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ECRA and the Bankruptcy Code

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ECRA AND THE BANKRUPTCY CODE

A. INTRODUCTION

In New Jersey, a conflict occurs when property from a bankrupt estate qualifies as an "industrial establishment"[1] under the Environmental Cleanup Responsibility Act (ECRA).[2] How must the trustee in bankruptcy respond to comply with the appropriate law? According to ECRA, violations for noncompliance "constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding."[3] Furthermore, all obligations resulting from such violations "constitute continuing regulatory obligations."[4] The Bankruptcy Reform Act of 1978[5] was enacted generally to "provide for an equitable settling of creditors' accounts by usurping from the debtor his power to control the distribution of his assets."[6] ECRA was enacted "to protect the citizens and environment of New Jersey from the harmful effects of improperly controlled hazardous substances."[7] When a trustee in bankruptcy transfers assets in violation of ECRA, a highly controversial conflict

1. N.J. STAT. ANN. § 13:1K-8(f) (West Supp. 1988) provides: " 'Industrial Establishment' means any place of business engaged in operations which involve the generation, manufacturer, refining, transportation, treatment, storage, handling, or disposal of hazardous substances or wastes on-site, above or below ground. . . ." *See also* N.J. STAT. ANN. § 13:1K-9 (West Supp. 1988) for the duties and obligations that the statute places upon owners or operators of industrial establishments planning to close, sell, or transfer operations.

2. Environmental Cleanup Responsibility Act, N.J. STAT. ANN. § 13:1K-6 to -13 (West Supp. 1988) [hereinafter ECRA].

3. N.J. STAT. ANN. § 13:1K-12, (West Supp. 1988); *see also* N.J. ADMIN. CODE tit. 7, § 26B-14.1(b) (1987).

4. N.J. STAT. ANN. § 13:1K-12 (West Supp. 1988).

5. 11 U.S.C. § 101 (1979).

6. *In re* Quanta Resources, 739 F.2d 912, 915 & n.7 (3d Cir. 1984), *aff'd sub nom.* Midlantic Nat. Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, *reh'g denied*, 475 U.S. 1090 (1986).

7. N.J. STAT. ANN. § 13:1K-7 (West Supp. 1988). *See also* Long, *New Jersey's En-*

between the two policies may result.[8]

B. Does the Bankruptcy Code Preempt ECRA?

Although courts have broadly construed a state's police power to promote legitimate public policy, federal law always preempts state law when the two directly conflict.[9] An important issue under ECRA is whether the Bankruptcy Code preempts in its entirety the effects of ECRA when both are applied to an estate in bankruptcy.

Because ECRA is a relatively new statute,[10] there is very little case law interpreting it. This makes subsequent litigation highly unpredictable. *In re Borne Chemical, Inc.*[11] is the only case that has addressed the conflict between bankruptcy law and ECRA. In *Borne*, the debtor-in-possession, pursuant to Chapter 11 of the Bankruptcy Code, sought judicial approval to transfer two parcels of land without complying with ECRA.[12] Parcels "A" and "B" were littered with hazardous waste that severely lessened the land's market value.[13] The sale was part of a plan to provide funds for reorganization.[14]

The debtor maintained that the federal Bankruptcy Code should preempt the ECRA bankruptcy provision[15] under the supremacy clause of the Constitution.[16] The court applied the preemption test set forth in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission.*[17] The *Borne* court determined that no

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vironmental Cleanup Responsibility Act: An Innovative Approach to Environmental Regulation, 90 Dick. L. Rev. 159, 192 (1985).

8. *See infra* notes 15-20.

9. *See* Perez v. Campbell, 402 U.S. 637, 644 (1971) (setting forth a two-step process for determining preemption questions: first, construe the statutes to discover their purposes; second, determine if state law interferes with the objectives of federal law); *see also infra* notes 15-20.

10. The law became effective December 31, 1983.

11. 54 Bankr. 126 (D. N.J. 1984).

12. *Id.* at 128. *See also* Long, *supra* note 7, at 192.

13. 54 Bankr. at 128.

14. *Id.*

15. *Id.* at 128-29. The federal Bankruptcy Code is cited in 11 U.S.C. § 101 (1982).

16. 54 Bankr. at 129; U.S. Const. art. VI, cl. 2.

17. 461 U.S. 190 (1983). This decision refined and explained the law of preemption as set forth in Perez v. Campbell, 402 U.S. 637, 644 (1971). *See supra* note 9 for presentation of *Perez* preemption test. In *Pacific Gas*, the Court presented an overview of preemption standards:

> It is well established that within Constitutional limits Congress may preempt state authority by so stating in express terms. Jones v. Rath Packing Co., 430 U.S. 519

Bankruptcy Code provision explicitly and directly provides that the Code supersedes all state law. The court also held that the Code is not so pervasive that it precludes enforcement of state law governing the sale of property.[18] Since it was possible to comply with both the federal and state legislation, ECRA was not preempted under the "physical impossibility" rule,[19] which provides that a federal law or regulation preempts state law "where compliance with both . . . is a physical impossibility."[20] Accordingly, the court permitted the debtor to sell the property only after it had complied with ECRA regulations.[21] In response, Borne Chemical sought to abandon Parcel B and

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(1977). . . . Absent explicit preemptive language, Congress' intent to supersede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 148 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

54 Bankr. at 130 (quoting *Pacific Gas*, 461 U.S. at 203-04). *See also* Note, *The Environmental Cleanup Responsibility Act (ECRA): New Accountability for Industrial Landowners in New Jersey*, 8 SETON HALL LEGIS. J. 331, 349-50 n.110 (1985).

18. 54 Bankr. at 130. The court quoted Rhodes v. Stewart, 705 F.2d 159, 163 (6th Cir. 1983), *cert. denied*, 464 U.S. 983 (1983): "[It] is fundamental that the state and federal legislatures share concurrent authority to promulgate bankruptcy laws." *Id.* Furthermore, the *Borne* court observed that the Bankruptcy Code specifically provides for the application of state bankruptcy law, or state law in general, citing 11 U.S.C. § 552(b) (1982) (state law bankruptcy exemptions) and 28 U.S.C. § 959(b) (1982) (trustee or debtor in possession shall manage or operate property in accordance with state law where it is situated). *See* Note, *supra* note 17, at 350 n.112.

19. 54 Bankr. at 130. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). An example of physical impossibility would be a case where federal law prohibits the marketing of avocados having a seven percent oil content and the state regulation excludes from the state any avocado having less than an eight percent oil content. *Id.* at 143. The *Borne* court concluded that such an impossibility did not exist in the instant case. 54 Bankr. at 130. *See* Note, *supra* note 17, at 350 n.114.

20. 373 U.S. at 142.

21. 54 Bankr. at 132.

to cease operations on Parcel A without complying with ECRA.[22]

C. MAY A BANKRUPT DEBTOR IGNORE ECRA AND ABANDON BURDENSOME PROPERTY?

If the bankrupt estate does not have the resources to clean up the noncomplying land, ECRA may be an obstacle to the sale of property.[23] Cleanup costs generally constitute the majority of ECRA compliance expenses.[24] While ECRA allows the transferee to assume these costs,[25] the transferee may not assume the expensive procedure of preliminary notice.[26]

Although the *Borne* court prohibited the precompliance sale of the two contaminated parcels, it did allow the debtor to abandon one parcel and cease operations on the other.[27] The court based its decision on section 554(a) of the Bankruptcy Code, which allows a trustee to abandon any property that is burdensome to the estate.[28] Finding Parcel B burdensome because of its environmental problems, the *Borne* court allowed its abandonment.[29]

The *Borne* court based its decision on the holding in *In re Quanta Resources Corp.*[30] In *Quanta*, a non-ECRA case, the United States District Court for the District of New Jersey held that the transferee could abandon burdensome property contaminated with hazardous waste even though abandonment would violate environmental statutes regulating the disposal of hazardous waste.[31] Accordingly, the *Borne* court granted the trustee's motion to abandon Parcel B without com-

22. *Id.* at 134-35.

23. *Id.* at 131.

24. *See* Note, *supra* note 17, at 351.

25. 54 Bankr. at 131 n.1. *See* N.J. STAT. ANN. § 13:1K-9(3)(c) (West Supp. 1988); N.J. ADMIN. CODE tit. 7, § 26B-5.1 to -5.8 (1987).

26. *See* N.J. STAT. ANN. § 13:1K-9 (West Supp. 1988); *see* N.J. ADMIN. CODE tit. 7, §§ 26B-3.1 to -3.5 (1987).

27. 54 Bankr. at 135. *See also* Note, *supra* note 17, at 351.

28. Borne qualified as a trustee in bankruptcy under 11 U.S.C. § 1107.

29. 54 Bankr. at 134.

30. 55 Bankr. 696 (D.C. N.J. 1983), *cert. granted sub nom.* Midlantic Nat. Bank v. N. J. Dep't of Envtl. Protection, 474 U.S. 494, *reh'g denied*, 475 U.S. 1090 (1985).

31. 55 Bankr. at 698-99. The district court in New York allowed the trustee in bankruptcy to abandon property which stored at least 70,000 gallons of contaminated oil. The State of New York argued that such abandonment was a prohibited disposal of hazardous waste under state law. *See* N.Y. ENVTL. CONSERV. LAW § 71-2702 (McKinney Supp. 1982). *See also* Note, *supra* note 17, at 352 & n.122.

plying with ECRA.[32]

To complicate matters, the United States Court of Appeals for the Third Circuit reversed *Quanta* after *Borne* was decided. The court found that "enforcement of state public health and safety laws is not superseded by the abandonment power contained in section 554 of the Bankruptcy Code."[33] The Third Circuit relied on congressional intent at the time of enactment of the abandonment provision of the Bankruptcy Code.[34] Prior case law revealed no legislative intent to grant a trustee abandonment power unrestricted by public health and safety regulation.[35] To the contrary, precedent showed that Congress intended to defer to state police powers.[36] In addition, the court scrutinized sections 554(a) and 959(b) and found that the Code was not enacted to abrogate relevant state laws.[37] Indeed, one court found that

32. 54 Bankr. at 135.

33. *In re* Quanta Resources, 739 F.2d 927 (1984), *aff'd sub nom.* Midlantic Nat. Bank v. N. J. Dep't of Envtl. Protection, 474 U.S. 494 (1986). The court adopted its rationale in the decision of a companion *Quanta* case, which involved the State of New York. *See In re Quanta Resources*, 739 F.2d 912 (1984).

34. 739 F.2d at 915-16. Congressional intent to withdraw police power from a state must be unmistakable. *Id.* at 916.

35. *Id.* at 915-22. The court began its analysis with the following general propositions: (1) there is a basic assumption that Congress did not intend to displace state law, Maryland v. Louisiana, 451 U.S. 725, 746 (1981); (2) where it is argued that Congress intended to withdraw police power from the state, that intention must be unmistakable, Penn Terra Ltd. v. Dep't of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984); and (3) although there has been no express recognition of the abandonment power in the pre-1978 bankruptcy statute, courts approved the exercise of such a power subject to the application of general regulations of a police nature, 4A COLLIER ON BANKRUPTCY para. 70.42, at 502-04 (14th ed. 1978). 739 F.2d at 916. *See also* Note, *supra* note 17, at 353 n.129.

36. 739 F.2d at 920.

37. 739 F.2d at 918-21. *See* 28 U.S.C. §§ 554(a), 959(b) (1982). *See also* Note, *supra* note 17, at 354 n.132. The Court found that, in light of other provisions of the Bankruptcy Code that limit the supersession of state laws and specifically incorporate equity principles into a bankruptcy court's jurisdiction, it was clear that § 554 did not itself preempt state police power regulations. 739 F.2d at 918.

In support of the proposition that Congress did not intend the Bankruptcy Code to generally abrogate the enforcement of state police power regulation, the Third Circuit first cited the express exception to the automatic stay provision. *Id.* That provision halts all actions against the debtor for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." *Id.* (quoting 11 U.S.C. § 362(b)(4) (1982)). This is the same preemption analysis applied in part by the *Borne* court in deciding not to allow the sale of two parcels of the debtor's property.

The Third Circuit also relied on 28 U.S.C. § 959(b) in support of this proposition. 739 F.2d at 919. Implicit in § 959(b) is the notion that the goals of the federal bankruptcy

"Congress has recently recognized in an express fashion its intention that public interest regulations are to outweigh that of the Bankruptcy Act and Rules in the case of conflict."[38]

Ultimately, the court deemed that bankruptcy proceedings were equitable and therefore required a balancing of the federal and state interests.[39] The court weighed the state's interest in "protecting the public health and regulating disposal of hazardous waste" against the federal policy of "providing for an equitable settling of creditors' accounts by preserving for distribution as much of the estate as possible."[40] Finding in favor of the state's interest, the Third Circuit held that the burden of large expenditures inherent in compliance with state waste disposal laws was not sufficient in itself to outweigh the public interest at stake.[41] Absent a clear indication that Congress intended to allow the substitution of governmental action for citizen compliance, equitable principles prompted the court to prohibit abandonment. The court thus relieved the government of its responsibility for cleanup, and enforced individual compliance with state environment laws.[42]

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laws do not authorize transgression of state laws setting requirements for the operation of business, even if the continued operation of the business would be thwarted by applying state laws. 739 F.2d at 919. The court recognized that the language of § 959(b), "manage[ment] and oper[ation]" of the "property," could be read broadly to include abandonment or narrowly to mean only the administration of the business as a going concern. *Id.* The court concluded, however, that "at the very least, the existence of § 959(b) indicates that Congress has not 'unmistakenly ordained' that state law is superseded by the trustee's powers to administer the property of the estate." 739 F.2d at 920.

38. *In re* Canarico Quarries, Inc., 466 F. Supp. 1333 (D. P.R. 1979) (citing § 362(b)(4) of the Bankruptcy Code).

39. 739 F.2d at 921. *See also* Long, *supra* note 7, at 194.

40. 739 F.2d at 921. The court indicated that this bankruptcy policy must be viewed in light of concurrent federal legislative policy which limits federal intrusion into state police power regulations, including environmental protection laws. *Id. See also* Note, *supra* note 17, at 354 n.135.

41. 739 F.2d at 921. *See also* Note, *supra* note 17, at 354 n.132.

42. 739 F.2d at 921-22. *See also* Note, *supra* note 17, at 354 n.137. The court warned that if trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the "cloak" of the abandonment power, compliance with environmental protection laws will be transformed into "government cleanup by default." 739 F.2d at 921. The bankruptcy laws, therefore, were not intended to create such a radical change in the nature of local public health and safety regulation (the substitute of government action for citizen compliance) without an indication that Congress so intended. *Id.* at 922. In support of this proposition, the court cites the Comprehensive Environmental Response, Compensation and Liability Act of 1980, which requires those parties responsible for the disposal of hazardous waste to reimburse the government for the cost of emergency cleanup. 42 U.S.C. § 9607 (1982). One of the objectives of imposing liability is "to induce such [liable] persons to voluntarily pursue appropriate environmental re-

The *Borne* court relied heavily on the district court's reasoning in *Quanta*.[43] The Third Circuit's reversal certainly means that a reversal of Borne Chemical's grant to abandon is imminent on appeal. A reversal of *Borne* will strike a blow in favor of state efforts to correct hazardous waste contamination. As *Borne* stands presently, a transferor can easily circumvent ECRA by petitioning for bankruptcy. Violators can pollute the land and seek refuge under the Bankruptcy Code when their duty to cleanup the site arises. A successful appeal of *Borne* will close this judicial loophole and warn ECRA violators that their indiscretions will be costly. If *Borne* is overturned, the law will be more predictable; other states, therefore, may be more likely to enact their own ECRA-like statutes.

Finally, the *Borne* court considered whether Borne Chemical could cease operations of Parcel A without complying with ECRA.[44] Section 959(b) requires a debtor in possession to "manage and operate property. . . according to the requirements of the valid laws of the State in which such property is situated."[45] Although the Third Circuit never directly addressed this issue, its broad interpretation of section 959(b) in the abandonment context may lead to a reversal of the *Borne* court's decision to permit the cessation of operations on Parcel A.[46] If the court interprets abandonment as cessation of operations, then the *Borne* court's grant to the debtor to allow cessation of Parcel A without compliance with ECRA is susceptible to reversal on appeal.

D. MAY A DEBTOR DISCHARGE ECRA LIABILITY IN BANKRUPTCY?

Section 727(b) of the Bankruptcy Code allows a debtor to discharge certain "claims" or "debts" in bankruptcy.[47] In *Ohio v. Kovacs*,[48] the

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sponse actions with respect to inactive waste sites." H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1 at 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

43. *In re* Borne Chemical, Inc., 54 Bankr. 126, 128 (D. N.J. 1984).

44. *Id.*

45. 28 U.S.C. § 959(b).

46. *See* Note, *supra* note 17, at 356.

47. 11 U.S.C. § 727(b) (1982); 11 U.S.C. § 524(a) (1982). Under § 524(a), a bankruptcy discharge erases the bankrupt's "debt," which is defined as "liability on a claim." 11 U.S.C. § 101(11) (1982). A "claim" is defined as a:

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

(B) right to an equitable remedy for breach of performance if such breach gives

Supreme Court addressed whether a state judgment requiring an individual debtor to clean up a hazardous waste site is a dischargeable "claim" or "debt."[49]

In *Kovacs*, the State of Ohio argued that the legislative history of the bankruptcy provision did not allow the court to classify an equitable remedy as a "claim" unless the plaintiff sought a remedy for a breach of performance.[50] Such a breach also permitted an alternative right to payment.[51] Accordingly, the State maintained that Kovacs' obligation to clean up stemmed from a violation of law, not a "breach of performance."[52] The State also claimed that there was no alternative right to payment, only a right to effect the cleanup order.[53]

The Bankruptcy Court and the Sixth Circuit held that Ohio was urging Kovacs to finance the cleanup in order to enforce an alternative right to payment[54] and to obtain compensation for the state's pecuniary losses.[55] The Sixth Circuit affirmed the Bankruptcy Court's judgment that Kovacs' obligation was a "claim" or "debt" dischargeable in bankruptcy.[56]

The Supreme Court affirmed the Sixth Circuit's holding and found that under state law Ohio had the right to an equitable remedy, in this case an injunction ordering cleanup.[57] Furthermore, the Court held

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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 secured.

11 U.S.C. § 101(4) (1982).

48. 469 U.S. 274 (1988).

49. *Id.* at 275.

50. *In re* Kovacs, 717 F.2d 984, 987 (1983), *aff'd sub nom.* Ohio v. Kovacs, 469 U.S. 274 (1988).

51. *Id.*

52. *Id.*

53. *Id.*

54. 29 Bankr. 816, 818 (S.D. Ohio 1982).

55. 469 U.S. 274.

56. *Id.* at 277.

57. *Id.* at 284-85. The decision should be limited to its facts because the Court emphasized the narrowness of its holding. *Id.* The Court pointed out that Kovacs still would be subject to criminal prosecution for the original violation and to contempt proceedings for failing to comply with the state court orders. *Id.* Moreover, the Court did not decide what the legal consequences would have been if Kovacs had filed his bankruptcy petition before the appointment of the receiver. In that situation, a bankruptcy trustee would have had the various powers and duties authorized by the Bankruptcy Code. *Id.* The Court emphasized that its decision addressed only the dischargeability of the affirmative duty to clean up the site and to pay money for the

that Kovacs' cleanup duty was reduced to a monetary obligation because the receiver was in control of the site and Kovacs was dispossessed.[58] Thus, Kovacs could discharge the obligation in bankruptcy.

Although the *Kovacs* decision apparently diminished the potency of state toxic waste legislation, Justice O'Connor, in concurrence, described how states can mitigate, indeed eliminate, the problems *Kovacs* appears to create.[59] Ohio claimed that the *Kovacs* decision would fatally hinder state environmental laws.[60] O'Connor emphasized that the Court's holding "cannot be viewed as hostile to state enforcement of environmental laws."[61] Substantial recourse remains for states to pro-

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cleanup. The Court's decision did not address the dischargeability of the state court injunctions against contributing further to the pollution or bringing toxic wastes to the site. *Id.*

Finally, the Court admitted that any person in possession of the site must comply with Ohio's environmental regulations and could not refuse to remove the source of the pollution. *Id.* The only parties that the Court lists, however, are Kovacs or anyone receiving the property upon abandonment, or a vendee from the trustee or receiver. *Id.* The Court made no mention of the trustee's obligation to comply with state laws. *Id. Cf.* 28 U.S.C. § 959(b) (1968) (trustee must "operate and maintain" business in compliance with state laws.) *See* Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 VAND. L. REV. 1037, 1053 n.98 (1985).

58. 469 U.S. 274. *See also* Note, *supra* note 17, at 357. The Court quoted a portion of the Sixth Circuit's opinion:

> Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovac's assets. Ohio later used state law to try and discover Kovac's post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the . . . cleanup. . . . The impact of [the State's] attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligation properly imposed upon him by the State Court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance.

In re Kovacs, 717 F.2d 984, 987 (1983).

59. 469 U.S. 285-86.

60. *Id.* at 282.

61. *Id.* at 286. Justice O'Connor recognized that "[b]ecause 'Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state interest as a lien on the property itself, a perfected security interest or merely an unsecured claim depends on Ohio law." *Id.* at 285-86. This statement should serve as a strong recommendation to states that wish to protect their interests in enforcing environmental laws. *See* Note, *supra* note 17, at 153.

tect their own interests.[62] If state law classifies cleanup judgments as statutory liens or secured claims, a state's interest in the debtor's assets is given priority over other creditors.[63] Therefore, New Jersey and states wishing to enact ECRA-like statutes would be advised to enact companion legislation to fill the gap opened by the *Kovacs* Court. Justice O'Connor's concurring opinion can be read as an admonition to state legislatures. Legislative action in this respect allows *Kovacs* and the dischargeability provision in the Bankruptcy Code to remain consistent with the preemption and abandonment issues mentioned above. Furthermore, this consistency will act as an impetus for other states to enact hazardous waste laws.

E. CONCLUSION

Courts normally grant states great deference to regulate public health and welfare via the state's police power. Absent an overwhelming federal interest, courts should allow New Jersey to regulate its toxic waste disposal without hindrance from federal legislation. Due to the severity of its toxic waste problem, New Jersey is at the forefront of toxic waste legislation. Other states confronting the toxic waste disposal crisis can learn from the New Jersey legislature's expertise in this field.

The federal government should promote the enactment of state toxic waste legislation. Judicial deference to ECRA encourages other states to enact similar statutes by giving them confidence that courts will not allow violators to circumvent liability. Such a policy is particularly necessary in the area of bankruptcy. Giving debtors a "fresh start" is a shield. It should not be used as a sword.

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62. 469 U.S. at 286.

63. *Id.* at 286. *See also* Note, *supra* note 17, at 358 n.153.

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