

APPENDIX F-5

Proposals by the National Association of Attorneys General

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 FIRST STREET NE SUITE 1100
WASHINGTON, DC 20002
(202) 326-6025
(202) 408-7014 FAX

CHRISTINE T. MILLIKEN
*Executive Director
General Counsel*

May 7, 1997

PRESIDENT
SCOTT HARSHBARGER
Attorney General of Massachusetts

PRESIDENT-ELECT
JAMES E. DOYLE
Attorney General of Wisconsin

VICE PRESIDENT
MIKE MOORE
Attorney General of Mississippi

IMMEDIATE PAST PRESIDENT
TOM UDALL
Attorney General of New Mexico

TO: Brady Williamson, Chair, Bankruptcy Review Commission

FROM: Karen Cordry, NAAG Bankruptcy Counsel

SUBJECT: Review of Outstanding Government Proposals

I have looked at the matrix on general governmental issues to isolate the remaining proposals that still need to be dealt with by the Commission. In doing so, I have tried to eliminate those that are more appropriately dealt with by the Rules Committee and which need no explicit statutory changes. While it would be helpful to have the Commission endorse these changes, I think most have sufficient merit for the Committee to consider them on their own. In any event, I recognize that at this stage of the process it is important to narrow the list of remaining issues.

The list that is attached is, of course, supplementary to the Working Group Proposals that have already been prepared, and is, by design, fairly short. I have, however, also included a number of matters that have been raised with me since the date of my original submissions to the Commission which was incorporated into the matrix. If these matters do not appear to be overly controversial, it would be helpful to have them considered as well.

Finally, I have attached a memorandum that reviews the current status of the complex of proposals dealing with, as I have phrased it, "the debtor's obligation to obey the law." Some of these matters have been dealt with by the Government Working Group. Some are implicated by the actions of the Future Claims and Mass Torts Group. To the extent that the suggestions by the latter group implicate governmental actions I do not believe that they can be divorced from the remainder of the decisions and policy judgments being made by the Commission. Thus, this memorandum attempts to deal with the issues on a global basis, as well as to respond to the future claims proposals and some of the comments received by the Commission about the proposed changes to the automatic stay. This discussion is meant to supplement the memorandum previously submitted by the Justice Department in December with which I wholeheartedly concur.

I hope it will be possible at the May meeting to reach final resolutions on a number of these items. If I can be of additional assistance please let me know.

cc: Bankruptcy Review Commission Members
Prof. Elizabeth Warren
Stephen Case, Esq.
Susan Jensen-Conklin, Esq.

Remaining Governmental Provisions

I. — Notice Issues (Grid No. 1, 41)

A. Claim Filing/Discharge Issues — Sections 342, 501, 502, 523, 1141, 1328. The Commission has referred proposals dealing with the specific notice requirements to the Rules Committee, but the *consequences* of failure to comply with those requirements remains a statutory issue that the Committee does not wish to address. We strongly believe that failures to comply by the debtor with the Rules must have consequences, just as do failures by creditors. In any event, whatever is decided on that question, we also believe that the current law is ambiguous, fails to address many issues, and that all parties would benefit from greater clarity. I have posed the issues below as questions, rather than as specific proposal. I think the resolution of these issues would benefit greatly by the naming of a small group, like the Tax Advisory Committee to consider them, as a package, and make a recommendation to the Commission on a total set of provisions dealing with the consequences to creditors and debtors of a lack of notice of the case.

Chapter 7 —

- 1) What consequence should there be for failing to list creditors in a no-asset case? Are nondischargeable claims the only ones that we should be concerned about? Or should there be a prophylactic component to the requirement so that there will be some sanction for failing to list claims even if they would otherwise be dischargeable? If so, what should the standard be for refusing to allow nonlisted claims to be discharged? Or should we leave the claims as nondischargeable, but (as discussed below) expand the ability to object to discharge at a later date?
- 2) With respect to nondischargeable claims, what should be the effect of failing to give notice in a no-asset case? Is the claim rendered totally nondischargeable? Or does the failure to list the claimant merely toll the time period for filing the exception to the claim and/or the overall discharge, so that the debtor can still dispute dischargeability after giving notice? (The latter provision does not impose any real sanction for the failure to list the claim; it merely prevents the debtor from benefitting from his misfeasance.)
- 3) Similarly, what is the effect where claims are not listed in an asset case? Are the claims not discharged or does this merely toll the time periods so that the creditor may (and must) file a late claim?

Chapter 11 —

- 1) There is currently no provision in the Code defining the effect of a failure to give notice, although the Rules allow for late claims to be filed where excusable neglect is shown. Case law generally provides that a claimant who does not receive formal service during the case will not have its claim discharged. Should this standard be incorporated into the Code?

Chapters 12, 13

1) The Rules do not allow excusable neglect to be asserted with respect to late-filed claims in Chapters 7 and 13. The distribution rules in Chapter 7 treat claims which are late-filed due to lack of notice as equivalent to timely-filed claims, which largely eliminates the problem. There is no such provision in Chapter 13, though. While such a claim might not be discharged, the creditor may still be forced to wait until the end of the plan to pursue the claim, which is an unfair burden. Should claims that are late, due to lack of notice, still be allowed in Chapter 13, upon a showing of excusable neglect? Courts often confirm plans well before the claims bar date, with the assumption that they can be modified or dismissed if the filed claims differ from those that are assumed. Would allowing late claims have much of a different effect? And, if accommodating a late-filed claim causes a plan to fail, does this just not indicate that the plan was not feasible to begin with?

2) If, on the other hand, the Commission does not recommend allowing late-filed claims due to lack of notice, the Code should be clarified as to the effect of not listing a claim in a Chapter 13 case. Are such claims not discharged? Should efforts to collect such claims be exempt from the automatic stay during the case?

B. Objections to Discharge — Section 727 (Grid No. 2)

The time period for filing objections, or seeking to revoke a discharge should be clarified to provide that time periods for taking such action only begin to run after the party has received notice in accordance with the requirements of the Code and the Rules. Some courts extend the deadline to assure that the creditor will receive the full required time periods, while others use a case-by-case approach to decide whether, in a given instance, the party had “enough” time to learn of the case and file its papers before the required deadline. This latter approach leads to unnecessary litigation and inconsistent decision making, and rewards the debtor for failure to comply with its obligations.

II. U.S. Trustee (Grid No. 7)

In conjunction with its proposed expanded role in monitoring small businesses, the U.S. Trustee’s office should be given powers to promulgate rules applicable to operations of debtor. For instance, it tried to require that all business debtors use checks labeled “debtor in possession,” but a court ruled that this was beyond its authority. To the extent that the Small Business and Consumer Working Groups are proposing additional monitoring roles for the Trustees, they should consider including some general rule-making powers.

III. Admissions (Grid Nos. 13, 14)

We recognize that the Working Group has proposed, and the Commission has tentatively adopted the provision supporting national admissions. However, the proposal does nothing about the corollary issue of local counsel requirements. As explained in prior submissions, this is at least as much, if not more burdensome, than actual admission requirements and there is little showing of any reason or necessity for this. Moreover, as explained by John Ellis, of the Washington Attorney General’s office, this is inconsistent with normal practice in multidistrict litigation, which is similar in that respect to bankruptcy cases. We urge reexamination of this issue.

IV. Procedures (Grid No. 17)

A. Creditors' committee membership.

Governments are frequently among the largest creditors in the case, yet are apparently excluded from being named to creditors' committees. There is no reason cited for this in the legislative history and a blanket exclusion runs contrary to the normal requirement that there must be proof that the presence of a specific creditor on the committee would cause problems.. The Commission now is considering a proposal to allow municipal creditors on committees in Chapter 9 cases. We see no reason why only municipalities should be included in such cases, nor why the governmental should be excluded in in other chapters.

B. Administrative Expense Filing (Grid No. 34).

Include in the "deemed filed" provision, a statement that requests for payment of administrative expenses in Chapters 11, 12, and 13 shall be deemed to be filed as claims in Chapter 7 cases, if the case is converted. This is another trap for the unwary. Once a request is properly filed and contained in the debtor's records and the court files, it should not be necessary for the creditor to file again just because the case has been converted.

C. Treatment of Liens in the Plan (Grid No. 35).

Clarify whether a debtor should be able to immediately avoid a lien upon confirmation, simply by providing for payment of a secured claim in its plan, without bringing an adversary proceeding, and without providing any assurance that it will actually be able to complete payment of the required payments. Preferably, the Code should provide that such liens cannot be avoided until the payment of the secured claim (which may be a stripped-down amount) has been completed so that the creditor does not lose its lien rights until it is guaranteed that they have served their purpose.

D. Setoff (Grid No. 42)

There is a working group proposal on automatic setoff of tax refunds. This still needs some tinkering to clarify the procedure to be followed to ensure that the claims are, in fact, undisputed. The most appropriate solution would probably be for the government to notify the debtor that it has imposed an administrative freeze on a tax refund in a particular amount, that it contends that the debtor owes additional taxes in a specific amount, and that it proposes to apply the tax refund to the debt. There would then be a specified period of time for the debtor to object. As long as it agreed that it owed the government at least as much as the amount of the refund, there would normally be no reason for it to dispute the setoff, and good reason for it to want the setoff to take place in order to reduce the accumulation of interest and penalties. Then, absent an objection by the debtor, the setoff could be effectuated after the waiting period.

In addition, there are many other types of setoffs that may be available, both to the government and to other creditors. It is now clear that a creditor has some ability to freeze payments owing to the debtor, but the *Strumpf* decision left open how long such a freeze could continue, and who bears the burden of changing the status quo. I suggest that treating setoff rights like cash collateral (i.e., the debtor must receive court permission to use the frozen funds and provide adequate protection) is most consistent with current Code language, but any

clarification and resolution of what steps must be taken by either the debtor or the creditor to resolve a freeze would be beneficial to all parties.

V. Police and Regulatory

A. Governmental/Environmental Issues — Definition of a claim/equitable remedies/future claims/use of Section 105/automatic stay/administrative expenses (Grid Nos. 36, 38, 39, 40, 47, 51,52). These issues are addressed in a separate memorandum.

B. Abandonment (Grid Nos. 3, 49) — Define when environmentally contaminated property may be abandoned by resolving the ambiguities in the infamous “footnote 9” from *Midlantic*. (I.e., is the issue whether the abandonment violates a police and regulatory law dealing with health and safety or must the state show that there is an actual hazard in this case?) Require notice be given to environmental agencies of proposed abandonments of real property. Consider correlating these proposal with the notice requirements in the proposed Rule changes which try to define which pieces of property the agencies will likely be concerned with, so that they only apply to properties which are truly likely to raise environmental concerns. Consider requiring that debtors complete at least a preliminary site assessment before it may move to abandon the property, so that all parties are acting from a base of *some* knowledge.

C. Criminal restitution (Grid No. 56)

Either eliminate Section 523(a)(13) because it is redundant of Section 523(a)(7) (as interpreted by the Supreme Court), or amend it to include references to restitution ordered entered under state or local law.

VI. Miscellaneous

There are five other points that have been raised with me since the grid was prepared. While these are not necessarily the highest priorities for the government, they do represent significant issue and some of the suggestions may not be controversial. Thus, it may still be possible to deal with these issues during the next few months.

A. Domestic Support Provisions/Priority of Governmental Claims

The Code primarily deals with domestic support obligations in three places: priorities, dischargeability, and exceptions from the automatic stay. Where such obligations are enforced by the spouse or child directly, it provides that a) the debts will be given seventh priority, b) actions to establish or modify paternity and support orders and to collect support from nonproperty of the estate are not stayed, and c) the debts are nondischargeable. However, under various welfare laws and domestic support enforcement laws, such claims are often assigned to government agencies to pursue in lieu of direct action by the spouse or child, or the government may have its own direct right of action against the nonsupporting spouse if he or she is required to provide support to the dependent spouse or child. In most respects, treatment of governmental claims has been made analogous to the action by the domestic support creditor (see 523(a)(5) and (18) and 362(b)(2)), but there are still some discrepancies. We believe that it makes sense to make the treatment of government claims consistent with the direct support claims, across the board. This is less confusing and, in any event, the government should not be penalized, relative to the spouse or child, because it takes on the costs and burdens of collecting those benefits, or

paying those costs to the debtor's dependents. After all, payments owed to professionals retained by a spouse in connection with divorce or custody proceedings are already generally treated as support payments and given priority even if the amounts owed are paid directly to the professional and are only tangentially related to direct support claims; the state's own payments that go to the actual domestic obligations should receive no less.

The first problem area has to do with the priority of the payments. As now written, the priority does not apply to a claim "assigned to another entity, voluntarily, by operation of law, or otherwise." This would seem to deny priority to *any* assigned claims, but some cases have distinguished assignments that are made purely for purposes of collection and have held that these are not barred from receiving the priority. *See, e.g., In re Smith (Smith v. Child Support Enforcement)*, 180 B.R. 648 (D. Utah 1995). If this conclusion is correct, it should be reflected in the Code. However, even if the right is actually assigned totally to the government, in exchange for the government providing the dependent spouse or child with direct support under welfare or similar programs, it makes little sense to downgrade the government's claim. The only real difference is the degree of need of the dependent spouse. If she does not need to go on welfare, she can assign the claim for collection purposes and it retains its priority. If she is so destitute that she needs direct government assistance, then the government's right to collect the payment for its own account loses the higher status. Why should the priority of the debtor's obligation to support his or her spouse or children depend on how desperately poor those persons have been left?

In addition, in some circumstances, state law may not provide the spouse or child with an enforceable right to support under state law at the time the petition is filed. Thus, they have nothing to assign to the government. *Cf. In re Visness (Visness v. Contra Costa County)* 57 F.3d. 775 (9th Cir. 1995). In such circumstances, the state often has a direct statutory right to collect support payments from the delinquent spouse. Yet, because these are not monies owed directly to a spouse or child, they do not fall under the current priority, even though the government is itself supporting those dependents and receiving the payment in compensation for its own payments. Again, why should the debtor's obligation to support his dependents be given a lower priority just because he files bankruptcy before their right to collect directly is firmly established? It surely makes little sense to suggest that the worse off a debtor leaves his spouse, the greater should be his ability to shuffle off his responsibilities onto the shoulders of the taxpayers.

Accordingly, we recommend that the priority section provide that payments, to whomever made, that go for domestic support, alimony, and maintenance obligations should receive the seventh priority. This would also clarify the treatment that is currently given to payments to professionals to the extent they are deemed to be support payments. This would require changes to both Section 507(a)(7) and (d).

In addition, the Code now makes most, but not all payments owed directly to the state nondischargeable. Section 523(a)(5) covers debts which are assigned to the state by the dependent spouse or child, and Section 523(a)(18) covers debts which are owed directly to the state under title IV(D) of the Social Security Act. However, that subtitle does not include all types of support obligations; others are listed in title IV(E) and other sections of the Act.

The simplest solution would be to delete Section 523(a)(18)(B) entirely and simply provide that debts owed to or payable to the state for domestic support obligations are nondischargeable.

B. Electronic Filings as “writing” within the meaning of Section 523(a)(2)(B).

Section 523(a)(2)(B) excepts debts that are incurred due to false statements regarding a party’s financial condition from discharge only if the statement is “in writing.” Recent changes in technology now allow many aspects of life to be carried on over the phone by punching in responses to questions. Are those responses the equivalent of a statement “in writing?” For instance, the IRS allows certain returns to be filed over the phone. Similarly, at least one state has set up its unemployment system so that recipients can call in, use a personal code number, and provide required information about the employment contacts they have made over the preceding period of time. Banks are increasing the amount of information and business that may be done over the phone by punching in responses to questions. In each of these instances, the point of using phone responses rather than traditional paper answers is to provide additional convenience to the user who need not physically fill out the document or appear at an office. If the party lies in those responses, however, about matters relating to its financial condition, should the use of this new means of furnishing information protect the debtor’s ability to discharge this fraudulent debt? What about other new means of communication, such as E-mail? Are those messages “writings?”

We urge that the Commission recommend that an appropriate body (perhaps the Rules Advisory Committee, perhaps the Administrative Conference’s body on technological change,) review this issue and make recommendations about a definition of “writing” that accommodates these new forms of discourse, while preserving, to the extent deemed necessary, the need for greater certainty of proof with respect to these types of statements.

C. Failure to buy legally-required insurance as a “willful and malicious” act.

In a number of areas, where experience has shown that serious injuries are likely to result, and that the perpetrators thereof are unlikely to be able to personally pay the resulting debts, legislatures have required that anyone involved in such activities must purchase insurance in order to protect foreseeable victims. These insurance provisions have generally been in the area of auto insurance and workers’ compensation insurance, but may also apply to many other types of hazardous activities, such as owning a dangerous animal like a pit bull. When a party fails to buy the required insurance, and the completely predictable harm results, the courts have, however, with only rare exceptions, concluded that the claims are dischargeable because the failure to purchase insurance was not “malicious.” That is, they hold, it cannot be said with virtual certainty that the failure to purchase insurance in a particular case will *inevitably* result in harm. This will only occur if another event — the predictable mishap — occurs. While true, the result is that the injured party is left facing exactly the dismal situation that the legislature tried to avoid. Allowing the discharge of such debts removes a major incentive to parties to either buy the necessary insurance or to refrain from engaging in hazardous behavior. Is it appropriate to reward knowingly reckless actions of this sort by allowing them to be discharged?

D. Partial discharge of student loans

The courts are substantially split on what to do where it appears that the debtor cannot currently make the full payments on student loans they owe, but could either currently make partial payments or might be able to make the full payments in the future. The Code is silent as to whether the courts may authorize a deferral in whole or in part of the payments, and/or whether they may discharge the principal or interests in whole or in part. Clarification of this issue would be of substantial benefit to all parties in the process.

E. Procedural Requirements for Turnover Actions

This issue is similar to those raised with respect to setoff, as discussed above. If the creditor lawfully seized collateral prepetition, is it obligated to automatically return those items after the petition is filed. Or should it be able to hold them, in the equivalent of the administrative freeze that is allowed with respect to setoff, and require the debtor to show the court why turnover would be appropriate. Like setoff, this could be done by treating these provisions as similar to those applicable to cash collateral. (Indeed, it makes little sense to suggest that the Code meant to give greater protection to creditors' rights in cash still being held by the debtor than in tangible property that had been lawfully repossessed prepetition.) As with setoff, if the cash collateral provisions are applied, this would require the debtor to take affirmative action and show how the creditors' interest would be adequately protected before a turnover order would lie. Such a procedure should address the problems raised in Don Harris' letter. (See attached copy.)

VII. Consumer Issues

While these issues have been assigned to the Consumer Working Group, the government obviously has a continuing interest in how they are dealt with. While some clearly are on the agenda for that group, others of a more mundane nature, but which come up repeatedly, do not appear to be likely to be addressed unless the group changes its focus somewhat. In any event, the proposals we still wish to be sure are addressed are:

- 1) The scope of the Chapter 13 discharge, as relates to the provisions that are now contained in the "superdischarge." Many of these dischargeable debts involve matters with which the government has police and regulatory interests. As stated in the recent letter from the Attorneys General, unless there is meaningful change to the requirements for Chapter 13 plan approval to ensure that at least some significant amount is paid on these claims, we believe that the exceptions to discharge should be the same in all Chapters. In addressing this issue, the new provisions should also deal with whether nondischargeable debts (including student loans) may be separately classified and paid under the plan.
- 2) Serial Filings — This issue is of concern, in multiple filings in different chapters, in Chapter 7 filings that are only interposed for delay, and in repeated Chapter 13 filings (and modifications) that allow debtors to spread out payments to creditors long beyond the three to five years the Code purportedly allows.
- 3) Property of the Estate — The Code desperately needs to be clarified to deal with issues as to whether postconfirmation earnings are property of the estate and what happens to property that "revests" in the debtor after confirmation. The recent *Fisher* decisions out of the bankruptcy and district courts in Northern Illinois, 198 B.R. 721 (1996) and 203 B.R. 958 (1997) illustrate the existing complexities and difficulties in analysis in this area.
- 4) Substantial Abuse — It would be helpful to clarify Section 707(b) to answer, once and for all, whether ability to fund a Chapter 13 plan is sufficient to warrant dismissal of a Chapter 7 case.

**The Debtor's Obligation to Obey The Law --
Sections 101(5), 105, 362, 503 and 28 U.S.C. 959**

From a governmental perspective, the most fundamental issues that the Commission must address is the complex of issues that arise from the conflict between the debtor's desire to reorganize and obtain a fresh start and its obligation to obey the law. We believe that there are several fundamental principles that were recognized by Congress when it drafted the Code in 1978, and which continue to be applicable. Making them explicit, however, will help in the analysis of some of these issues we raise below.

- ! Filing bankruptcy is not, standing alone, a basis for avoiding compliance with generally applicable law, nor is the fact that compliance with a law will impede the debtor's reorganization a basis for excusing compliance with the law.
- ! Filing bankruptcy, standing alone, does not prove that the debtor is financially incapable of complying with generally applicable law
- ! Because laws must protect society as a whole, they cannot always guarantee that all parties will be able to operate profitably while complying with those laws. The fact that some businesses may be unsuccessful does not justify *ad hoc* reconsideration of the merits of the law by those charged to enforce them. Such reconsideration is particularly inappropriate in the bankruptcy context because focusing on the needs of the individual debtor makes it difficult to take into account the accumulated expertise of the legislature, the needs of society as a whole, or the impact on the debtor's competitors if it is excused from compliance with regulations that are binding upon them.
- ! A judgment that financial difficulties should be allowed to excuse compliance with generally applicable law should only be made with respect to specific, limited provisions, not by means of unregulated judicial discretion, and a decision that nonbankruptcy law should be overridden should be stated explicitly in either the Code or the other law.
- ! Finally, all parties would be better served by continuing to use nonbankruptcy legal standards and principles, wherever possible, in order to avoid creating additional legal issues and to reduce incentives for filing bankruptcy as a means of forum shopping.

A number of comments have been submitted to the Commission, including letters from Judge Samuel Bufford (Bankr. C.D. Cal.) and papers by the American College of Bankruptcy and the National Bankruptcy Conference, which take a different position on some of these issues. In addition, the recent draft proposals in the future claims area appear to suggest a position on the debtor's obligations to comply with its statutory obligations that is substantially at odds with these positions. Finally, the Commission has not yet fully addressed some aspects of the complex of provisions that deal with the debtor's ongoing obligation to obey the law. This memorandum seeks to provide a full

statement of the changes necessary and to answer some of those comments, which appear to be based in part on misapprehensions of what the government's proposals entail and, in other respects on a view of the bankruptcy court's role and powers fundamentally at odds with our federal system.

I. Proposed Changes

The Commission currently has three Working Group proposals (Nos. 5-7) dealing, respectively, with Section 105, the definition of a claim, and expanding the governmental exception to the Section 362 stay. The drafts would essentially endorse the government's view of the proper interpretation of the Code's current Section 105 and definition of a claim, but leave the existing language unaltered. They also include a portion of the government's suggested changes to Section 362(b). The government has proposed an alternative to Proposals 5 and 7 that would clarify Section 105 and further amend the governmental exception to the stay but has held the proposed changes to the definition of a claim in abeyance in light of the Commission's tentative endorsement of its view of the definition of a claim. Finally, there has been little or no discussion about the proposals made in NAAG's original submissions about changes to the definition of an administrative claim and to 28 U.S.C. 959(b).

The Commission is now seeking to finish its work and we believe that it should take a final look at the entire range of proposals that define the debtor's obligation to obey the law. If the Commission does agree with the government's position that bankruptcy does not and should not provide authorize debtors to violate the law, then the changes we suggest in these related sections will follow with little difficulty. We hope that the Commission would endorse all of the proposed changes because we believe the current language of these sections, even if generally interpreted favorably, has sufficient ambiguities to encourage unnecessary litigation. If, however, the Commission feels that the current language is sufficient to protect the government's position, then we would urge, at a minimum, that the Commission include language clearly and unmistakably endorsing those interpretations and urging Congress to include such endorsements in any report on future legislation.

For ease of reference, the proposed changes are set forth below. We believe to make them more closely reflect the consensus that can be gleaned from the case law about how those provisions *should* be interpreted, notwithstanding that the current phrasing may be ambiguous in expressing those concepts. Like the death of Mark Twain, we believe that the degree of conflict over many of these is often greatly exaggerated by those who wish to argue for the minority view. One or two aberrant cases do not make a legal battleground. By the same token, where a regulatory area, such as environmental law, generates only a handful of decisions a year, one must conclude that the parties have, in fact, found a *modus vivendi*, despite the dark forebodings of those who argue that allowing the government to freely enforce the law inimical to the functioning of the Code.¹ However,

¹ The April 14, 1997 staff memorandum on environmental issues, for instance, prominently cites *In re Whizco*, 841 F.2d 147 (6th Cir. 1988) and *In re Goodwin*, 163 B.R. 825 (Bankr. D. Idaho 1993) with respect to the definition of a claim, even though neither case has been followed to any degree,

so long as the current infelicitous language is used, at least some parties will continue to argue that the minority interpretation should be applied, thus leading to unnecessary and prolonged litigation. Using clear language will benefit all except those who seek delay for its own sake.

The proposed changes are set out next for ease of reference. They will be discussed briefly and then some of the counter-arguments will be reviewed.

A. Definition of a claim

....

101(5)(B) "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment which the debtor has the option, under generally applicable nonbankruptcy law, of requiring the creditor to accept in lieu of compliance with the equitable remedy, whether or not such right to an equitable remedy"

or

101(5)(B) "right to an equitable remedy for breach of performance if such breach does not allow the creditor the right to demand specific performance of one or more terms of a contract, lease, or performance of a statutory or other obligation, whether or not such right to an equitable remedy"

B. Definition of an administrative expense and Section 959:

Section 503(b)(1)(A) the actual, necessary costs and expenses

(i) of preserving the estate, including wages, salaries, or commission for services rendered after the commencement of the case,

(ii) of compliance by the debtor with all governmental laws and regulations that would be otherwise applicable to the debtor with respect to its activities following the filing of its petition had it not filed for bankruptcy, or

(iii) incurred by the government in carrying out such compliance activities on behalf of the

while either not discussing or relegating to a “but see” citation, the truly influential cases in the area — *In re Chateaugay*, 944 F.2d 997 (2nd Cir. 1991); *In the Matter of CMC Heartland Partners*, 966 F.2d 1143 (7th Cir, 1992); and *Torwico Electronics, Inc. v. N.J. Dept. Of Environmental Protection*, 8 F.3d 146 (3rd Cir. 1994). Those cases largely adopted the government’s position with respect to its right to enforce cleanup orders against debtors. Yet, contrary to what one might expect, those ruling have not set loose a flood of litigation. Instead, in the three years ending July 1994, 1995, and 1996, by my count, there were only 12, 5, and 8 published decisions, respectively, dealing with environmental bankruptcy issues that were of *any* interest to the government. Since August 1996, I have noted only 3 decisions of interest. While those numbers leave out cases with environmental issues that have no *bankruptcy* component, they do include many other issues besides those being discussed now. Thus, there are only a literal handful of decisions being issued in this area each year. Those numbers are not typical of a system in crisis; rather they suggest that the current legal situation is one that all parties have been able to adapt to.

debtor if the debtor will not or cannot perform them.

.....

Section 959(b) . . . [A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, is liable for compliance with all applicable governmental laws and regulations with respect to his activities and with respect to property now or formerly in his possession or control, or property of the estate in the same manner that the owner, operator, or possessor thereof would be bound to do absent the appointment of the trustee, receiver or manager or the filing of bankruptcy.

C. Changes to Section 362:

(b) the filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay -

...

(4) under subsection (a)(1), (2), (3), and (6) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police and regulatory power, including by the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's police or regulatory power;

[delete existing subsection (5)]

4. Changes to Section 105

(e) In issuing an injunction, the court shall apply the standards and procedures applicable to a district court under nonbankruptcy law, except to the extent procedures are modified by the Federal Rules of Bankruptcy Procedure.

(f) A police or regulatory act of a governmental unit that is not stayed or proscribed by a specific provision of this title may be enjoined only to the extent authorized by nonbankruptcy law.

II. Scope of Proposed Amendments

A. Definition of a claim²

The Code's definition as regards equitable relief is both inscrutable and unworkable. *See In re Udell*, 18 F.3d 403 (7th Cir. 1994). Read literally, it might suggest that *any* injunctive order for which money damages *could* be awarded as an alternative is a claim. Yet, if a plaintiff so chooses, he may *always* accept damages, no matter how clear his right would be to demand specific performance of an equitable remedy that he has been granted. (I can, for instance, always forego specific performance of my right to buy Blackacre, take damages, and buy Whiteacre instead.) By the same token, even if a statute does not explicitly provide the government with the option of doing the work itself and suing for its costs, it could surely use the theories of nuisance, quantum meruit, and unjust enrichment to ensure that it could recover its costs if it were forced to carry out an emergency cleanup. Taking those possibilities into account, then, would suggest that *every* equitable remedy is actually a claim. The Code, however, clearly does not intend that result, yet it gives very little assistance to a party trying to draw a line to distinguish claims from non-claims. The difficulty is not limited to environmental cases; the courts have struggled equally with the issue in other contexts, such as covenants not to compete, and similar problems. *In re Davis*, 3 F.3d 113 (5th Cir. 1993); and *Gouveia v. Tazbir*, 37 F.3d 295 (7th Cir. 1994).

In the end, those cases, along with *Chateaugay*, *Torwico*, and *CMC*, essentially reach what we believe to be the proper distinction; that is, between cases where the plaintiff can be *forced* to accept monetary relief, versus cases where that party may *choose* whether or not to accept a money satisfaction. If the former is true, then there is a claim; if the latter, then there is a claim only if the party opts to seek money damages. If the party chooses to enforce its equitable remedy, its right to do so will not be a claim. The distinction is essentially that between cases where the plaintiff may obtain specific performance under nonbankruptcy law and those where it may be forced to accept a monetary judgment. Utilizing that existing distinction would allow the bankruptcy courts to apply

² This paper only discusses the "equitable relief" arm of the definition of a claim. The Future Claim/Mass Tort Working Group is considering when a monetary liability will rise to the level of a "claim" and separate comments have already been submitted there. In brief, they argue that the issue is not the definition of a claim (or a future claim) but rather what treatment should be given to claims where the claimant's may lack of notice of the existence of the claim, either because of its latent nature or because actual injury has not yet occurred and suggest amendments that would better address those concepts. In addition, the comments noted that, despite the statement that future claims were to be a subset of "claims," that the proposal's definition of a "future claim," as regards injunctive relief, was actually far more expansive than the court's current consensus on which injunctive orders constitute claims. That proposed expansion would affect many governmental enforcement efforts, including but not limited to environmental cleanup orders. While it was unclear whether that was the intent of the changes proposed in the general memorandum, the April 14 staff memorandum does explicitly suggest such changes. The discussion in this memorandum is intended to address and oppose those suggestions.

a well-established body of law when analyzing the issue, rather than trying to create a new, purely bankruptcy oriented notion of when equitable remedies will or will not be enforced. Some might fear that this would result in a rush to make all obligations specifically enforceable, but the fact that any such principle would also have to be applied generally in nonbankruptcy cases should obviate that possibility. There are good reasons for making specific performance only sparingly available in the commercial context; the relatively small number of bankruptcies where it might be applicable are unlikely to be enough to sway that general consensus.

What this clarification *will* do is eliminate the issues with respect to governmental enforcement activities by giving proper deference to the prosecutorial discretion of those charged with deciding how to enforce applicable laws.³ Recognizing that the government will normally use injunctive orders, where possible, does not treat the debtor differently than any other party; it is surely the exceptional case where the government does the work and bills for it, rather than requiring the responsible party to do the work itself. Allowing a defendant-debtor to determine unilaterally that it may *force* a state to do a cleanup and be relegated to a claim for money damages would be an extraordinary reversal of the normal enforcement process. On the other hand, because the proposed definition would leave the government with discretion to *choose* how to proceed, it would have the necessary flexibility to decide that it must do the work itself, either because it is unlikely that the debtor will ever be able to do the work, or because it will not do so in a sufficiently timely fashion to avoid health hazards. If so, then the government will be able to file a claim for the costs it incurs. This will normally occur in a liquidation case, but could, depending on the recalcitrance of the debtor or the estate's current assets also occur in a reorganization case. If the debtor is able to do the work though, the government will, in most cases, use the regulatory flexibility accorded to it to work with the reorganized debtor to arrive at a feasible remediation plan. It is clear that this flexibility is working, as reflected in the dearth of opinions — the parties are not litigating, they are remediating.

However, while this distinction appears to generally reflect what the courts are doing, they must reach these results largely in spite of, not because of, the wording of the statute. A revision that may be more clearly understood and applied would be of assistance to all parties.

2. Definition of administrative expense, obligation to obey the law

Section 503(b) defines administrative expenses as including “the actual, necessary costs and expenses of preserving the estate.” That test has routinely been restated as requiring that an expense must “benefit the estate” in order to receive this status. In the context of normal trade and employee expenses, such a criteria is reasonable. But that requirement makes little sense in the context of statutorily mandated obligations such as taxes, minimss than the minimum wage if doing so would

³ Much of the discussion of this issue poses a false dichotomy: either the government will *always* have a money remedy or it must *always* seek injunctive relief. The truth of course is that the government will make the appropriate choice in the circumstances of the particular case. The essence of a nonclaim equitable remedy is the element of choice; there is nothing incongruous or inequitable about the fact that the option may be exercised differently in different situations.

benefit the estate? Should it be allowed to refuse to install a required piece of safety equipment because the costs would hinder its reorganization effort? Obviously not. Yet, if one requires a showing that such expenditures “benefit” the estate, it is hard to see how they could ever receive administrative status.⁴ The courts in most cases do require such payments but to reach those results they must contort the language of the Code almost beyond recognition. As with claims, the courts must reach the correct results in spite of the language of the Code, not because of it.

However, because the language does not deal explicitly recognize the special issues that arise in connection with statutorily required obligations, the courts are left to grapple with how to handle the less obvious forms of administrative expenses. Although the issue is often thought of in connection with environmental claims, two Ninth Circuit cases illustrate other aspects of the problem. In *In re Palau Corp. (NLRB v. Walsh)*, 18 F.3d 746 (1993), the court refused to grant administrative status to backpay accruing to unlawfully discharged employees after the petition was filed due to the debtor’s refusal to reinstate them. The court held that, because the employees were not actually working, they did not provide a “benefit” to the estate — even though the only reason they were absent was because the employer refused to reinstate them! In *Oregon v. Witcosky (In re Allen Care Centers)*, 96 F.3d 1328 (9th Cir. 1996), the debtor decided it could not afford to carry out an orderly closure and transfer of patients from an unprofitable nursing home in its chain. It invoked a state law that authorized the state to take over a failing nursing home transfer patients where necessary to ensure their health and safety. Despite the fact that the debtor’s costs of operating the home had been paid routinely, the exact same costs, when paid by the state during the transition period, were denied administrative status because they did not “benefit” the estate. Plainly, the debtor could not lawfully have simply abandoned the patients anymore than it could have walked away from an operating blast furnace or a contaminated piece of ground. Had it done so, the state’s costs of dealing with an acute problem cause the state had prescribed an orderly process for a transition involving a financially troubled operator, the costs were downgraded. These results do not seem appropriate yet neither is plainly foreclosed by the current wording of Section 503.

The same problem also arises with respect to torts and other post-petition liabilities that arise out of the operation of the business. The Supreme Court has stated that expenses that are "normally incident" to the operation of the debtor post-petition must be given administrative status, and rejected a strict "benefit to the estate" *See Reading Co. v. Brown*, 391 U.S. 471 (1968). Yet, even with this clarification, the Ninth Circuit rejected the state’s argument in *Allen Care* because it viewed *Reading* as only applying where there was a violation of law and the facility was acting lawfully when it foisted its obligations onto the state. There is nothing in *Reading* that limits its application to cases where the

⁴ While this principle causes little problem in these areas, its application appears to be more problematic when it comes to environmental issues. *See, e.g., In re Lazar*, 1997 WL 160173 (Bankr. C.D. Cal. 4/1/97) where Judge Bufford held that “remediation could only have been undertaken after authorization of this court upon a showing that it was in the best interests of the creditors.” If the debtor must remedy the structural failings of its factory — whether or not this benefits creditors — why should it only be required to remedy its damaged surroundings if this will help the creditors? Put another way, do we really believe that the debtor may violate the law if this will benefit its creditors?

law is being broken, yet this sort of limitation is read in by the courts because of their sense that the “benefit to the estate” test requires them to apply a very strict definition category of administrative expenses even where governmental compliance requirements are at issue.

Moreover, by attempting to shoehorn governmentally-required expenditures into the unwieldy mold of “administrative expenses,” as currently defined, courts are left with a fundamental mismatch between the language of Section 503 and the requirements of 28 U.S.C. 959(b).⁵ That section requires a trustee or debtor to “manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated” Those laws generally require that contaminated property be remediated when discovered, regardless of when the contamination originally occurred.⁶ Thus, under Section 959, the debtor may be required to clean up the property, but under the definition of an administrative expense, the debtor could argue (as in the *Lazar* case) that it should not have to do so unless this benefits the creditors.⁷

Yet, once the state orders the debtor to do the work, does the bankruptcy court have general authority to second guess the merits of the state’s order? As discussed further below, considerations of comity and collateral estoppel dictate that the answer must be no. And if not, then the debtor must be allowed to spend estate funds to do so. When it does perform such work, the costs will, *ipso facto*, be paid as the equivalent of an administrative expense and, indeed, as a “superpriority” expense, like other ordinary course expenses that are laid out during the course of the case.⁸ If one accepts

⁵ See, for instance, the court’s decision in *Alabama Surface Mining Commission v. N.P. Mining Co.* (*In re N.P. Mining Co.*), 963 F.2d 1449 (11th Cir. 1992) where the court concluded that postpetition penalties imposed for failure to remediate existing contamination did *not* meet the Section 503 definition, but *would* be granted priority status because of Section 959.

⁶ This is based both on the legal determination that the properties need to be cleaned up, now, regardless of who was “at fault” in causing the original spill, as well as the factual issue that, unless a leaking tank is plugged and in-ground contamination removed, the laws of physics guarantee that more leakage will occur and that the existing contamination will likely spread. Thus, even if the origin of the problem was prepetition, the damage will almost inevitably grow worse, postpetition.

⁷ While a cleanup may often be economically beneficial, this will concededly not always be the case and, in any event, making that determination may require resolution of hotly disputed valuation issues. Such litigation is unlikely to prove beneficial to anyone in the case.

⁸ While all administrative expenses are theoretically equivalent, some are, in the Orwellian sense, “more equal” than others. There is a difference between ordinary course expenses paid to employees and suppliers and compensation provided to the bankruptcy professionals. While holdbacks and even disgorgement may be ordered against the latter, virtually all cases hold that ordinary course payments may not be recovered. See, e.g., *In re Lochmiller Industries, Inc.*, 178 B.R. 241, 247-250 (Bankr. S.D. Cal. 1995); *In re Slim for Life Weight Loss Centers Corp.*, 182 B.R. 701, 705-706 (Bankr. D. N.J. 1995); *In re Telesphere Communications, Inc.*, 148 B.R. 525, 530 (Bankr.

that the debtor will automatically pay these costs as administrative expenses if it does the work, then governmentally required expenditures clearly should fit within that category. These are expenses that apply to anyone in the debtor's situation, rather than being occasioned by the bankruptcy itself. If the debtor is not required to do the work itself, it will be receiving a benefit that no one else enjoys. A debtor that is allowed to remain in bankruptcy without complying with the law places the risk of nonpayment of these costs squarely on the shoulders of the unconsenting taxpayers.

By the same token, if the debtor may be ordered to do the work and pay the expenses in full, it makes little sense to deny the government the same status for its expenditures if it is forced to do the work itself during the case and seek to collect thereon.⁹ There is currently a consensus that, at a minimum, the government may receive administrative costs for postpetition cleanups that remediate sites that present an "imminent and identifiable harm." See *In re McCrory Corp.*, 188 B.R. 763 (Bankr. S.D.N.Y. 1995) (reviewing case law). In view of the large number of sites that must be remedied, the limited state resources, and the strong preference for using injunctive orders, rather than laying out state funds on the hope and belief that the estate will be administratively solvent,¹⁰ it is likely that such sites will comprise the vast majority of the occasions where the states will do the work themselves. Thus, the proposed revision to the definition of an administrative expense to clarify the priority of expenditures made by the government to enforce compliance with the law is unlikely to actually have much effect in the environmental area, although clearer language will make it easier

N.D. Ill. 1992). Our position is that compliance with generally applicable police and regulatory requirements is as much an ordinary course expense as any other operating expense, even if this require an entity to correct a past problem. All businesses are subject to such requirements, just as they are subject to requirements to reinstate employees fired before the petition was filed, or to install new pollution control equipment on plants that were built before that date. Indeed, businesses generally voluntarily assume obligations to remediate prepetition product defects under warranty programs, although it could legally deem such matters to be claims, and insist on payment of only the appropriate *pro rata* portion of the costs of repairs.

⁹ No one disputes that these types of expenditures, if incurred prepetition, constitute a monetary claim and are not currently entitled to priority payment. While there are certainly grounds to argue for a priority for such costs, the government has not done so before the Commission, and has been willing to live with the current consensus, with the changes suggested to date.

¹⁰ The debtor and the other creditors should, upon reflection, generally prefer this option as well. As all advocates of privatization recognize, it is likely that the state performance of the cleanup may well be more costly and take more time than if the debtor does the work. Moreover, by leaving the debtor in charge of doing the work, the state now has a strong incentive to keep the debtor in business and to structure the cleanup obligation in a way that makes the debtor's reorganization feasible. If it does the work itself during the case, or simply files a claim for projected cleanup costs, those incentives disappear. To the contrary, it will be forced to use a worst-case estimation method when it submits a claim in order to ensure that it will receive its fair share when the work is eventually done.

for lawyers to advise their clients in this area. The proposed change would clarify other situations, however, such as *Palau* and *Allen Care* by ensuring that the debtor's obligations to obey the law do not vanish when it files for bankruptcy and that the government's right to compensation, when it performs those obligations for the debtor, does not depend on whether other creditors are "benefitted" thereby. Compliance with the law is not a cost-benefit issue and the Code should be amended to make this clear. There may be some requirements which could be waived for a financially troubled entity without causing undue harm, but the decision to provide such relief should be made by the legislature after full consideration of *all* of the interests at stake, not just those of an individual debtor and its creditors. Absent such waivers, the Code should make unambiguously clear that filing bankruptcy does not exempt the debtor from the law.

Section 959 does express that principle in part, but is inadequate if it is actually meant to define the totality of debtor's obligations to obey the law. For instance, it fails to mention federal and local laws and regulations. Surely debtors are not exempt from those requirements, yet they are not explicitly referred to in the section. Similarly, references to "manag[ing] and operat[ing]" property in the debtor's "possession" suggests to some that the debtor is obligated to obey the law only when operating a business or dealing with property in its possession.¹¹ Yet, this is obviously absurd. May a Chapter 7 debtor defraud his neighbor or steal or murder just because he is not operating a business and those crimes do not involve property of the estate? Obviously not. Similarly, if there are sufficient unencumbered funds in a Chapter 7 liquidation case to carry out a cleanup, should the debtor be automatically exempted from doing so merely because it is no longer operating the facility? Environmental laws are not limited to those actually operating facilities, and neither the Code nor the substantive law explicitly exempt "owners" who file bankruptcy from the application of those laws¹² Yet, a number of courts have concluded that debtors in liquidation are not required to obey at least some laws because Section 959 does not say they have to do so.

In short, while Section 959(b) expresses a useful principle, its limited scope can be easily misinterpreted. This is largely because the section was never meant to be a comprehensive statement of the obligations of a debtor or trustee to obey the law. Indeed, the notion is somewhat absurd —

¹¹ This interpretation is certainly open to dispute — "managing" property certainly can be read to apply to duties that are applicable to any owner of property, whether or not it is used in a business. However, because the terms are not defined, they lend themselves to overly narrow applications by those who wish to excuse the debtor from complying with the law.

¹² Remember, of course, that inability to pay is an affirmative defense to injunctive orders and that existing liens are recognized in determining such ability. Thus, requiring even debtors in liquidation to obey the law does not require impossibilities or impinge on property rights of other creditors. Even granting administrative status to postpetition penalties for failure to carry out a cleanup of existing contamination is defensible. Such penalties are meant to produce compliance — and to ensure that the cost of noncompliance is greater than the cost of obeying the law. As such, they make clear that compliance does "preserve the estate" from even greater liability. Refusing such status removes the incentives for the debtor to move forward with the necessary work.

if we must pass a second law that says someone must obey the first law, where would this end? To the contrary, laws obviously apply to all *unless* there is a specific exception for some party. And, while the Code does explicitly override applicable law in a few instances, and some nonbankruptcy laws allow inability to pay as a defense, none of those laws contains any general provision that voids application of the law to debtors.¹³ *See, e.g., Ohio v. Kovacs*, 469 U.S. 274, 285 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984). Thus, in one sense, a section like 28 U.S.C. 959(b) should be completely unnecessary. However, the evidence to date suggests that such a provision is important to remind everyone that debtors are still subject to the rule of law. If, though, it is to serve that purpose, it should be amended to fully describe the debtor’s and trustee’s obligations, so that it does not unintentionally suggest a lower standard.¹⁴ The proposed language seeks to do this.

C. Exceptions to the Automatic Stay

D. Limitations on the Discretionary Stay

These provisions have been discussed extensively in earlier submissions to the Commission and will be only briefly reviewed here. In the current Code, Sections 362(b)(4) and 362(b)(5) allow the government to litigate the debtor’s substantive liability for a violation of the law, liquidate the amount owed, and pursue any necessary appeals. If the result is a money judgment it must then submit that claim to the bankruptcy court for allowance and payment. However, many proceedings do not result in money judgments; instead they produce injunctive orders or other determinations that could be viewed as affecting “property of the estate. As such, some courts believe that they run afoul of the stay provisions contained in in Section 362(a)(3) and (a)(6) which, respectively, bar acts to “obtain possession” or “control” property of the estate, and to “collect, assess, or recover a [prepetition] claim against the debtor.”¹⁵ If these sections are deemed to apply to such actions, then

¹³ Even if the automatic stay might apply to restrain certain governmental actions, this does not mean that those law are no longer applicable. At most, it means that the government may need to give the bankruptcy court an opportunity to review its action before it is allowed to forward. But, as will be discussed below, the legitimate bases for denying the government’s motion to proceed are extremely limited.

¹⁴ Why does the section read the way it does now? The answer is probably that the section was really intended to deal more with defining how, where, and when trustees, debtors and the like may be sued without seeking the authorization of the appointing court than in attempting a precise statement of their obligations to obey the law. *See In re Markos Gurnee Partnership (Schechter v. State of Illinois, Dept. of Revenue)*, 182 B.R. 211, 221-222, 226-227 (Bankr. N.D. Ill. 1995). The current wording of Section 959, however, does lead to analytical confusion and should be clarified so that its limited venue and suit authorization provisions are distinguished from the more general language that describes the obligation of trustees and debtors to obey the law.

¹⁵ To the extent that the government’s position on the definition of a claim is adopted, the likely impact of Section 362(a)(6) will be greatly lessened or eliminated. The government agrees that a true

the freedom of governmental action apparently provided by the exemptions provided in Section 362(b)(4) and (5) will prove to be largely illusory.

Our earlier submission urges the Commission to recommend that police and regulatory actions should be exempt from both of these provisions. As will be discussed further, below, there is virtually no basis on which the bankruptcy court could legitimately refuse to allow the police and regulatory action to be implemented once the state court has made its determinations. If so, then it makes no sense to require the government to go through the cost and delay of filing a lift-stay motion just to allow the bankruptcy court to take the ministerial action of entering an order. Thus, we have urged that the police and regulatory exceptions to the stay should be amended to add this provision as well.

Finally, it does little good to except the government from the application of the automatic stay if some courts believe that they have general authority to use the discretionary stay to bar police and regulatory actions. The proposed changes to Section 105 would require a) that injunctive orders meet the normal requirements for injunctions and b) in the case of police and regulatory actions that are not barred by some other provision of the Code (i.e., the discrimination provisions of Section 525), a stay may only be issued where similar relief could be granted under nonbankruptcy law. Those provisions do exist, but they are severely limited, in recognition of the fact that the “Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.” *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); *U.S. v. Murdock Machine and Engineering Company of Utah*, 81 F.3d 922, 930 (10th Cir. 1996). The same limitations should be observed in bankruptcy cases, for the same reason.

III. Responses to Government Proposals and Replies Thereto

A. Treatment of Injunctive Remedies as Dischargeable Claims

As noted earlier the Working Group on Future Claims and Mass Torts have produced two memoranda dealing with when claims arise and how this should affect their treatment under the Code. The results, to date, we believe are fundamentally flawed, particularly with respect to the use of injunctive remedies. We do not believe that the issue is whether or not to bring environmental “claims” within the bankruptcy; rather, the issue is whether the governments use of injunctive orders are claims at all. In our view, and in the consensus view of the courts, they are not. The two “future” claims proposals seek to change that consensus and turn such matters into monetary claims, which may be discharged in bankruptcy. In our view, such proposals are unwarranted and inappropriate. Moreover, the discussions are both unclear and contradictory. Problems with the March proposal have already been noted; similar issues are also readily apparent with respect to the April 14

monetary judgment is a claim and must be paid under bankruptcy court supervision. The actions which it seeks to pursue under these exceptions should normally not fit that definition. However, to extent that the current definition and the changes proposed with respect to “future claims” could enlarge the definition of a claim, this could make applicability of this section more problematic.

memorandum.

For instance, it is internally contradictory with respect to which injunctive orders it would discharge. At pp. 2-3, it appears to endorse the position that a reorganized debtor that does not remediate existing contamination during its case will remain liable for such cleanups, after confirmation, but at pp. 4-5, it appears to provide that the debtor will be able to discharge liabilities regarding such matters. What exactly does this mean? Is the suggestion that, upon paying some amount under its plan to the government, the debtor is now free from any obligation to do anything about the contaminated site upon which it is operating? Is the government now obligated to clean up the site or else leave it contaminated forever? Does this immunity from the law attach only to the debtor or may it sell its exemption to a new purchaser? Moreover, while apparently only discussing this notion in the context of environmental claims, its approach would have far wider ramifications. For instance, may a debtor estimate how much it might extra it might have to pay if it bargained in good faith with its union, call that amount a claim, pay it in part, and then be exempt from further bargaining obligations? At least one judge once thought so several years ago. His opinion was promptly reversed, but would the same result occur if these changes were made?

Moreover, these changes are largely premised on the debtor's desire to obtain certainty about its future obligations. But how can it do so if it really does *not* know what liabilities it has? Estimation is not a magic wand that allows the debtor and the court to ferret out totally unknown liabilities. Unless the debtor already has a fairly substantial idea about what it may potentially owe, it *cannot* produce a defensible estimation. And, if it knows that much, then it would seem a present claim already exists. The mere fact that the expenditures may not yet have been incurred has never been deemed to detract from the existence of a claim. Both of the current proposals try to draw some meaningful distinction between a present and a future claim; we suggest that none exist. The only true issue is whether some claims can be sufficiently ascertained and dealt with during the case, or whether they are so amorphous that due process forbids latter is true, the debtor may simply have to take that risk into account when making its showing about the feasibility of its plan.¹⁶ It is not acceptable, in any event, to provide that the debtor may be excused from complying with the law with respect to undiscovered liabilities merely by the expedient of filing a petition. This does not provide the government with some "special" benefit with respect to debtors, it simply ensures that their "fresh start" does not become a "head start" with respect to their competitors who remain liable for

¹⁶ There may be ways of dealing with some of those concerns with respect to governmental claims, where the claim-holder is known, and it is merely the extent of the claims which is at issue. The government may be willing to agree to how such unknown claims will be handled; i.e., as in the Eagle-Picher case, where it agreed that the debtor would only be required to pay any liability assessed at future-discovered sites at the same percentage as it was paying for claims resolved under the plan. Or, as in the Circle K case, the government may be willing to share the risk with the debtor by negotiating a fixed price for future liabilities. Other solutions may be worked out in order to accommodate and reduce the risks of dealing with unknown sites. But, each of those solutions requires agreement by a claim-holder who knowingly accepts those risks and waives its existing rights. Using a future claims representative to make these decisions is not an adequate substitute.

remediation of their property, whether or not they were the ones who created the problems.

B. Amendments to the Stay Provisions

Those who oppose the proposal to except police and regulatory actions from Sections 362(a)(3) and (6) presumably do so because they agree with Judge Bufford that the stay *should* apply “if the government action would have a substantial impact on the value of the debtor’s business, . . . [but in] some cases relief from the stay should be granted” and that, in any event, creditors should be notified and given an opportunity to challenge the lifting of the stay so that “the court [would] have an opportunity to balance the interests of all creditors and the debtor before permitting the government agency to take action that destroys substantial value belonging to the estate.” Such a position, we submit, is inconsistent with the current Code, unworkable in application, and in conflict with fundamental aspects of our federal system.

In this regard, imposing an *automatic* stay on an action implies that it normally *will* be appropriate to bar that action from being carried out during some (and often all) of the time the bankruptcy case is pending and that it is reasonable to give the bankruptcy court substantial discretion to decide whether to lift the stay. The party seeking to lift the stay bears a substantial burden to justify making a change from the initial presumption of non-action.¹⁷ As of now, the Code plainly allows the government to determine, for instance, that a license should be revoked, that contaminated property should be destroyed, that counterfeit goods should be seized, or that a dangerous building should be torn down. The only remaining issue is whether the government should be able to implement those decisions without being required to obtain an order from the bankruptcy court lifting the automatic stay.¹⁸ If not, it must be because it is appropriate to grant a bankruptcy court discretion

¹⁷ For that reason, statements that suggest that imposing the automatic stay merely shifts the burden of going forward to the creditor greatly understate the burden actually being imposed. The merits of the issue are not in equipoise once the lift-stay motion stay is filed; rather, the moving party must still fight an uphill battle to convince the court that the relief should be granted. In addition, although the 1994 amendments imposed additional deadlines on the hearing process, nothing requires the court to issue its *decision* in a particular time period. In short, a decision to impose a stay should not be made on the assumption that such an action can be quickly or easily reversed.

¹⁸ The courts do not agree as to whether Section 362(a)(3) and/or (6) apply to police and regulatory actions that are otherwise exempted from the automatic stay by Sections 362(b)(4) and (5). While some courts have read the statute this way, other courts, including most recently the Sixth Circuit in *In re Javens* (*Javens v. City of Hazel Park*), 1997 WL 65766 (6th Cir. 1997), have concluded that those sections do not bar the government from exercising those powers even if the bulldozing of condemned buildings is required. On the other hand, the court in *In re Albion Disposal, Inc.* (*Slater v. Town of Albion*), 203 B.R. 884 (Bankr. W.D.N.Y. 1996), refused to dismiss a proceeding that alleged that the passage of a city ordinance allegedly directed against the debtor’s property interests could violate Section 362(a)(3) even if it was concededly enacted for police and regulatory purposes. The interest of all parties require the Commission to clarify this issue and define

to forbid completely or delay substantially the exercise of police and regulatory powers against a debtor during the case. And, if so, that conclusion must rest on one of two underlying propositions:

! either it is appropriate to give bankruptcy courts authority, on an *ad hoc* basis, to determine which generally applicable police and regulatory laws a debtor may violate, or

! the bankruptcy court should have the power to redetermine on a *de novo* basis, the judgments on liability and remedy that are made by other, coordinate bodies of government.

The former statement assumes the validity of the governmental action but subordinates the enforcement thereof to the goal of assisting the debtor;¹⁹ the latter assumes that the other governmental entities may have erred and that the best mechanism for detecting and correcting that error is direct review by the bankruptcy court. Neither proposition is consistent with sound policy or the basic precepts of American jurisprudence.

Judge Bufford's proposal, for instance, is largely based on the first view — that if obeying the law hinders the debtor's reorganization, it should be entitled to obtain an order from a court of law that authorizes those violations in order to assist the debtor's reorganization or to provide additional payments to its creditors. This would be a dramatic departure from principles that long predate the current Code. And, in any event, such a proposal would be thoroughly unworkable. What, for instance, is a "substantial impact?" Would this be a percentage level? Would it be set in the Code or would each judge pick his own level? Whatever the level is determined to be, how will the "impact" of an action be valued? Will a temporary shutdown automatically be deemed to destroy the value of a business? If not, how much impact will it have?²⁰ How will disputed valuation issues be decided and, more important, what happens in the meantime if the enforcement process is stayed while these issues are being contested and appealed? How will the costs to the government or the public incurred during the delay caused by the valuation process be dealt with? Are the creditors benefitted if the estate incurs substantial additional, ultimately unnecessary administrative costs while contesting the government's order?

specifically the boundaries of permissible government activity during the case.

¹⁹ Note, that, because the automatic stay applies in all chapters, any changes to its scope will not be limited to assisting in reorganizations, but will be just as applicable to pure liquidations.

²⁰ While this might seem obvious, the reemergence of ValuJet after its extended shutdown belies that "common sense" assumption. Had it filed for bankruptcy, though, upon receiving the shutdown order, should the FAA have been precluded from enforcing that order until a bankruptcy court decided whether Valujet would be able to survive such a closure? Is the bankruptcy court entitled to "balance" the impact on the debtor's survival against the possibility that the debtor's seriously deficient maintenance practices would cause another crash and kill another 100 people? Should the airline be allowed to fly while these issues are being litigated?

Worst of all, how is the government to determine whether the automatic stay applies if such a standard were used? Section 362 now applies based solely on the *type* of action being taken, not on the result of an amorphous balancing test. If such a standard applied, how could the government ever reliably determine whether or not a particular action is stayed? Must it seek bankruptcy court permission before it takes any action that may have more than a *de minimis* effect to avoid the possibility of sanctions? Who can say? The obvious result of such a standard would be to paralyze governmental enforcement activity, thereby providing an overwhelming incentive to defendants seeking to delay or derail enforcement activities to file bankruptcy to further that goal.

In short, realistically speaking, Congress must either decide to bar *bona fide* police and regulatory actions from going forward at all, or allow them to reach their conclusions unhindered by application of the stay. For obvious reasons, it has always taken the latter position. Once that basic judgment has been made, though, it is illogical and, largely impermissible, for the bankruptcy courts to assert that they may bar *implementation* of those decisions, even if this may unavoidably impair the debtor's reorganization or limits recoveries to other creditors. Allowing an entity to violate the law simply because it cannot do otherwise and make a profit unfairly sacrifices the rights of all citizens to be protroup.

The limits on second-guessing the decisions of other governmental bodies applies whether this is done by overriding valid decisions to assist the debtor's reorganization or by concluding that those decisions are not correct and may be redetermined *de novo*. Where a state court has, for instance, determined that applicable law, applied fairly and evenly requires that a debtor's license should be revoked or that property be seized or destroyed in order to protect a valid police or regulatory interest, what options does the bankruptcy court actually have even if the government is deemed to be subject to Section 362(a)(3) and required to file a lift-stay motion? May it allow the debtor to relitigate the substantive determinations made by the state court? May it ignore them? Is it not, in fact, bound to them by principles of collateral estoppel, *res judicata* and full faith and credit? If so, what legitimate basis does the court have to refuse to lift the stay? And, finally, if it will not, except in the rarest of circumstances,²¹ have a basis for refusing to lift the stay upon requires, then why should there be a stay at all, much less an *automatic* one? If the bankruptcy court *must* give full faith and credit to the state's determinations on the need for the action, do we really believe that a bankruptcy court now has, or ever should have, the authority to authorize a continuing violation of the law simply because this would allow a debtor to keep property that it allegedly needs to reorganize?

As noted above, Section 959 states exactly the opposite, debtors *must* obey all applicable laws. By the same token, Section 105 only allows the court to use its powers to enforce the *provisions* of the Code, not merely its generalized *policy* goals. And while reorganization is

²¹ Governmental actions may be enjoined on grounds such as estoppel, bad faith, or *ultra vires* actions, but those exceptions are extremely narrow. Applied properly, they would be applicable only in highly unusual circumstances. Cf. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493 (1995); *Younger v. Harris*, 401 U.S. 37 (1971).

obviously a primary goal of our bankruptcy system, there is *no* provision in the Code that gives bankruptcy courts *general* authorization to allow a debtor to ignore applicable police and regulatory legislation.²² Nor is there any established body of law that allows such powers to be exercised by the bankruptcy courts.²³ To the contrary, Congress has not, and should not be urged to authorize such a startlingly broad grant of power to judges to overrule legislative enactments.

In this regard, see *In re Vel Rey Properties, Inc.*, 174 B.R. 859 (Bankr. D.D.C. 1994), where the court rejected a motion by a Chapter 7 trustee who sought personal immunity to be able to operate an apartment building in violation of local housing regulations. The court held that it had *no* authority to authorize a trustee to violate the law, citing *Gillis v. California*, 293 U.S. 62, 66 (1934). In that case, the Court concluded that under the predecessor to 28 U.S.C. 959(b), Congress withheld "from the District Courts the power to authorize receivers in conservation proceedings to transact local business, contrary to state statutes obligatory upon all others." Congress, the Court stated, had

²² Obviously, as with executory contracts, the Code does explicitly overrule contrary nonbankruptcy law in some respects. Those sections are not at issue here and no one disputes that Congress *may* decide to give the Code primacy in a particular instance. But, where it does not do so, there is nothing that suggests that Congress intended a bankruptcy filing would serve to generally suspend applicable police and regulatory provisions. Even if Section 362(a)(3) is thought to require the government to ask to have the stay lifted before acting, that does not suggest that Congress thought bankruptcy courts would leave the stay in place so as to allow debtors to break the law.

²³ Despite some contrary decisions by lower courts, the Supreme Court and the Courts of Appeals have repeatedly noted the limited scope of the powers provided by Section 105. See, e.g., *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988); *Chiasson v. J. Louis Matherne and Assoc. (In re Oxford Mgmt., Inc.)*, 4 F.3d 1329, 1333-34 (5th Cir. 1993); *In the Matter of Fesco Plastics Corp., Inc.*, 966 F.2d 152, 154 (7th Cir. 1993); *In re Eagle-Picher Industries, Inc.*, 963 F.2d 855, 858 (6th Cir. 1992); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 601 (10th Cir. 1990); *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1188, n. 16 (Section 105 "does not authorize the bankruptcy court to create substantive rights that are otherwise unavailable under applicable law or constitute a roving commission to do equity."); *In re Southern Ry. Co. & Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985); *PBCG v. Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1988).

Despite the apparent clarity of this law, however, many debtors still raise these issues, courts still grant such motions, and the submissions of the American College of Bankruptcy and the National Bankruptcy Conference indicate that there is still doubt, confusion, and disagreement over the proper resolution of these questions. Those submissions suggest that Section 105 should be available to stay police and regulatory actions in situations beyond those applicable under nonbankruptcy law, but suggest no defensible basis on which such relief could be granted. As such, the Commission should support changes that will clearly, and unambiguously settle these issues. Maintaining ambiguity in the law that spawns unnecessary litigation serves no legitimate interest of any party.

clearly withheld from the courts the right to empower receivers to disregard local statutes and "if the receiver cannot continue to carry on the Company's business according to the plain direction of Congress, he must pursue some other course permitted by law." Nothing in the current Code suggests that the bankruptcy courts have been given greater powers to authorize illegal conduct. *See also Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 389 (3rd Cir. 1987); *In re Capital West Investors*, 186 B.R. 497, 500 (N.D. California 1995); *In re 1820-1838 Amsterdam Equities, Inc.*, (*City of New York, v. 1820-1838 Amsterdam Equities, Inc.*), 191 B.R. 18 (S.D.N.Y. 1996).

In short, if the bankruptcy court is not, and should not be, entitled to disregard the law to benefit the debtor's reorganization, then there is no basis to bar the government from implementing its police and regulatory decisions. Laws are passed to protect the health, safety, and economical well-being of *all* citizens and are enacted with full knowledge that not every business will be able to operate in conformity therewith and still make a profit. *See Morysville, supra*. If legislatures believe that those requirements should be relaxed in cases of financial incapacity, they can and have included such accommodations in the substantive law. Absent such an exemption, however, the bankruptcy courts should not assume that they may infringe on those legislative decisions simply because they have general authority to resolve the debtor's financial affairs. *Cf. U.S. v. Noland*, 116 S.Ct. 1524 (1996).²⁴ Applying an automatic stay or expanding Section 105 so that bankruptcy law may preempt the valid application of otherwise applicable police and regulatory laws to assist a debtor's reorganization would mark a dramatic, and, we believe, unwise, change from the current policy choices in the Code. This is true, even if it may reduce assets available for the debtor's creditors.

When the government enforces police and regulatory statutes against a defendant, it protects the rights of many parties including not only the defendant's employees and customers; but also its neighbors, its competitors; the employees, customers, and suppliers of those competitors; and the public at large. In doing so, the legislature may decide that the most effective way to protect those parties may be seize and/or destroy property produced in violation of the law. If such a defendant files bankruptcy, the government's actions may well reduce the amount available to pay its direct creditors. But, even if true, that does not justify providing those parties with a blanket right to intervene to oppose the government's action or allowing their needs to override the requirements of the law. Theirs are not the only interests at stake. Surely, the injured victims that the law protects have every bit as much interest and standing as those creditors. Will those other parties be allowed

²⁴ As noted above, Congress *could* provide that the Code's provisions would override other federal laws and preempt the exercise of state law. But, in the absence of a clear statement, the courts may not assume that two federal laws contradict each other. By the same token, the party arguing that state law is preempted bears the burden of showing that the Congressional intent to do so is "clear and manifest." *BFP v. Resolution Trust Corp.*, 114 S.Ct. 1757, 1764, *reh'g denied*, 114 S.Ct. 2771 (1994). *See also Building & Trades Council v. Associated Builders*, 113 S.Ct. 1190, 1194 (1993); *Dept. of Revenue of Oregon v. ACF Industries*, 114 S.Ct. 843, 851 (1994); *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Nothing in the Code generally provides such a "clear and manifest" statement to preempt these legislative policy choices at either the state or federal level.

to appear and be heard as well? May they object and appeal a decision in favor of the debtor? How should their interests be weighed in the balance against those of the debtor and its creditors? This is a recipe for chaos.²⁵ The answer to such suggestions is that those competing interests have already been weighed in the legislative balance. Allowing the courts to reopen and rebalance the legislative tradeoffs with respect to police and regulatory actions is inappropriate and unworkable.

The debtor will not lack a proper forum, whether before the bankruptcy court, the state court, or both, to contest improper actions taken against it. The creditors can add nothing to the argument, except their own, self-serving desire to be paid. There is nothing wrong with that wish — but it hardly needs their presence to be recognized and appreciated. And, in any event, how do their pecuniary interests change the analysis with respect to whether the debtor should be allowed to violate the law? Should a debtor be allowed to sell contaminated meat if this will benefit its creditors? Must the government become a counterfeiter by selling bogus goods confiscated from the debtor in order to provide additional funds for the debtor’s creditors? Should the government allow a nursing home to operate an unsafe facility and bill patients in order to ensure that payments can be made to its suppliers? If their interests argue for overriding the law, the interests of the debtor’s victims, as noted above, equally argue for upholding it.

The implication of a test that would “balance” the interests of the creditors against application of the law is that the government must *prove* anew, in each specific case, the wisdom and merit of the political choices it made in enacting its law. Such a requirements would be incredibly burdensome. Moreover, how would the issue be proved by the government? Must it show in each case that excepting *this* debtor from *these* requirements would *inevitably* lead to the harm the statute seeks to avoid? Or would some lesser standard be applicable? Who knows and who knows how to make such a prediction? Bankruptcy judges must not try to predict the feasibility of a Chapter 11 plan — and, despite their best efforts, at least half of the time they are proven wrong when the plan subsequently fails, often within only months after confirmation. Must those judges now also attempt to predict a debtor’s future intentions and ability to comply with the intent (not the letter) of the law? Will their predictions in this area prove any more accurate?

The previous discussion assumed that the nonbankruptcy court or agency had completed its work and made its determinations, with no questions raised as to the *bona fides* of those actions. A fallback argument might be that the bankruptcy court should respect the decisions of those other

²⁵ Creditors are normally may not intervene in an adversary proceeding between the debtor and other private litigants even if the outcome may decide ownership of a particularly valuable asset, or create an enormous liability for the estate. See, e.g., *In re Kaiser Steel Corp. (Vermejo Park Corp. v. Kaiser Steel Corp.)*, 998 F.2d 783, 790-91 (10th Cir. 1993) and *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3rd Cir. 1994) (while adhering to its prior position allowing interveners broad rights to participate in any adversary action, Third Circuit concedes that its position is widely criticized and a distinctly minority position). Certainly, they should have no greater rights in cases involving governmental police and regulatory powers.

bodies after they are finished, but should be able to make its own decisions where the action is either incomplete or the accuracy of the other court's conclusions is attacked by the debtor. Shouldn't the bankruptcy court be able to intervene then to make the decision itself or to reverse an "incorrect" decision by the other body? *When viewed in the context of our federal system, the answer to those questions should still be "no."*

Bankruptcy courts are not the only entities within, or without, the federal system, that must afford due process to *all* affected parties. Relege in self-help actions that are not provided for in the law. Moreover, nonbankruptcy courts — federal and state alike — are as much governed by and bound to apply the provisions and protections of the Code as are bankruptcy judges. In short, nothing about the Code or our federal system implies, much less requires, that bankruptcy courts should be viewed as the sole champions of debtors against the failings of other courts and governmental entities. Indeed, our entire system assumes directly the contrary. Every court is required to presume that other courts and administrative agencies bodies will apply the law correctly and respect their jurisdictional boundaries. If a lower body makes a mistake, appeal mechanisms within those other systems (culminating in Supreme Court review) permit correction of the error. The principles of federalism, comity, and respect for coordinate branches of government as represented by exhaustion requirements, require that those higher bodies be allowed to correct the errors of their subordinate entities, rather than imposing the supervisory intervention of a bankruptcy court. *See Howlett v. Rose*, 496 U.S. 356, 369 n. 16. Bankruptcy judges, like all other judges, have no right to second-guess the actions of every other judicial and administrative actor in the system. To be sure, those other entities might make a mistake, but that is inherent in any system run by human beings. Courts can only aspire to providing due process, not perfection — and they are entitled to deference even if they are wrong.

Some might suggest that the bankruptcy courts could quickly and easily supply the necessary corrections for the errors of those other parties, thereby improving the functioning of the system. But that would assume that bankruptcy judges have more expertise and are less fallible than other actors in the process. It casts no aspersions on their competency to reject that notion out of hand. Indeed, on occasion, their attempts at "corrections" may simply introduce new errors into the system that did not previously exist. (For instance, in the compilation of Section 105 cases previously provided to the Commission, almost all of the decisions that imposed a discretionary stay were later overturned on appeal as being in excess of the court's powers. Thus, these "corrections" served only to impede and delay lawful government actions.) Our constitutional system rejects the notion that federal courts should micromanage other players in the system, and the bankruptcy courts are no exception, particularly when their actions may impair the ability of the rest of government to protect its citizenry.

This is also the rejoinder to the argument raised by both Judge Bufford and the National Bankruptcy Conference about the effect of the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). There are a number of controls that may be asserted by the bankruptcy court to enforce the stay against state officials. And, as noted above, state courts are bound to apply the provisions of the Code, including the automatic stay, as coequal parts of state law. *Howlett, supra*. It is an affront to the states any ignore that duty. (Indeed, rather than state

courts recklessly ignoring the stay, a problem frequently faced by state governmental entities is convincing a state court judge that he may continue even the most clear-cut police and regulatory matter postpetition, without receiving an explicit ruling on the applicability of the stay by the bankruptcy court.) In short, even if the other courts are agencies are still completing their work, or the debtor charges that they have been “unfair” or misapplied their statutes, this still does not suggest that the universal panacea for all such problems is vesting unlimited discretionary powers in the bankruptcy courts.

IV. Conclusions

In short, a bankruptcy filing cannot insulate the debtor from all of the consequences of a competitive society. And, conversely, a society that seeks to protect all of its citizens cannot function if its laws may be overridden by those who try, but are unable, to operate profitably in compliance therewith. In the main, the government does not believe that enforcement of generally applicable laws *will* have the detrimental effect that is routinely conjured up by debtors. But, if in a particular case, an irreconcilable conflict arises, then the Code should be clear: governmental units should continue to be allowed to perform their most basic function, that of protecting their citizens from harm. This means that their injunctive orders should not be treated as claims or discharged at the end of the case, that the costs of compliance should be recognized as entitled to administrative status, and that unnecessary barriers should not be erected to the government’s enforcement and implementation of its police and regulatory powers. The proposals we have suggested would serve those goals.