however, and has not been made in other cases.\textsuperscript{155} Thus, section 959 holds trustees more accountable than the Bankruptcy Code holds debtors. The former requires that bankrupt businesses be operated in compliance with all applicable laws, whereas the Code’s automatic stay provision shields debtors from some actions and proceedings.\textsuperscript{156}

Although the language of section 959 appears clearly to establish a right to challenge post-petition conduct, the bankruptcy courts have not been receptive to its use. First, some courts have overlooked the section altogether.\textsuperscript{157} Second, if the conduct at issue did not occur exclusively after the bankruptcy petition was filed, a court may merge pre-petition and post-petition conduct and find section 959 inapplicable. Third, a bankruptcy court may use its equitable powers to deny a hearing to the post-petition suit by finding the benefits of the suit are outweighed by its burdens or associated dangers to the bankruptcy estate.

The distinction between pre-petition and post-petition conduct must be carefully pled. In \textit{Revere Copper And Brass} the Chapter 11 debtor-in-possession continued to manufacture copper and aluminum products.\textsuperscript{158} Without leave of the bankruptcy court, two environmental groups filed a lawsuit against the debtor under the citizen suit provision of the Clean Water Act.\textsuperscript{159} Their complaint alleged that the debtor had violated the Act in the past and would continue to do so in the future.\textsuperscript{160} Accordingly, the requested relief included an injunction against future violations and civil penalties for each day the manufacturing plant had operated in violation of the Clean Water Act.\textsuperscript{161} The bankruptcy court refused to hear the suit for two reasons. The motion for exemption from the automatic stay under section 362(b)(4)

\textsuperscript{154} In re Revere Copper And Brass, Inc., 29 Bankr. 584, 588 (Bankr. S.D.N.Y. 1983).
\textsuperscript{156} See supra notes 113-31 and accompanying text.
\textsuperscript{157} See, e.g., Matter of National Hospital & Institutional Builders, 658 F.2d 39 (2d Cir. 1981), cert. denied, 454 U.S. 1149 (1982) (allowing bankruptcy court to enjoin local regulatory board from revoking debtor’s permit to operate nursing home); In re King Memorial Hospital, Inc., 4 Bankr. 704 (Bankr. S.D. Fla. 1980) (allowing bankruptcy court to enjoin state health agency from forfeiting debtor’s exemption from a certificate of need review).
\textsuperscript{158} 29 Bankr. at 585.
\textsuperscript{159} 33 U.S.C. §1365 (1976).
\textsuperscript{160} 29 Bankr. at 585-86.
\textsuperscript{161} \textit{Id.} To the extent that the civil penalty portion of the prayer was not for actual damage but, rather, was meant as punishment, it would not be allowed against the reorganizing debtor. See supra notes 58-59 and accompanying text.
was denied because the plaintiffs did not fall within the Code's definition of governmental unit.\(^{162}\) Plaintiffs were also denied an opportunity to bring the suit under section 959. The court correctly characterized section 959 as being concerned only with operation of the debtor's business after the commencement of the bankruptcy case. Yet, the court enjoined the prosecution of that portion of plaintiff's lawsuit alleging distinct post-petition Clean Water Act violations.

Because the court's opinion inadequately addressed the fact that the complaint alleged *continuing* violations of the Clean Water Act, it is impossible to determine whether the court based its decision on section 959 or, instead, on the court's broad powers of equity.\(^{163}\) If the court applied section 959, it seems to have established a rule of strict pleading for actions brought under the section. The Federal Rules of Civil Procedure should preclude such a strict rule.\(^{164}\) On the other hand, if the court enjoined the lawsuit based on its general equitable powers,\(^{165}\) it must have found that the public harm caused by the debtor's continued violation of the Clean Water Act was outweighed by the costs to the bankruptcy estate of litigating the continuing violation claim. Section 959, however, does not provide for such a balancing.

The Eighth Circuit Court of Appeals also applied section 959 unsatisfactorily by interjecting equitable balancing into its application of the section. In *Missouri v. U.S. Bankruptcy Court for E.D. Arkansas*,\(^{166}\) the State of Missouri sought a writ of prohibition to prevent the bankruptcy court from exercising jurisdiction over farmer-owned grain stored in the debtor's grain elevators. Missouri contended, *inter alia*, that the trustee was operating the grain elevators without a state license in violation of section 959.\(^{167}\) In denying the writ, the court noted that the trustee was obligated to conduct the debtor's business in conformance with applicable state laws, but stated that the trustee need only do so "to the extent possible."\(^{168}\) Because the court did not fully explain its decision, the size of the hole it punched into section 959 remains unclear.\(^{169}\)

The reluctance of the bankruptcy courts to apply 28 U.S.C. § 959

\(^{162}\) See supra notes 133-38 and accompanying text.


\(^{164}\) The United States Supreme Court has said, "The Federal Rules [of Civil Procedure] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." Conley v. Gibson, 355 U.S. 41, 48 (1957). See also Moore's *Federal Practice* ¶ 8.04 (2d ed. 1983); F. James & G. Hazard, *Civil Procedure* § 2.11 (2d ed. 1977).

\(^{165}\) See supra note 113.

\(^{166}\) 647 F.2d 768 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982).

\(^{167}\) Id. at 777.

\(^{168}\) Id. at 777-78.

properly may stem from the section’s award of unconditional rights to plaintiffs bringing certain actions. On its face, the section seems a formidable weapon to ensure that businesses operating under Chapter 11 comply with environmental laws. Faced with such a potentially serious restriction on the debtor’s rehabilitation effort, the bankruptcy courts seem to be asserting their perhaps inherent bias that rehabilitation of the debtor should take precedence over the debtor’s compliance with federal and state law. To the extent that Congress has taken the opposite position by enacting section 959, as well as the section 362(b)(4) exceptions to the automatic stay, the courts should defer to Congress’ intent.170

IV
A HYPOTHETICAL

This Part applies the environmental/bankruptcy conflicts analysis developed above to a hypothetical solvent Chapter 11 petitioner. Acme Industries, Inc. is a large conglomerate with interests in manufacturing, real estate development, timber production, and mining. Acme is currently profitable, with a strong financial future. However, the company’s environmental record is not good, and it faces a number of environmental lawsuits.

Foremost among these suits are claims stemming from Acme’s illegal disposal of toxic wastes generated by its manufacturing division. Although the federal government quickly took cleanup actions upon discovering the wastes, many residents of the areas surrounding the toxic dumpsites have filed lawsuits for injuries incurred while the wastes were in the dumps. Many of these lawsuits seek punitive damages. In addition, the federal government seeks indemnification for cleanup expenses.

Acme’s real estate division is also involved in litigation. It is defending a condemnation proceeding brought by the State of Columbia. Columbia hopes to expand a state park by acquiring land upon which Acme intended to develop a large condominium complex and village.

The state has also sued Acme’s timber division. Columbia has commenced a timber permit revocation proceeding against Acme because the company violated an agreement not to cut down a stand of old-growth timber which supported a rare owl habitat. Acme also vio-

170. Of course the bankruptcy court maintains the authority to stay any action regardless of whether it falls within 28 U.S.C. § 959. See supra note 113. In reaching its decision, however, the court should consider the objectives sought by the applicable law. The action or proceeding should only be stayed if the balance of injury favors the debtor.
lated the agreement by causing excessive siltation of an important salmon and steelhead spawning ground.

Conduct of Acme's mining division has prompted a group of Columbia citizens to sue the company for alleged violations of the Clean Water Act. The lawsuit alleges that Acme's construction of a waste pond next to a river which provides local residents with water has endangered the health and safety of the plaintiffs in violation of the Act.

Faced with these threats to its profitability, Acme files a petition to reorganize under Chapter 11 of the Bankruptcy Code. Immediately upon filing, the automatic stay halts the federal government's toxic cleanup indemnification suit. Similarly, the automatic stay prevents the private prosecution of all pending and future toxic waste suits. Any plaintiffs who have already received favorable judgments are stayed from instituting collection procedures. Acme probably will obtain the appointment of a special master to estimate the validity and amounts of the remaining toxic waste suits. In addition, Acme will likely avoid the awarding or collection of punitive damages.

The condemnation proceeding may or may not be stayed, depending upon how the bankruptcy court interprets the section 362(b)(4) exception to the automatic stay. If the court views the exception as only covering governmental actions to protect the public's health and safety, then the proceeding will be stayed. These same considerations will determine whether or not the State of Columbia may continue its timber permit revocation proceeding. Since the protection of rare owl habitat and fish spawning grounds are not conventionally viewed as involving public health or safety, the permit revocation proceeding may also be stayed. The automatic stay will also stop the citizens' suit to force Acme to clean up the mining waste pond. Because the term governmental unit does not include groups acting as private attorneys general under citizen suit legislative provisions, the section 362(b)(4)

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171. See supra notes 54-57, 105-112 and accompanying text. Even though some of the lawsuits may not be brought until after Acme has filed its bankruptcy petition because they are based on pre-petition conduct, the automatic stay will apply to them.

An interesting case may occur where the injury to a plaintiff does not manifest itself until after the filing of the petition but is based on pre-petition conduct of the debtor. If the applicable law does not recognize a cause of action until the injury has become manifest, the plaintiff has a lawsuit that could not have been brought before the commencement of the bankruptcy case. See 11 U.S.C. § 362(a)(1) (1982). If section 362(a)(1) and 28 U.S.C. § 959 are read literally, this situation is covered by neither.


173. See supra notes 60-68 and accompanying text.

174. See supra notes 58-59 and accompanying text.

175. See supra notes 113-131 and accompanying text.

176. Of course, 28 U.S.C. § 959 may be used to insure the debtor's post-petition compliance with applicable law regardless of the objectives sought by the law. See supra notes 149-170 and accompanying text.
exception will not apply.\textsuperscript{177} Because the conduct underlying the timber permit revocation proceeding and the Clean Water Act citizen suit occurred entirely before the commencement of Acme's bankruptcy case, 28 U.S.C. § 959 is not applicable. However, the section may be used to insure that the conduct does not continue and worsen existing problems. Once in bankruptcy, Acme must conduct its business in conformance with all applicable laws.

Adoption of the reforms suggested by this Comment would substantially alter the results of this hypothetical. First, Acme's access to bankruptcy protection would not be automatic. The company would need to prove that it is presently insolvent\textsuperscript{178} or that without protection insolvency is imminent. A mere threat to the company's profitability would not be sufficient to trigger access to bankruptcy. If Acme establishes a legitimate need for bankruptcy protection, the government's indemnification suit and the toxic tort suits will be automatically stayed.\textsuperscript{179} Unless the litigation costs are extremely burdensome to the company, the court should allow the toxic tort suits to proceed to judgment and stay only the enforcement of any judgments.\textsuperscript{180} Second, the timber revocation and condemnation proceedings would be excepted from the automatic stay. This would result from reading the section 362(b)(4) exception to the automatic stay to include government actions to protect the public welfare. If the continuation of these proceedings would substantially interfere with Acme's bankruptcy rehabilitation, the bankruptcy court could order a discretionary stay under its equity powers.\textsuperscript{181} And, third, by redefining "governmental unit" to include citizen groups acting as private attorneys general under legislative citizen suit provisions, the private lawsuit seeking to force Acme to clean up its waste pond would not be stayed. All in all, these reforms would help achieve a better balance between the goals of environmental protection and bankruptcy rehabilitations.

CONCLUSION

With the advent of the Bankruptcy Reform Act of 1978 bankruptcy has become an attractive business planning option. The omission of the insolvency requirement for business reorganizations under Chapter 11 has opened the bankruptcy courts' doors to previously inel-

\textsuperscript{177} See supra notes 132-139 and accompanying text.
\textsuperscript{178} For a definition of insolvency, see supra note 36.
\textsuperscript{179} These suits will be automatically stayed because their objectives are pecuniary. See supra notes 118-129 and accompanying text.
\textsuperscript{180} This result is desirable because it may be the only way the toxic tort claimants can be equitably treated. Acme's insolvency may mean that the tort claims cannot be paid in full. If the earliest toxic tort judgment creditors are allowed to collect in full, later judgment creditors will be inequitably forced to bear the burden of Acme's insolvency.
\textsuperscript{181} See supra note 113.
igible business debtors. Rather than serve as the last resort for financially distressed businesses, bankruptcy can serve as a hiding place for any company desiring to benefit from its wide-ranging protective provisions. The publicity surrounding the recent Chapter 11 filing by Manville Corporation has insured that a businessperson no longer need be clever to exploit this new bankruptcy opportunity.

As the Manville case shows, the advantages of filing to reorganize in bankruptcy may be substantial. The automatic stay of most pending and future lawsuits and proceedings, the prohibition against punitive damage claims, and the estimation of contingent claims all provide debtors with financial advantages. In addition, the conflicting interpretations of the section 362(b)(4) exception to the automatic stay and the recent reluctance of courts to apply 28 U.S.C. § 959 insures that in many cases compliance with important environmental regulations may be avoided by a business willing to file for a bankruptcy reorganization. Taken as a whole, these elements of bankruptcy law show a system skewed in favor of the reorganizing business and against the environment and individuals who have been personally injured by the debtor.

As environmental issues become ever more important to the American people, and greater environmental responsibilities are placed on businesses, the deficiencies in the bankruptcy law will increasingly manifest themselves in the environmental arena. Workable solutions to these problems have been proposed in this Comment. If instituted, they would help bring about a better compromise between society's sometimes conflicting goals of preventing business failures and protecting the environment.