10-1984

Ohio v. Kovacs

Lewis F. Powell Jr.

May be moot, as argued by Resp. CFR on mootness, subject to discussion

1/4/83

Included to CVR for consideration of mootness

reply rec'd see over

It is not entirely clear as to status of case.

I do think CA 6 is wrong.

Preliminary Memo

January 7, 1983 Conference
List 5, Sheet 3

No. 82-815

OHIO v. KOVACS, et al. OK	Cert to CA 6 (Engel, Brown & Horton [DJ]; per curiam) Federal/Civil	Timely

1. SUMMARY: Whether an injunction requiring the clean-up of a chemical waste storage facility was a money judgment outside the scope of the governmental exemption to the automatic stay provision of the Bankruptcy Act.

2. BACKGROUND: 11 U.S.C. §362(a)(2) provides for an automatic stay of the enforcement, against a debtor or against property of the estate in bankruptcy, of a judgment obtained before the commencement of bankruptcy proceedings. Section

Call for reply on Mootness. This decision sounds wrong to me.

Mike

362(b)(5) creates an exception whereby "the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police power or regulatory power is not automatically stayed upon filing of a bankruptcy petition."

3. FACTS & PROCEEDINGS: Prior to filing a petition in bankruptcy, the debtor resp Kovacs had been engaged in the business of industrial waste disposal in Ohio. In 1979, the state of Ohio sued Kovacs as an individual and an officer of several businesses for violations of various state environmental laws. At that time, Kovacs signed a stipulation and judgment order prohibiting him from causing further pollution, requiring him to remove hazardous waste from the premises of his company, and directing him to pay $75,000 to the Ohio Department of Natural Resources. Because Kovacs failed to comply, the state court appointed a receiver to collect Kovacs' nonexempt assets and use them to finance the cost of clean-up. In July 1980, Kovacs filed a personal petition in bankruptcy in United States Bankruptcy Court (S.D. Ohio). In an effort to assure the availability of adequate funds to implement the clean-up order, Ohio sought a state court hearing on Kovacs' current employment status and income. Kovacs thereupon moved the Bankruptcy Court to enjoin Ohio from proceeding in state court under the automatic stay provisions of 11 U.S.C. §362. The Bankruptcy Court agreed and enjoined the state from proceeding in state court "to levy on post-filing wages of the debtor." The DC affirmed, finding that

the state sought to collect money "just as though it were enforcing a money judgment."

CA 6 affirmed per curiam. It concluded that while §362(b) clearly permitted governmental units to continue to enforce their police power through mandatory injunctions despite the filing of a bankruptcy petition, it denied them the power to collect money in their enforcement efforts. Like the two lower courts, CA 6 believed that Ohio had returned to state court in pursuit of what in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay.

3. CONTENTIONS: Petr argues the case presents a question of "profound importance to the federal, state and local governments which are attempting to protect citizens from the dangers presented to their health and safety by illegally operated chemical waste disposal facilities." Specifically, petr argues that the Court of Appeals misapplied the Bankruptcy Act in wrongfully preventing a state from exercising its police power to abate a public health hazard. Legislative history of the Bankruptcy Reform Act of 1978 indicates that Congress was concerned that bankruptcy courts not use their authority to disrupt the enforcement of statutes adopted pursuant to the states' police power to protect public health and safety. Accordingly, §362(b)(5), the governmental exemption to the automatic stay provisions, was drafted. Unfortunately, the lower courts have disagreed as to when the statutory stay is applicable against state police power actions. See Petn, p. 10-11. Petr alleges a conflict with National Labor Relations Board v. Evans

Plumbing Co., 639 F.2d 291, 293 (CA 5 1981) (statutory stay does not apply against NLRB proceedings); and SEC v. First Financial Group of Texas, 645 F.2d 429 (CA 5 1981) (holding automatic stay does not apply against an injunction and order appointing a receiver in a federal police power enforcement action). The Fifth Circuit's decision makes clear that the use of receiverships was a mechanism for implementing injunctive relief and should not be considered a money judgment. CA 6 has cut against Congress' intent that the automatic stay not apply in these circumstances.

The Solicitor General has filed an amicus brief in support of petr.[1] The SG argues that the meaning of money judgment for purposes of §362(b)(5) does not extend to injunctions which entail the expenditure of money for their performance. In such cases, the government's foremost aim is to protect the public health, not to enhance the public fisc.[2] Pennsylvania and 14 other states have also filed an amicus brief urging a grant. They note that the decision below has already been cited by other courts in blocking state police power efforts. See In re Penn Terra, Ltd., No. 82-845 (W.D. Pa., Nov. 4, 1982); United States v. Johns-Manville Sales Corp., No. 81-299D (D. N.H., Nov. 15,

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[1]The interest of the United States is that the decision below may be used to cripple its own environmental enforcement efforts under a number of federal laws.

[2]The state and the United States recognize that the $75,000 payment provided for in the judgment order is a money judgment subject to the automatic stay provisions.

1982). Moreover, the decision below cuts against the Tenth Amendment, 11 U.S.C. §543(c)(1), which obligates a bankruptcy court to protect Ohio from the receiver's inability to carry out his obligations, and 28 U.S.C. §959(b), which provides that a receiver shall manage property in his possession according to requirements of valid state laws. Amicus also argue that the decision below was an unconstitutional exercise of judicial power by non-Art. III judges. Northern Pipeline Construction Co. v. Marathon Pipeline Co., 103 S.Ct. 199 (1982).

Resp argues first that the case is moot because on September 17, 1982 the DC entered its decision affirming the Bankruptcy Court's determinatation that resp's obligations under the injunction were dischargable in bankruptcy. Consequently, petr would be unable to seek to collect the post-petition personal earnings of the debtor even if the decision of CA 6 on the automatic stay were reversed by this Court. On the merits, resp argues that this case is of limited importance because it does not involve a corporate debtor or business reorganization under Chapters 11 or 13 of the Bankruptcy Code, but rather involves a Chapter 7 proceeding for an individual debtor. Moreover, it does not involve that portion of the stipulation in judgment entry requiring resp to stop polluting. Resp then seeks to distinguish cases cited by petr. In NLRB v. Evans Plumbing Co., supra, the Court noted that "should it be necessary to enforce the judgment for backpay, a different question would be presented. We express no opinion as to whether an action to execute or enforce a money judgment would be exempt from the automatic stay." 639 F.2d, at

293. SEC v. First Financial Group of Texas, supra, did not require payment of moneys by the debtor and only allowed the government agency to implement injunctive relief by preventing future violations of the law through the appointment of a receiver. Resp contends that CA 6 correctly found that the state court order appointing the receiver could not be distinguished in substance from a money judgment because of its requirement that the receiver obtain all nonexempt assets of the debtor as well as any sums of money which would become payable to the debtor in the future. The state fails to accept that a court order may be both an injunction and a money judgment.

Resp also suggests that Congress, in reshaping the Bankruptcy Act to comply with Northern Pipeline, may change substantive provisions, such as the automatic stay sections.

4. DISCUSSION: (1) Mootness. If resp is correct that the case is moot, then the decision below should be vacated so that it will not carry any precedential effect. United States v. Munsingwear, Inc., 340 U.S. 36 (1950). This matter might, however, fall under the "capable of repetition, yet evading review" exception. Unless petr responds to the mootness suggestion in a reply brief, I recommend calling for such a response.

(2) On the merits, the issue of whether an injunction which requires seizure of a debtor's funds is a money judgment for purposes of the automatic stay provisions of the Bankruptcy Reform Act is certworthy. Although resp is fairly persuasive in distinguishing the allegedly conflicting CA 5 decisions, the

decision below has already been relied upon in several courts to block similar exercises of police power. Because it is not clear that Congress intended the automatic stay provision to apply in these circumstances, and because of the important interests of both the United States and a number of states in the matter, if the case is not moot, I would recommend a grant.[3]

5. RECOMMENDATION: I suggest calling for a response from petr on the question of mootness.

There is a response and two amicus briefs.

December 21, 1982 Singer Opinion in Petition

ME

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[3]The Art. III problem concerning the bankruptcy courts should not in any way affect this case, given that Northern Pipeline is limited to purely prospective effect, and because, contrary to resp's suggestion, there is no reason to believe that Congress will in response to that decision change the automatic stay provisions.

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 82-815

Submitted ....., 19... *Announced* ....., 19...

OHIO

vs.

KOVACS

GVR on mootness

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.			GVR on mootness										
Marshall, J.				"									
Blackmun, J.				"									
Powell, J.				"									
Rehnquist, J.				"									
Stevens, J.			✓										
O'Connor, J.				"									

L on mootness issue.
2/14/84

Response received case is not moot.

Important Q as to whether a claim by State of Ohio for damages & injunction vs Resp, who had a ctt. with State to dispose of industrial waste, is dischargeable in Bankruptcy.

Grant 2/29

Cammil's memo attached

Q is important, & is a Grant.

But Resp. argues mootness — & we should have this briefed

PRELIMINARY MEMORANDUM

February 17, 1984, Conference
List 5, Sheet 3

No. 83-1020-CFX

OHIO

v.

KOVACS (Bankrupt operator of waste dump)

Cert to CA6 (Kennedy, Wellford, McRae [DJ])

Federal/Civil

Timely

1. SUMMARY: Petrs challenge the decision of the courts below that certain liabilities of resp under a state-court injunction were dischargeable in bankruptcy.

2. FACTS AND PROCEEDINGS BELOW: Resp Kovacs had been engaged in the business of industrial waste disposal in Ohio. In

CFR - Important question of whether ~~police~~ enforcement of state police power (here environmental) that requires expenditure of money is dischargeable in bank-

1979, the State of Ohio sued Kovacs as an individual and as the officer of several business entities, including the Chem-Dyne Corp., for alleged violations of various state environmental laws. Resp signed a stipulation and consented to entry of an order prohibiting him from causing further pollution, requiring him to remove all hazardous wastes from the premises of the Chem-Dyne Corp. by July 1980, and directing him to pay $75,000 to the Ohio Dep't of Natural Resources. When resp failed to comply, the state court appointed a receiver to collect resp's nonexempt assets and use them to finance the cost of cleanup at the Chem-Dyne site.

Subsequently, in July 1980, resp filed a Chapter 11 petition for personal bankruptcy in the United States Bankruptcy Court for the Southern District of Ohio. In re Kovacs, Bankr. No. B-1-80-1499. By order of the Bankruptcy Court, the proceedings were converted to Chapter 7 proceedings in September 1980. In an effort to ensure the availability of adequate funds to implement the cleanup order, Ohio sought a state court hearing on resp's current employment status and income. Resp moved in Bankruptcy Court to enjoin Ohio from proceeding in state court, arguing tht the State's goal was to obtain an order permitting the state-court receiver to use his post-bankruptcy income to satisfy the unfilled obligation to clean up the Chem-Dyne site and that such an order would violate the automatic stay provision of 11 U.S.C. §362. The Bankruptcy Court granted the injunction.

On appeal, both the DC and the CA6 affirmed. The CA6 concluded that, while §362(b) clearly permitted governmental units to continue to enforce their police power through mandatory

injunctions despite the filing of a bankruptcy petition, it denied them the power to collect money in their enforcement efforts.[1] The CA6 also found that Ohio was pursuing in state court what "in essence" amounted to a money judgment against resp. Thus, the State's action was properly subject to the automatic stay.

Subsequently, Ohio petitioned this Court for cert.[2] In response to that petition, resp argued that the stay appeal was moot because the DC had recently affirmed the Bankruptcy Court's determination that resp's obligation to comply with the injunction was dischargeable in bankruptcy. Assuming resp's liability under the state-court injunction was dischargeable, petr would be unable to seek to collect the post-petition personal earnings of resp even if the decision of the CA6 with respect to the stay was reversed. In reply, Ohio argued that its petition was not moot because the bankruptcy Court's determination of dischargeability was erroneous and could be reversed on the appeal of that decision then pending before the CA6. This Court granted Ohio's petition for cert, vacated the judgment of the CA6, and remanded the case to the CA6 for consideration of the question of mootness in light of the pending dischargeability appeal.[3] Upon considering the

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[1] 11 U.S.C. §362(b)(5) provides that "the enforcement of a judgment, other than a money judgment, obtained in an action proceeding by a governmental unit to enforce such governmental unit's police power or regulatory power is not automatically stayed upon filing of a bankruptcy petition."

[2] In its cert petition, the State conceded that the $75,000 payment provided for in the state-court judgment order was a money judgment subject to the automatic stay provisions.

Footnote(s) 3 will appear on following pages.

dischargeability appeal, the CA6 affirmed the DC and Bankruptcy Court's determinations of dischargeability, expressly relying on its holding in Kovacs I that "injunctions which require the performance of acts which necessitate the expenditure of money are really money judgments."

In the present cert petition, Ohio challenges the judgment of the CA6 with respect to the dischargeability appeal. The CA6's consideration of the mootness issue remains pending before it. It is petr's assumption that the CA6 is awaiting the Court's action on this cert petition before determining whether its dischargeability decision makes Kovacs I moot.

3. CONTENTIONS: Petr (and SG as amicus curiae):[4] The CA6 decision effectively releases resp from a mandatory injunction designed to protect public health and safety. In both Kovacs I and this case, the CA6 eviscerated the difference between a dischargeable right to payment for a breach of performance and a nondischargeable right to enforce an injunction that entails the expenditure of money. The consequence is that a pre-existing obligation to clean up a hazardous waste disposal site has been wholly excused. This result encourages polluters to abuse the Bankruptcy Code and defy state and federal environmental protection laws. Because of the great number of dumpsites

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[3]The action concerning the stay issued by the Bankruptcy Court is hereafter referred to as Kovacs I.

[4]A group of 30 States have also filed an amicus brief in support of petr.

urgently requiring cleanup and the limited funds available to state and federal governments for the purpose, any rule that excuses the responsible polluter from performing cleanup work has grave consequences.

Under the Bankruptcy Code, only two classes of claims are dischargeable in bankruptcy: (1) any right to payment; and (2) a right to an equitable remedy for breach of performance if such breach itself gives rise to a right to payment. 11 U.S.C. §101(4). Thus, a mandatory injunction will only be dischargeable if the breach may be remedied either by an injunction or by a right to payment. Such is not the case here, for, as the DC acknowledged, the Ohio statutes that authorized the state court to order resp to remove and dispose of the industrial and hazardous wastes did not provide the State with an alternative right to money payment. The CA6 made no contrary finding, but suggested that the State may pursue other remedies against resp, such as penalties and criminal sanctions. Penalties and sanctions are not alternative remedies, but are enforcement mechanisms.

The CA6 vastly oversimplified the situation here and took the view that if the injunction entails the expenditure of money, then it must be a right to payment, which is a dischargeable claim. When the thrust of the government's action is not to collect money damages from the debtor but rather to protect the public health and safety, then the government does not stand in the shoes of an ordinary creditor and the bankrupt's obligation to comply with an order requiring him to abate health and environmental dangers may not be voided in bankruptcy. Many environmental injunctions

entail the expenditure of money for their performance. A defendant may be ordered to fund a study to determine the extent of the threat posed by its waste disposal practices, to remove leaking drums of toxic wastes that threaten to contaminate groundwater, or to remove industrial wastes previously deposited in navigable waters. In each case, when the government seeks to enforce the order, its aim is to protect the public health, not to enhance the public fisc.

Here, the state court's orders were preventive, not compensatory. Initially, resp was ordered to clean the dumpsite. Only when there was a showing that resp had not complied did the court order resp to release certain assets and future earnings to the court-appointed receiver. Although the order directed the payment of money by resp to the receiver, the receivership was established for the limited purpose of implementing the cleanup order. Accordingly, the order must be distinguished from a traditional money judgment.

The present decision expressly builds on Kovacs I. Therefore, it is relevant to note that the CA6 decision in Kovacs I is at odds with the approach followed by other courts in deciding whether governmental enforcement actions fall within an exemption to the automatic bankruptcy stay. See NLRB v. Evans Plumbing Co., 639 F.2d 291, 293 (CA5 1981) (reinstatement order exempt from bankruptcy stay even though tantamount to an order to begin paying wages); Commonwealth v. Peggs Run Coal Co., 55 Pa. Commw. 312, 423 A.2d 765 (1980) (action brought by state seeking mandatory injunction ordering compliance with environmental

statutes and posting of bond to ensure compliance not attempt to enforce money judgment and thus exempt from automatic bankruptcy stay). The CA6's decision in the present case cannot be reconciled with the decisions of several other courts that have consistently held that a bankrupt defendant's obligation to pay criminal restitution -- whether ordered by another court before or after the petition in bankruptcy -- survives discharge. E.g., United States v. Carson, 669 F.2d 216 (CA5 1982); In re Newton, 15 Bankr. 708 (Bankr. W.D.N.Y. 1981). The rationale in these cases focuses on the fact that the government's action is undertaken in the public interest -- whether it be to protect the public by deterring criminal conduct or to rehabilitate criminal offenders -- not on the fact that the resulting order requires a bankrupt to spend money. The same analysis should have been applied in the present case, for the government's action was undertaken in the public interest to protect public health and safety.

Resp: Resp contends that the cleanup of the waste dump ordered by the state court was completed as of December 22, 1983, three days after the cert petition was filed in this case. Resp has attached to his response an affidavit from Kenneth E. Zimmerman, Resident Engineer, United States Army Corps of Engineers, supporting his contention that the cleanup is complete. The State phrased the issue in this case as whether "the obligation to comply with the injunctions imposed upon Debtor Kovacs by the Butler County Court of Common Pleas to cleanup the Chem-Dyne waste storage site" is dischargeable. The debtor's obligation under the state court order was to assist the receiver

Moot?

in the cleanup of the Chem-Dyne facilities. Inasmuch as the cleanup has been completed, so that all obligations of the debtor pursuant to the state court order have been satisfied, the State of Ohio would be unable to pursue any remedies against resp in the event that this Court were to overrule the decision of the CA6 and hold that the debtor's obligations under the state court decision were nondischargeable. Therefore, the case is moot. There is nothing in the record to suggest that the underlying issue here is "capable of repetition, yet evading review." Because the case has become moot, it should be remanded to the CA6 with directions to vacate the judgments of the DC and the Bankruptcy Court and to remand the case for dismissal. See Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979).

If the case is not moot, cert should be denied because it does not present an important question of federal law and there is no conflict among the circuits. The case does not involve any question pertaining to the ability of the federal, state, and/or local governments to protect the health and safety of their citizens. Instead, the case involves the efforts of Ohio to collect money from an individual debtor and Ohio's attempt to cloud its efforts to enforce a money judgment by the facade of arguing that it is attempting only to require the assistance of the debtor in cleaning up the Chem-Dyne facilities. The only type of performance the State sought from resp was payment of money.

Petr has been unable to point to any other decision in conflict with the decision of the CA6. Further, petr has not shown that anything about the decision below requires intervention

of this Court in the exercise of its supervisory powers.

4. DISCUSSION: Resp makes a strong argument that the case is moot since the dumpsite has now been cleaned. It is not clear, however, from either resp's representations or the affidavit, exactly how the cleanup of the dumpsite was financed. If the State paid for the cleanup, it may attempt to seek reimbursement from resp. A continuning controversy over reimbursement may not be enough to save the present suit from mootness, for whatever cause of action the State may have may not be grounded on the state-court order appointing a receiver, which is the order at the heart of this litigation.[5]

Petr has not responded to resp's allegation of mootness. I recommend that the Court call for a reply on the issue of mootness. If resp is correct that the case is moot, then the decision of the CA6 should be vacated and remanded with instructions to vacate the DC and Bankruptcy Court judgments. United States v. Munsingwear, Inc., 340 U.S. 36 (1950).

If it is not moot, the issue raised by petrs appears to be an important one with potentially far-reaching effects. Although there is no square conflict, the issue is so significant that I think it merits this Court's attention. In the cert petition in Kovacs I, resp noted that several lower courts had followed the

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[5]Since the State conceded in Kovacs I that the $75,000 payment provided for in the state-court order was a money judgment, I am assuming that the State is not contesting the dischargeability of that liability. Therefore, resp's payment or nonpayment of that liability is irrelevant to whether or not there is still a live controversy here.

lead of the CA6. Because environmental cleanup efforts could be severely hampered if polluters were allowed to evade their court-ordered responsibilities, I recommend a GRANT if the case is not moot.

5. RECOMMENDATION: I suggest calling for a reply on mootness. If the case is moot, the Court should issue a Munsingwear order. If the case is not moot, I recommend a GRANT.

A response and two amicus briefs have been filed..

February 8, 1984 Durand Opn in petn

Stay provisions. The case, however, may be moot (pp. 7-8). Response should be requested to address the mootness issue.

CRR

Jurisdictional - attach to cert memo

February 29, 1984

RE: Ohio v. Kovacs No. 83-1020

: Grant

TO: Justice Powell

FROM: Cammie

The reply brief on the mootness issue is in and the state makes a convincing argument that the case is not moot. The state court injunction ordered Kovacs to conduct a cleanup to remove all the waste material in the soil and groundwater around the site. Kovacs never complied with the injunction. Although the state has removed the hazardous and industrial wastes from the surface of the site, the underground wastes remain. Moreover, because Kovacs violated a court-ordered injunction, the state may file a criminal contempt action against Kovacs. Its reply brief professes a desire to do so, but the bankruptcy court's statutory stay and determination of dischargeability prevent this action. Thus, there are two live issues in the state's challenge to the bankruptcy court's order: (1) Kovacs' duty under the state court injunction to abate the continuing water pollution by removing the waste material that still remains on the site; and (2) Kovacs' liability for his contempuous disregard of the state court's injunction.

Because the issue is not moot and is important, I recommend a GRANT.

Argued ....., 19... *Assigned* ....., 19... No. 83-1020

Submitted ....., 19... *Announced* ....., 19...

OHIO

vs.

KOVAS

Brief on issue of mootness requested and received.

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.					Join 3.								
Brennan, J.		✓											
White, J.					Join 3.								
Marshall, J.								Dissent					
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.				Join									

No. 83-1020, State of Ohio v. Kovacs

Memorandum to File

This is a summary memo on the basis of a preliminary reading of the briefs.

The only question presented is whether an injunction issued by a state court requiring appellee Kovacs to clean up a hazardous waste storage site is a "debt" or "claim" under §523 of the Bankruptcy Act that is dischargeable in Kovacs' Title 11 bankruptcy?

This case was here before on the question whether, in this same bankruptcy proceeding, the state order to clean up the waste was exempt from the "automatic stay provision" of §362 of the Act? Both the DC and CA 6 held that the state order was not exempt. Ohio appealed the case to our Court. We vacated the judgment and remanded to determine whether a discharge order had made the case moot. On remand, the case was found not to be moot.

The issue now before us is whether Kovacs' identical obligation under the state court judgment is nondischargeable. The Bankruptcy Court and CA 6 held that the state order is a "claim" within the meaning of that term in §523. Therefore, it is dischargeable.

The DC held that the "law of the case", established in Kovacs I, doctrine applied. The question of discharge was viewed as identical with the question of an automatic stay. CA 6, however, held that the "law of the case" doctrine was inapplicable since we had vacated the prior judgment. CA 6 noted that Kovacs "cannot personally clean up the waste he wrongfully released into Ohio waters ... except by paying money or transferring over his own financial resources." It observed that the State of Ohio "acknowledged this by its steadfast pursuit of payment as an alternative to personal performance." Accordingly, the state order was found to be a "claim" and therefore dischargeable.

* * *

Perhaps we should have summarily affirmed CA 6 rather than Noting this appeal. I do not find the briefs of either of the parties particularly well written. The brief on behalf of the State of Ohio argues that the state court injunction order to clean up the waste was entered pursuant to a compromise settlement entered in the state court receivership that preceded the bankruptcy. Such an order, Ohio argues, was an equitable remedy to abate an environmental contamination. Any expenditure of money made by Kovacs to comply with the order was simply a means of compliance with an equitable obligation rather than paying of a claim or a debt.

The brief of appellee injects a new factual situation into the case. It states that:

> "As of December 22, 1983 the total surface cleanup of the facility was completed, and no chemical, container, or other items holding chemicals or other wastes remain on the site."

The brief states that the cost of the cleanup was paid from funds of the United States Corps of Engineers under a "superfund" established for the purpose. The brief also states that "part or all of this cost was recouped by the United States through settlements obtained from toxic waste generating companies named as defendants in another lawsuit." Br. p. 5.

Accordingly, as the third point in its brief (see III), appellee argues that the obligation of Kovacs to remove the toxic waste "has been performed and this case is, therefore, moot". It is further stated that "any claim for indemnity belongs to the United States - not to the State of Ohio.

Curiously, this argument of mootness is advanced as only the third argument on behalf of appellee. His principal argument continues to be that the claim was equitable, and therefore not a debt or a claim.

* * *

If we have to decide the bankruptcy question, I am inclined to go along with the analysis of the courts below. I do not want a full bench memo or even a long bobtail bench memo. In view of the possible mootness, the case now may not present a justiciable issue. Its importance certainly seems to have diminished. I would like my clerk's view as to the legal question whether an equitable claim of the kind that can be discharged only by the payment of money, is a dischargeable claim - as the court below held.

L.F.P.

file

dro 10/04/84

Ohio has changed its position as to sub-surface waste

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Ohio v. Kovacs, No. 83-1020.

This is the case concerning whether a state order to clean up toxic wastes is dischargeable in bankruptcy. It is scheduled for oral argument on Wednesday, Oct. 10th. The State of Ohio has just submitted a reply brief which does not affect the merits but does possibly affect the mootness issue; i.e., whether all that the state court order commands has been performed.

may affect mootness issue

Kovacs contends that the case is moot because the U.S. government, as part of a Superfund clean-up operation, has removed all the wastes covered by the order. Until now, the State had claimed that the order covered not only surface wastes, which the Superfund operation removed, but also subsurface wastes, which it did not. As I pointed out in my memo, however, this argument is unpersuasive. Now for the first time the State has changed its argument. It now argues that the subsurface wastes on Kovacs's property are actually wastes that were stored on the

changed its argument

surface until after the Ohio court issued its clean-up order. After this point, the State now claims, Kovacs dumped the surface chemicals into the ground in a cynical attempt to comply with the court's removal directive.

If Ohio is right, the order has probably not been complied with, and the case is probably not moot. One must wonder, though, why Ohio has waited until now to make this argument if it is indeed true. In any event, the issue is definitely worth pursuing at oral argument. If Kovacs agrees that he dumped wastes covered by the order into the ground after the order issued, then the Court should probably proceed to the merits. If he does not agree, the Court should try to find out what happened, perhaps by remanding to the CA6 for consideration of mootness.

Reviewed 9/11 - Dan's memo is thorough
dro 08/24/84 and closely reasoned.

Dan (Thurber) thru case is moot, & that we should vacate & remand to CA 6 with instructions to CA 6 to vacate the decisions below.

If Court reaches merits, Dan would reverse CA 6. He doesn't think there is a "debt" or "claim" dischargeable in bankruptcy. See pp 13, 14.

See n 2 for § 727(b) of Bkruptcy Act

Language of Act & leg. history support ~~Petitioner~~ State's argument that there is no dischargeable debt or claim.

BENCH MEMORANDUM

No. 83-1020

Ohio v. Kovacs

(CA6)

Dan August 24, 1984

Question Presented

Whether a state court judgment entry requiring resp to clean up certain toxic wastes is a "debt" or "claim" dischargeable in bankruptcy.

I. Background

A. Statutory Background.

With certain exceptions not at issue here, the Bankruptcy Code discharges a debtor from "all debts that arose before the date of the order for relief ..., and any liability on a claim ... as if such claim had arisen before the commencement of the case ...." 11 U.S.C. §727(b) (emphasis added). The Code defines "claim" and "debt" as follows:

> "In this title--
>
> * * *
>
> (4) "claim" means--
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;
>
> * * *
>
> (11) "debt" means liability on a claim ...." 11 U.S.C. §101(4), (11).

language at issue

This case concerns the proper interpretation of the underlined language in §101(4)(B).

B. Facts and Decisions Below.

Resp operated a hazardous waste disposal facility in Ohio. In 1976, the Ohio Environmental Protection Agency and Dept. of Natural Resources instituted pollution proceedings in state court against him and others. Resp settled this suit by signing a stipulation and judgment entry which, among other

things, ordered him to stop causing water and air pollution and to remove certain wastes from the premises. By Feb. 1980, resp had fallen behind the clean-up schedule and the state court appointed a receiver to do the job.

In July 1980, resp filed a Chapter 11 petn for personal bankruptcy, which the BC converted to Chapter 7 in Sept. 1980. Later, the State asked a state court to determine resp's current employment status and income. Resp moved the BC to stay these state proceedings. The BC, believing the state court motion to be only a preliminary to a request for the state court to apply resp's income to the clean-up, stayed the state court proceedings under the Code's automatic stay provision, 11 U.S.C. §362. The DC and CA6 upheld the stay, but on Jan. 24, 1983 this Court vacated and remanded for consideration of mootness. The Court apparently believed that the DC and CA6 decisions in a later (the present) case might have mooted the stay controversy. The CA6 appears to be waiting for this Court to decide the present case before hearing the stay remand.

We remanded to consider "mootness"

The "present case" arose when the State asked the BC to hold several of resp's obligations under the judgment entry--in particular, his duty to stop polluting and to clean up the premises--to be nondischargeable. The BC held, however, that the obligations were dischargeable as "claims" because resp could perform them only by paying money. On appeal, the DC and CA6 affirmed. Following the BC, the CA6 reasoned that these obligations amounted to a money judgment, which everyone agrees is dischargeable in bankruptcy. It explained its decision as follows:

"Ohio is essentially seeking to obtain a money payment from Kovacs. The impact of its attempt to realize upon Kovac's income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources." Ohio v. Kovacs, 717 F.2d 984, 988 (CA6 1983), cert. granted, 104 S.Ct. 1438 (1984). CA6

This Court granted cert and the United States and approximately thirty states have filed or joined amicus briefs arguing for reversal. 30 states

II. Discussion

A. Mootness.

Resp contends now, as he did in his cert petn, that the case is moot. The federal "Superfund" program, he claims, removed all the wastes covered by the judgment entry before cert was even filed. Any action against him now, he believes, belongs to the United States or to the clients of his who contributed to the "Superfund" clean-up costs, not to the State of Ohio. These others are not parties in this case.

The State answers that the case is still live for three reasons: (i) because the "Superfund" program cleaned up only surface wastes, leaving resp still responsible for those below the surface, (ii) because resp is still "causing pollution" in violation of the judgment entry, and (iii) because the state cannot seek criminal contempt against resp as long as the BC decision remains in effect.

All three reasons appear invalid. Although the CA6 has twice characterized the judgment entry as requiring the clean-up

of "all" wastes at the dump site, Id., at 985; Ohio v. Kovacs, 681 F.2d 454, 454 (CA6 1982) (per curiam), vacated and remanded for consideration of mootness, 103 S.Ct. 810 (1983), it appears to have misconstrued the entry. The judgment entry does not actually appear to require the clean-up of subsurface wastes. The relevant order, Order 3, requires resp "to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) ...." App. to Pet. for Cert. A-46. Finding No. 7, in turn, states:

> "(7) The Defendants currently estimate that they have the following amounts of industrial wastes and/or other wastes stored at their facilities ...:850,000 gallons in liquid form and 4,000 barrels of solid or semisolid sludges." Id., at A-45 (emphasis added).

This language describes only "stored" wastes, not contaminants that have leached into the soil. These dispersed subsurface wastes can hardly be said to be "stored" in the ordinary sense of the word. Furthermore, the description of the amount and type of waste further argues against the State's view. It would be odd indeed to characterize dispersed wastes in the subsoil as "gallons" of liquid or "barrels" of solid matter or sludge. In short, the "Superfund" clean-up appears to have done all that Order 3 requires of resp.

Resp also appears not to be "causing pollution" in violation of the judgment entry. Order 1 states:

> "(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing 'pollution,' as that term is defined in Section 6111.01(A) of the Revised Code, of 'waters of the state,' as that term is defined in Section 6111.01(H) of the Revised Code." App. to Pet. for Cert. A-46.

Although the State admits that resp is no longer disposing of wastes improperly, it argues that resp "causes pollution" within the terms of the order whenever it rains and wastes previously dumped into the ground seep into the water table.

There are two difficulties with this argument. First, the BC held that "it is clear that the negative injunctions, to refrain from causing water pollution etc. ..., are mooted since defendant is not in possession of the premises, since a receiver has been installed there." Id., at A-20. The State failed to appeal this finding at any level below and does not really argue against it now.

Second, the State reads Order 1 quite expansively. Under the State's view, a violation occurs not only when someone actually dumps waste, but also everytime it rains and long-abandoned wastes seep into the water system. It seems more natural, however, to assume that "causing" refers to the actual dumping of wastes, not to the leaching of them from the soil into the water system. The leaching, but not the dumping, is beyond resp's control. Furthermore, the State's interpretation of these terms does not comport satisfactorily with Ohio law. Ohio Rev. Code Ann. §6111.04 states: "No person shall cause pollution or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state ...." This section distinguishes between causing pollution and placing wastes in a location where they in turn cause pollution. If this distinction has any meaning, it must be that acts, like resp's, of dumping wastes into the ground where

they can later seep into the water table constitute "plac[ing] ... waste[s] in a location where they cause pollution," not "caus[ing] pollution" itself. Also, the State's broad interpretation could create potentially unlimited liability under Ohio law. Section 6111.07 makes "each day of violation ... a separate offense" which §6111.09 makes punishable by a "civil penalty of not more than ten thousand dollars." The State's view would impose the penalty each day waste seeps from the soil into the water table, not only each day waste is dumped into the soil. Although thorough investigation of any legislative history might indicate otherwise, common sense suggests that the penalty was not meant to work this way.

As a third reason why the case presents a live controversy, the State simply asserts that the BC order prevents it from seeking criminal contempt sanctions against resp. I do not understand, however, how the order ties the State's hands. The BC decision merely held the judgment entry's obligations to be dischargeable. It did not stay any present or future state court proceedings.[1] It is unclear, moreover, what the State would base criminal contempt on. Resp appears to be violating no order at this time.

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[1]The BC's earlier decision did, of course, stay state court proceedings, but those state court proceedings concerned the collection of money from resp, not criminal contempt. The Bankruptcy Code's stay provision, moreover, specifically prohibits stays "of the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. §362.

B. Merits.

Both sides agree that the only question is whether the judgment entry gives the State a "right to an equitable remedy for breach of performance ... [that] gives rise to a right to payment ...." 11 U.S.C. §101(4)(B). If it does, the obligation it creates is dischargeable; otherwise it is not. Although the answer is certainly not clear-cut, on balance I think that the obligation is not dischargeable because it involves neither a "breach of performance" nor a "right to payment." Dan

The State and resp offer two different interpretations of the "breach of performance" language of §101(4)(B). The State reads the statute as implicitly distinguishing between breaches of "performance" and breaches of "legal duty." In its view, the only equitable remedies that the statute makes dischargeable are those for breaches of "contractual obligations," not for obligations otherwise imposed by law. Resp, on the other hand, reads the statute as implicitly distinguishing between obligations to act and those not to act. The former, he believes, whether contractually or otherwise created, give rise to breach of performance, while the latter do not. In the context of this particular case, his distinction boils down to the traditional distinction between mandatory and prohibitory orders. He would find the former, but not the latter, dischargeable. State's reading

Of these two interpretations, I find the State's more persuasive. For one thing, the use of the word "performance" along with "breach" follows traditional contract usage. For another thing, there is support elsewhere in the Code for believing Dan finds State's reading more persuasive.

that Congress viewed statutory duties differently. Section 523(a)(7), for example, exempts from discharge any debt "to the extent such a debt is a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss other than a tax penalty ...." Id. For another, the distinction between mandatory and prohibitory injunctions is somewhat slippery and formalistic. It is nearly always possible to view either type of order in terms of the other by, for example, wording a command not to act in a certain way as a positive command to act differently. Furthermore, I can find no support--policy or otherwise--for this distinction in the Code. For purposes of bankruptcy, the "style" of the order appears irrelevant.[2]

The judgment entry also does not satisfy the second requirement of §101(4)(B) that it "give rise to a right to payment." The legislative history, while not absolutely conclusive, supports this view. In the original House bill, the term "claim" included a "right to an equitable remedy for breach of performance if such breach does not give rise to a right to payment ...." H.R. 8200, 95th Cong., 1st Sess., p. 3 (1977) (emphasis added). The committee report noted how broad a definition this was:

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[2]Resp also argues that even if the Court believes the term "breach of performance" refers only to contractual duties, there was such a breach in this case. He rests this remarkable argument on the belief that the judgment entry is nothing but a private contract. The fact that both parties agreed to the judgment entry, however, makes it no less an order of the court.

"The definition also includes as a claim an equitable right to performance that does not give rise to a right to payment. By this broadest possible definition ..., the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." H. R. Rep. No. 95-595, 95th Cong., 1st Sess., p. 309 (1977).

The Senate, however, recoiled from so broad a definition. Its bill, in fact, deleted all references to equitable remedies from the definition of "claim" and restricted that term exclusively to rights to payment.

When the House then considered the Senate bill, the House sponsor, Representative Edwards, proposed the eventually enacted language as a compromise. He explained the compromise as follows:

> Section 101(4)(B) represents a modification of the House-passed bill to include [in] the definition of 'claim' a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. This is intended to cause the liquidation, or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some states a judgment for specific performance may be satisfied by an alternative right to payment, in the event that performance is refused; in that event the creditor entitled to performance would have a 'claim' for purposes of a proceeding under title 11.
>
> On the other hand, rights to an equitable remedy for breach of performance with respect to which such breach does not give rise to a right to payment are not 'claims' and would therefore not be susceptible to discharge in bankruptcy." 124 Cong. Rec. 32350, 32393 (1978) (emphasis added).

The Senate later accepted the House definition.

These statements, particulary the last, all suggest that Congress intended to discharge equitable obligations only when there was an alternative right to damages. Of course, as petr

points out, Representative Edwards's statement does not actually say that the House definition was intended to provide for liquidation of equitable remedies only when an alternative damages remedy exists, but this does seem the most reasonable conclusion. Such a view, in effect, forces the election between alternative remedies that is dischargeable.

Resp argues, however, that the language "gives rise to a right to payment" covers more than just situtations in which an alternative damages remedy exists. In his view, an obligation is dischargeable so long as it requires any kind of payment. Resp argues this position along two different lines. First, he claims that any injunction requiring an expenditure--no matter how small--"gives rise to payment." This, however, proves too much. As the CA3 noted recently in a very similar case: "[A]lmost everything costs something. An injunction which does not compel some expenditure or loss of monies may often be an effective nullity." Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267, 278 (CA3 1984). The only virtue of this interpretation is its consistency with resp's earlier interpretation of "breach of performance." Since it costs money to do almost anything and only doing nothing can possibly be said to be costless, resp is again putting forward the distinction between mandatory and prohibitory orders. But again, this distinction is largely formalistic. Prohibitory orders are rarely costless: stopping from doing one thing often requires spending money to do something else.[3]

Footnote(s) 3 will appear on following pages.

Resp also argues that the presence of a receiver necessarily means that any breach of performance gives rise to a right to payment. His point is that his obligation now consists not of cleaning up the premises, but only of having to pay the receiver to clean them up. Breach of this new obligation, he believes, can give rise only to a right to payment.

Even if resp is technically correct, it seems odd that the receiver should make any difference. After all, the state court appointed him only because it found that resp had acted in "flagrant disregard of the Stipulation and Judgment Decree." App. to Pet. for Cert. A-54. His appointment merely bifurcated resp's existing duty. Although resp's primary duty was to clean up the premises, there was of course the underlying duty to spend the money necessary to do so. He could not fulfill the first duty without fulfilling the other. The receiver's appointment merely placed the duty to clean up in the receiver while leaving the duty to pay in the resp. It did not create any new duties or change the nature of those that already existed. In this view, the appointment of a receiver makes at most a technical difference in the nature of the duty involved. Furthermore, holding that this technical difference makes the obligation dischargeable would have the unfortunate effect of encouraging parties to de-

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[3]Resp admits that a small class of mandatory orders violate this distinction. These orders, commands to act that the individual can perform by himself without spending money, are so rare, he argues, that they can be safely ignored. In any case, he adds, his obligation does not fall into this category.

fault on their obligations. If an obligation is dischargeable when a receiver is appointed but not otherwise, obligors will have every incentive not to perform their duties and to act in bad faith.

III. Summary.

Since the Superfund program has already cleaned up all the wastes apparently covered by the order, the case is most likely moot. Any cause of action against resp for the clean-up lies with the United States or the firms that helped pay for it, not with the State.

On the merits, the obligation imposed by the judgment entry is not dischargeable. It meets neither of §101(4)(B)'s requirements for a "claim." First, resp's failure to observe it does not constitute a "breach of performance," but rather a breach of legal duty. Second, the breach does not "give rise to a right to payment." The legislative history indicates (although not conclusively) that the breach must give rise to an alternative right to payment. It is not enough that the remedy requires spending money.

IV. Recommendation.

I would find the case moot and vacate and remand with instructions for the CA6 to vacate the decisions below it. See United States v. Munsingwear, 340 U.S. 36 (1950). I would not recommend that the Court simply vacate and remand for consideration of mootness, for two separate panels of the CA6 have al-

ready misconstrued the critical provision of the judgment entry. In each case, they have simply assumed that it applies to all wastes even though the order itself speaks of only "stored" wastes.

If the Court wants to reach the merits, I would reverse the CA6. The statutory language and policy and the legislative history all suggest that Congress did not intend for obligations like this one to be dischargeable in bankruptcy. Furthermore, resp has not made an adequate showing that Congress intended to preempt the traditional state police powers involved here. This type of preemption should not be lightly inferred.

Of the two possible grounds of reversal--that the obligation does not involve a "breach of performance" and that it does not "give[] rise to a right to payment"-- I would recommend reversing on the second. The presence of legislative history on this second question provides firmer support for reversal.

83-1020 OHIO v. KOVACS

Argued 10/10/84

Mucknicki (Asst A G of Ohio)

Most serious problem is pollution of ground water.

Replying to B R W, counsel ~~[illegible]~~ answered that Receiver is in possession Receiver would be happy to have Kovacs ~~[illegible]~~ clean ~~[illegible]~~ up waste.

Receiver also is obligated ~~[illegible]~~ by the injunction to "clean up". Also the order appointing Receiver directed Receiver as well as Kovacs (both) to "clean up."

Kovacs has not been cooperative

~~[illegible]~~

When State was before Ohio S/Ct Ct didn't know extent of ground water pollution. ~~[illegible]~~ The Ohio S/Ct largely ignored the policy arguments that requires clean-up of pollution. But as W+R noted, this case is under ~~[illegible]~~ fed. Bankruptcy Act.

Ohio's position is that there is no "claim" w/in meaning of Act.

W+R commented if not a "claim", Ohio could not participate with other creditors in bankruptcy assets.

Muchnicki (cont.)

"Claim" is defined in terms of equitable remedies. Any payment made is to facilitate & carry out the injunction. Ohio only seeks to have equitable remedies enforce.

Nothing left in estate - no assets.

Oberly (SG)

Injunction may require years of oversight

What Kovacs wants is to "buy-out" her obligations under injunction. Thus payment of money is not along satisfaction.

BRW asks whether appointment of Receiver relieves Kovacs. All Receiver wants is money. Oberly denied this, both are now responsible.

Not a "debt" or "claim". The Act uses these terms in context of contractual or commercial obligations to pay money. Here equitable relief is sought.

~~Abbott SB cont.~~)

Caldwell (Resp)

The Q is what are debtor's obligations on date of bankruptcy. ~~At that point~~ The court order at issue was entered on July 18, 79. It was a negotiated settlement of a civil law suit.. ~~He~~ He did not comply with settlement & filed in bankruptcy. Rec Receiver was appted Feb 4 '80.

~~Order can't be read to clear~~ Kovacs has complied with her obligation to clean up the surface contamination. Under settlement he had no obligation extending for years.

5 0'C thinks courts below have not resolved all issues - an disagreement of counsel reflects.

If there is an equitable obligation to extend for years & involving millions, no judge would ~~hesitate~~ cite for contempt.

Caldwell (Cont.)

Reversal here would accomplish nothing.

SOC noted that if bankruptcy discharges obligations to clean-up pollution, ~~a~~ polluters ~~a~~ would avoid ~~responsible~~ responsibility.

→ BRW agreed that U.S. has sued ~~suc~~ successfully the companies that marketed these chemicals.

(Kovacs has been granted a discharge. Whether their claim was discharged ~~as to~~ in quest. here ?. But the bankruptcy court never took over their property from the Receiver. Prop. in still in possession: State Ct receiver used all liquid assets)

Reviewed - very helpful.

Conclude Resp. appears to be violating no order at this time. Case therefore may be moot. Remand ~~to~~ for further fact findings.

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: Mootness of Ohio v. Kovacs, No. 83-1020.

If moot, we do not reach bankruptcy issue

Resp contends now, as he did in his cert petn, that the case is moot because the federal "Superfund" program has removed all the wastes covered by the judgment entry. Any action against him now, he believes, belongs to the United States or to the clients of his who contributed to the "Superfund" clean-up costs, not to the State of Ohio. These others are not parties in this case.

Until it filed its reply brief, the State argued that the case was still live for three reasons: (i) because the "Superfund" program cleaned up only surface wastes, leaving resp still responsible for those below the surface, (ii) because resp is still "causing pollution" in violation of the judgment entry, and (iii) because the state cannot seek criminal contempt against resp as long as the BC decision remains in effect. In its reply brief, the State added another reason. For the first time, it claimed that resp dumped some of the surface wastes into the

ground after he agreed to the judgment entry. Interestingly, the State did not even mention this at oral argument.

If resp did not dump surface wastes into the soil after he agreed to the entry, all of the State's arguments against mootness appear invalid. Although the CA6 has twice characterized the judgment entry as requiring the clean-up of "all" wastes at the dump site, Id., at 985; Ohio v. Kovacs, 681 F.2d 454, 454 (CA6 1982) (per curiam), vacated and remanded for consideration of mootness on other grounds, 103 S.Ct. 810 (1983), it appears to have misconstrued the entry. The judgment entry does not actually appear to require the clean-up of subsurface wastes. The relevant order, Order 3, requires resp "to remove and dispose of all industrial wastes and/or other wastes as described in Finding No. Seven (7) ...." App. to Pet. for Cert. A-46. Finding No. 7, in turn, states:

> "(7) The Defendants currently estimate that they have the following amounts of industrial wastes and/or other wastes stored at their facilities ...:850,000 gallons in liquid form and 4,000 barrels of solid or semisolid sludges." Id., at A-45 (emphasis added).

This language describes only "stored" wastes, not contaminants that have leached into the soil. These dispersed subsurface wastes can hardly be said to be "stored" in the ordinary sense of the word. Furthermore, the description of the amount and type of waste further argues against the State's view. It would be odd indeed to characterize dispersed wastes in the subsoil as "gallons" of liquid or "barrels" of solid matter or sludge. In short, the "Superfund" clean-up appears to have done all that Order 3 requires of resp--assuming that he did not dump the

stored wastes into the soil after he agreed to the judgment entry. If he did, he would probably still be in continuing violation of Order 3 and the case would not be moot.

Resp also appears not to be "causing pollution" in violation of the judgment entry. Order 1 states:

> "(1) The Defendants and their employees and agents are permanently enjoined and restrained from causing 'pollution,' as that term is defined in Section 6111.01(A) of the Revised Code, of 'waters of the state,' as that term is defined in Section 6111.01(H) of the Revised Code." App. to Pet. for Cert. A-46.

Although the State admits that resp is no longer disposing of wastes improperly, it argues that resp "causes pollution" within the terms of the order whenever it rains and wastes previously dumped into the ground seep into the water table.

There are two difficulties with this argument. First, the BC held that "it is clear that the negative injunctions, to refrain from causing water pollution etc. ..., are mooted since defendant is not in possession of the premises, since a receiver has been installed there." Id., at A-20. The State failed to appeal this finding at any level below and does not really argue against it now.

Second, the State reads Order 1 quite expansively. Under the State's view, a violation occurs not only when someone actually dumps waste, but also everytime it rains and long-abandoned wastes seep into the water system. It seems more natural, however, to assume that "causing" refers to the actual dumping of wastes, not to the leaching of them from the soil into the water system. The leaching, but not the dumping, is beyond resp's control. Furthermore, the State's interpretation of these

terms does not comport satisfactorily with Ohio law. Ohio Rev. Code Ann. §6111.04 states: "No person shall cause pollution or place or cause to be placed any sewage, industrial waste, or other wastes in a location where they cause pollution of any waters of the state ...." This section distinguishes between causing pollution and placing wastes in a location where they in turn cause pollution. If this distinction has any meaning, it must be that acts, like resp's, of dumping wastes into the ground where they can later seep into the water table constitute "plac[ing] ... waste[s] in a location where they cause pollution," not "caus[ing] pollution" itself. Also, the State's broad interpretation could create potentially unlimited liability under Ohio law. Section 6111.07 makes "each day of violation ... a separate offense" which §6111.09 makes punishable by a "civil penalty of not more than ten thousand dollars." The State's view would impose the penalty each day waste seeps from the soil into the water table, not only each day waste is dumped into the soil. Although thorough investigation of any legislative history might indicate otherwise, common sense suggests that the penalty was not meant to work this way.

As a final reason why the case presents a live controversy, the State simply asserts that the BC order prevents it from seeking criminal contempt sanctions against resp. I do not understand, however, how the order ties the State's hands. The BC decision merely held the judgment entry's obligations to be dischargeable. It did not stay any present or future state court proceedings. The Bankruptcy Code's stay provision, moreover,

specifically prohibits stays "of the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. §362. And even if the BC could stay contempt proceedings, it is unclear what the State would base criminal contempt on. Resp appears to be violating no order at this time.

I would recommend vacating the judgment of the CA6 for consideration of mootness and allowing it in turn to remand the case if further fact-finding is necessary.

83- Ohio v. Kovacs (1)

A state ct. ordered Resp to clean up toxic waste. Resp. went into bankruptcy.

Q: whether the order is a "claim" dischargable in bankruptcy?

"Claim" is defined by § 101(4) to include an "equitable remedy" that "gives rise to a right to payment."

Mootness Issue

Resp. Resp. claims order covered only surface waste all of which has been cleaned up.

Ohio says: (latest Brief) that there is subsurface waste still present because after State court order, Resp. dumped surface chemicals on the ground. This created sub-surface contamination.

If facts are not clear-up, Remand the Case.

83-1020 12

Merits

If not remanded ~~on~~ on Mootness issue, we reach the Bankruptcy Issue.

All three courts below: Bkruptcy Ct., DC & CA 6 found that the State Court order "gave rise to payment of money", & was a dischargable "claim."

Question is close

I'll await argument & discussion. Policy favors non-dischargability of an injunction to clean up toxic waste.

But language as to what constitutes a claim can be construed either way

Fell

These are views on basis of Dan's memo. I'll take a second look. 9/11

83-1020 Ohio v. Kovacs

(We remanded this case to CA6 to consider "mootness". CA6 found not moot)

Question: Whether Ohio court judgment requiring Resp. to clean up toxic waste created by his business is a "debt" or "claim" dischargeable in Bankruptcy?

"Claim" is defined in § 727(b) to be a "right to an equitable remedy for breach of performance if such breach gives rise to a "right to payment."

Statute requires

Judg. of Ohio Court vs Resp: to stop pollution of air & water, & "remove" certain wastes. When Resp. failed to remove the waste, Resp. filed under Ch. 11 (later converted to Ch 7)

This suit: State asked Bankruptcy Ct to hold that Resp. obligation to "remove" was non-dischargeable. Bankruptcy Ct, D.C. & CA6 all held it was not dischargeable.

All three cts held claim was not dischargable

Mootness. The "Superfund" program of U.S. has removed the waste. I could Hold case is moot, & vacate all judgments.

Merits. If reach merits, held no "right of payment". to State. Only order of State Ct was to stop pollution & "remove" waste. Resp. owes State no money. The Receiver may owe U.S. for its expense of removing waste.

83-1020

83-1020 Kovacs

Is Resp. in violation of state ct. injunction?

Ohio & Fed Cts have debated this case for years

Order 3: requires Resp. "to remove & dispose of all industrial waster ~~[redacted]~~ & other waster" described in Findings No 7

Findings No 7 (A-45) estimated the waster "stored" at Resp's facilities to be "850,000 gallons in liquid form & 4000 bbl. of solid sludge".

State Reply Brief

Then described only "stored" waster — not contaminants that have "sunk into the soil" — as State's Reply Brief alleges - p 12

Reply Brief also says Resp. "poured" the liquid waste onto the ground. - This is a new allegation. ? Even if true this would leave Q whether then conduct constituted "removal" of the 850,000 gal & 4000 bbls.

Resp's claim

Until these factual issues are resolved, we don't know whether case is moot - as Resp. argues.

Resp's Br asserts all waster cover by Order 3 & Findings 7 have been "removed". Other unlawful activities ct. Br 18.

Remand

If case is moot, bankruptcy issue not longer exists.

No. 83-1020, Ohio v. Kovacs Conf. 10/12/84

The Chief Justice DIG without explanation, or affirm.
Not a debt. Case not moot.
Few Δs have resources to clean up a massive pollution problem.
Ordinarily, an equitable remedy is not dischargeable unless it is easily satisfied by money. No one knows extent of pollution or whether or when it will be "cleaned off" or what it will cost
Will join and form justices. No satisfactory solution

Justice Brennan Remand to Bankruptcy Ct?
Kovacs says he was ordered only to "remove" specified waste,
State differs & says the order is to "clean up" pollution.

Justice White Affirm or DIG
Assume Resp. was ordered to "remove" & "clean up". Once Resp. goes into Bankruptcy, Trustee would not be justified in paying State whatever the costs – leaving all other creditors in cold. But here a State Receiver is in picture. The Receiver only wants "money" & this is all State wants. The Trustee under Fed Act has title to prop. & he should not have turned it over to Receiver.
CA6 is right. All State wants is money.

(None of us has a clear rationale for deciding this case. I've rarely heard such divergent and unclear views by all of us)

This claim is like the $75,000 payment. Can is a short.

Justice Marshall Remand

Justice Blackmun DIG or Aff in
Agree with BRW - all State
wants is money

Justice Powell Remand
See my notes. Agree with WJB

Justice Rehnquist Affirm ?! ~~Very troubled~~.

Case is a real sports. No way to sort it out.

But in the end, what State wants is money — & this has to be discharged

There is a claim in bankruptcy — unliquidated because never reduced to judgment.

Part of injunction ordering Resp not to pollute in future can be preserved.

Justice Stevens affirm or DIG. Would not Remand

Fight is primarily about money.

~~State's~~ Purpose of Bankruptcy Code is to enable one to settle all debts & start fresh.

State had burden ~~of~~ to establish this claim was not dischargable. It failed to do so. There are specific exemptions in Act. None applies to this case. We can't create an exception

---

Justice O'Connor Affirm in part, & vacate as to State law.

State law quest. as to ~~the~~ exactly what Resp's was obligated to do under the order. If under state law, clean up of past pollution is ~~a claim~~ an enforceable ~~order, not the~~ claim, it is dischargable in bankruptcy. But we still don't know what State law is.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: DEC 17 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1020

OHIO *v.* WILLIAM LEE KOVACS, DBA B & W ENTERPRISES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[December ——, 1984]

JUSTICE WHITE delivered the opinion of the Court.

Petitioner State of Ohio obtained an injunction ordering respondent William Kovacs to clean up a hazardous waste site. A receiver was subsequently appointed. Still later, Kovacs filed a petition for bankruptcy. The question before us is whether, in the circumstances present here, Kovacs' obligation under the injunction is a "debt" or "liability on a claim" subject to discharge under the bankruptcy code.

I

Kovacs was the chief executive officer and stockholder of Chem-Dyne Corporation, which with other business entities operated an industrial and hazardous waste disposal site in Hamilton, Ohio. In 1976, the State sued Kovacs and the business entities in state court for polluting public waters, maintaining a nuisance, and causing fish kills, all in violation of state environmental laws. In 1979, both in his individual capacity and on behalf of Chem-Dyne, Kovacs signed a stipulation and judgment entry settling the lawsuit. Among other things, the stipulation enjoined the defendants from causing further pollution of the air or public waters, forbade bringing additional industrial wastes onto the site, required the defendants to remove specified wastes from the property,

and ordered the payment of $75,000 to compensate the State for injury to wildlife.

Kovacs and the other defendants failed to comply with their obligations under the injunction. The State then obtained the appointment in state court of a receiver, who was directed to take possession of all property and other assets of Kovacs and the corporate defendants and to implement the judgment entry by cleaning up the Chem-Dyne site. The receiver took possession of the site but had not completed his tasks when Kovacs filed a personal bankruptcy petition.[1]

Seeking to develop a basis for requiring part of Kovacs' post-bankruptcy income to be applied to the unfinished task of the receivership, the State then filed a motion in state court to discover Kovacs' current income and assets. Kovacs requested that the bankruptcy court stay those proceedings, which it did.[2] The State also filed a complaint in the bankruptcy court seeking a declaration that Kovacs' obligation under the stipulation and judgment order to clean up the Chem-Dyne site was not dischargeable in bankruptcy

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[1] Kovacs originally filed a reorganization petition under chapter 11 of the bankruptcy code, 11 U. S. C. § 1101 et seq., (1982) but converted the petition to a liquidation bankruptcy under chapter 7. See 11 U. S. C. § 1112 (1982).

[2] The bankruptcy court held that the requested hearing was an effort to collect money from Kovacs in violation of the automatic stay provision. *See* 11 U. S. C. § 362. It entered a specific stay as well. The District Court affirmed, ruling that Ohio was trying to enforce a judgment obtained before filing of the bankruptcy petition. The Court of Appeals for the Sixth Circuit also found the hearing barred. *In re Kovacs*, 681 F. 2d 454 (1982). In that court's view, while § 362(b) allowed governmental units to continue to enforce police powers through mandatory injunctions, it denied them the power to collect money in their enforcement efforts. Because of the later filing by Ohio of a complaint to declare that Kovacs' obligations were not claims under bankruptcy, we granted certiorari, vacated the judgment of the Court of Appeals and remanded to that court to consider whether the dispute over the stay was moot. —— U. S. ——; 103 S. Ct. 810 (1983). As far as we are advised, the Court of Appeals has taken no action on the remand.

because it was not a "debt,"—a liability on a "claim," within the meaning of the bankruptcy code. In addition, the complaint sought an injunction against the bankruptcy trustee to restrain him from pursuing any action to recover assets of Kovacs in the hands of the receiver. The bankruptcy court ruled against Ohio, as did the District Court. The Sixth Circuit Court of Appeals affirmed, holding that Ohio essentially sought from Kovacs only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the bankruptcy statute. We granted certiorari to determine the dischargeability of Kovacs' obligation under the affirmative injunction entered against him.

II

Kovacs alleges that the Army Corps of Engineers, using funds recovered from those concerns that generated the wastes, has removed all industrial wastes from the site and that if he has an obligation to pay those expenses, the obligation is owed to the United States, not the State. Kovacs urges that the case is therefore moot. The State argues that the case is not moot because the removal of the barrels and wastes from the surface did not satisfy all of Kovacs' obligations to clean up the site; it is said that the ground itself remains permeated with toxic materials that must be removed if further pollution of the public waters is to be avoided. We perceive nothing feigned or frivolous about the State's submission. *Sibron* v. *New York*, 392 U. S. 40, 57 (1968). The State surely has a stake in the outcome of this case, *United States Parole Commission* v. *Geraghty*, 445 U. S. 388, 397 (1980), which in our view is not moot. We proceed to the merits.

III

Except for the nine kinds of debts saved from discharge by 11 U. S. C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy. § 727(b). It is not claimed here that Kovacs' obligation under

the injunction fell within any of the categories of debts excepted from discharge by § 523. Rather, the State submits that the obligation to clean up the Chem-Dyne site is not a debt at all within the meaning of the bankruptcy law.

For bankruptcy purposes, a debt is a liability on a claim. § 101(11). A claim is defined by § 101(4) as follows:

> "(4) 'claim' means —
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;"

The provision at issue here is § 101(4)(B). For the purposes of that section, there is little doubt that the State had the right to an equitable remedy under state law and that the right has been reduced to judgment in the form of an injunction ordering the cleanup. The State argues, however, that the injunction it has secured is not a claim against Kovacs for bankruptcy purposes because (1) Kovacs' default was a breach of the statute, not a breach of an ordinary commercial contract which concededly would give rise to a claim; and (2) Kovacs' breach of his obligation under the injunction did not give rise to a right to payment within the meaning of § 101(4)(B). We are not persuaded by either submission.

There is no indication in the language of the statute that the right to performance cannot be a claim unless it arises from a contractual arrangement. The State resorted to the courts to enforce its environmental laws against Kovacs and secured a negative order to cease polluting, an affirmative order to clean up the site and an order to pay a sum of money to recompense the State for damage done to the fish popula-

tion. Each order was one to remedy an alleged breach of Ohio law; and if Kovacs' obligation to pay $75,000 to the state is a debt dischargeable in bankruptcy, which the State freely concedes, it makes little sense to to assert that because the clean-up order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes. Furthermore, it is apparent that Congress desired a broad definition of a "claim"[3] and knew how to limit the application of a provision to contracts when it desired to do so.[4] Other provisions cited by Ohio refute, rather that support, its strained interpretation.[5]

The courts below also found little substance in the submission that the clean-up obligation did not give rise to a right to payment that renders the order dischargeable under § 727. The definition of "claim" in H. R. 8200 as originally drafted would have deemed a right to an equitable remedy for breach of performance a claim even if it did not give rise to a right to payment.[6] The initial Senate definition of claim was narrower,[7] and a compromise version, § 101(4), was finally adopted. In that version, the key phrases "equitable remedy," "breach of performance," and "right to payment" are not defined. *See* 11 U. S. C. § 101. Nor are the differences

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[3] H. R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 21 (1978). See 2 Collier on Bankruptcy, ¶ 101–.04, at 101–16.2 (15th ed. 1984).

[4] See 11 U. S. C. § 365 (1982) (assumption or rejection of executory contracts and leases).

[5] Congress created exemptions from discharge for claims involving penalties and forfeitures owed to a governmental unit, 11 U. S. C. § 523(a)(7), and for claims involving embezzlement and larceny. *Id.*, § 523(a)(4). If a bankruptcy debtor has committed larceny or embezzlement, giving rise to a remedy of either damages or equitable restitution under state law, the resulting liability for breach of an obligation created by law is clearly a claim which is non-dischargeable in bankruptcy.

[6] H. R. 8200 (House Committee Print), 95th Cong., 1st Sess., (1977), as reported September 8, 1977, 309–310.

[7] See S. 2266, 95th Cong., 1st Sess., (1977), as introduced October 31, 1977, 299.

between the successive versions explained. The legislative history offers only a statement by the sponsors of the Bankruptcy Reform Act with respect to the scope of the provision:

> "Section 101(4)(B) . . . is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title 11."[8]

We think the rulings of the courts below were wholly consistent with the statute and its legislative history, sparse as it is. The Bankruptcy Court ruled as follows, *In re Kovacs*, 29 Bankr. Rep. 816 (Bankr. SD Ohio 1982):

> "There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U. S. C. § 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U. S. C. § 101(11). Furthermore, we have concluded that that debt is dischargeable."[9]

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[8] 124 Cong. Rec. H11089 (daily ed. Sept. 7, 1978) (remarks of Rep. Edwards); see also 124 Cong. Rec. S17406 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

[9] More fully stated, the Bankruptcy Court's observations were:

"What is at stake in the present motion is whether defendant's bankruptcy will discharge the affirmative obligation imposed upon him by the Judgment Entry, that he remove and dispose of all industrial and/or other wastes at the subject premises. If plaintiff is successful here, it would be able to levy on defendant's wages, the action prevented by our Prior Decision, after defendant's bankruptcy case is closed and/or the stay of 11 U. S. C. § 362 as interpreted by our Prior Decision is no longer in force.

The District Court affirmed, primarily because it was bound by and saw no error in the Court of Appeals' prior opinion holding that the State was seeking no more than a money judgment as an alternative to requiring Kovacs personally to perform the obligations imposed by the injunction. To hold otherwise, the District Court explained, "would subvert Congress' clear intention to give debtors a fresh start." App. to Pet. for Cert. A–16. The Court of Appeals also affirmed, rejecting the State's insistence that it had no right to, and was not attempting to enforce, an alternative right to payment:

> "Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovacs' assets. Ohio later used state law to try and discover Kovacs' post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now inter-

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The parties have crystallized the issue here in simple fashion, plaintiff stoutly insisting that the just identified affirmative obligation is not a monetary obligation, while defendant says that it is. The problem arises, of course, because it is not stated as a monetary obligation. Essentially for this reason plaintiff argues that it is not a monetary obligation. Yet plaintiff in discussing the background for the Judgment Entry says that it expected that defendant would generate sufficient funds in his ongoing business to pay for the clean-up. Moreover, we take judicial notice that plaintiff sought discovery with respect to defendant's earnings, the matter dealt with in our Prior Decision, for the purpose of levying upon his wages, a technique which has no application other than in the enforcement of a money judgment. There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U. S. C. § 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U. S. C. § 101(11). Furthermore, we have concluded that that debt is dischargeable." 29 Bankr. Rep., at 818.

> ested is a money payment to effectuate the Chem-Dyne cleanup."
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> . . . . .
>
> "The impact of its attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance." 717 F. 2d, at 987–988.

As we understand it, the Court of Appeals held that, in the circumstances, the clean-up duty had been reduced to a monetary obligation.

We do not disturb this judgment. The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' non-exempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property. Furthermore, when the bankruptcy trustee sought to recover Kovacs' assets from the receiver, the latter sought an injunction against such action. Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray clean-up costs. At oral argument in this Court, the State's counsel conceded that after the receiver was ap-

pointed, the only performance sought from Kovacs was the payment of money. Tr. of Oral Argument 19–20. Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied. On the facts before it, and with the receiver in control of the site,[10] we cannot fault the Court of Appeals for concluding that the clean-up order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy.[11]

IV

It is well to emphasize what we have not decided. First, we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy. Third, we do not ad-

[10] We were advised at oral argument that the receiver at that time was still in possession of the site, although he was contemplating terminating the receivership. Tr. of Oral Argument, 4, 56–57. We were also advised that it was difficult to tell exactly who owned the property as 500 Ford Boulevard and that although the trustee did not formally abandon the property, he did not seek to take possession of it. Tr. 55, 58.

[11] The State relies on *Penn Terra, Ltd.* v. *Department of Environmental Resources*, 733 F. 2d 267 (CA3 1984). There, the Court of Appeals for the Third Circuit held that the automatic stay provision of 11 U. S. C. § 362 did not apply to the State's seeking an injunction against a bankrupt to require compliance with the environmental laws. This was held to be an effort to enforce the police power statutes of the state, not a suit to enforce a money judgment. But in that case, there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits to enforce the regulatory statutes of the state, but the enforcement of such a judgment by seeking money from the bankrupt—what the Court of Appeals for the Sixth Circuit concluded was involved in this case—is another matter.

dress what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee.[12] Fourth, we do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy; we here address, as did the Court of Appeals, only the affirmative duty to clean up the site and the duty to pay money to that end. Finally, we do not question that anyone in possession of the site—whether it is Kovacs or another in the event the receivership is liquidated and the

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[12] The commencement of a case under the Bankruptcy Act creates an estate which, with limited exceptions, consists of all of the debtor's property wherever located. 11 U. S. C. § 541. The trustee, who is to be appointed promptly in Chapter 7 cases, is charged with the duty of collecting and reducing the property of the estate and is to be accountable for all of such property. 11 U. S. C. § 704. A custodian of the debtor's property appointed before commencement of the case is required to deliver the debtor's property in his custody to the trustee, unless the bankruptcy court concludes that the interest of creditors would be better served by permitting the custodian to continue in possession and control of the property. 11 U. S. C. § 543. After notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. 11 U. S. C. § 554. Such abandonment is to the person having the possessory interest in the property. S. Rep. No. 95–989, 95th Cong., 2d Sess. 92 (1978). Property that is scheduled but not administered is deemed abandoned. 11 U. S. C. § 554(c). Had no receiver been appointed prior to Kovacs' bankruptcy, the trustee would have been charged with the duty of collecting Kovacs' non-exempt property and administering it. If the site at issue were Kovacs' property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee—must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions. As the case comes to us, however, Kovacs has been dispossessed and the State seeks to enforce his clean-up obligation by a money judgment.

The judgment of the Court of Appeals is

Affirmed.

dro 12/17/84

MEMORANDUM

To: JUSTICE POWELL

From: Dan

Re: JUSTICE WHITE'S First Draft of Ohio v. Kovacs, No. 83-1020.

I see three difficulties with JUSTICE WHITE'S opinion, but I am not sure that they should keep you from joining. First, JUSTICE WHITE slides around the serious mootness problem in this case by saying merely that "[w]e perceive nothing feigned or frivolous about the State's submission." This is hardly an answer to Kovacs's argument and the clear language of the judgment entry that he signed. Given that the Court wants to decide the merits now, however, I am not sure that writing separately on this point would be a good idea. It would merely point out a problem that readers would probably otherwise be unaware of and perhaps complicate mootness doctrine for future cases. On the whole, I am inclined to recommend that you let this sleeping dog lie.

Second, I disagree with JUSTICE WHITE'S interpretation of the statute. The real question posed by the case is whether Kovacs's failure to clean up the dump site constituted a "breach of performance ... giving rise to a right to payment." As I said in my bench memo, I believe that legislative history and the lan-

guage of the statute indicate the opposite of JUSTICE WHITE'S result. This is admittedly a close question, however, and I am not sure how much would be gained by writing separately. JUSTICE WHITE'S current draft is so vague in its discussion of the two relevant statutory terms that it might not affect the lower courts' interpretation of them in situations outside the narrow one presented here.

Third, JUSTICE WHITE places much importance on the presence of a trustee in this case. On the one hand, this greatly limits the case--which is a good idea considering how messy it is. On the other hand, giving this distinction any importance encourages potential bankrupts not to carry out their legal obligations. If they stall, the State will presumably appoint a trustee and their obligations will thus be dischargeable later. This strikes me as bad policy, but again I am not sure it is worth quarreling over.

These are all close judgment calls which my inexperience prevents me from making with much confidence. If pushed, however, I would hesitantly recommend joining the opinion. You might consider waiting a bit to see if other Justices see some of these same problems and feel strongly about them.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 18, 1984

Re: 83-1020 - Ohio v. Kovacs

Dear Byron:

Please join me.

Respectfully,

Justice White

Copies to the Conference

December 18, 1984

83-1020 Ohio v. Kovacs

Dear Byron:

Please join me.

Sincerely,

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 19, 1984

Re: No. 83-1020 Ohio v. Kovacs

Dear Byron,

Please join me.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 19, 1984

No. 83-1020 Ohio v. Kovacs

Dear Byron,

Please join me. I will also be circulating a brief separate concurrence mentioning that in my view state law would govern the preference, if any, to be given Ohio's claim.

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 27, 1984

Re: No. 83-1020-Ohio v. Kovacs

Dear Byron:

Please join me.

Sincerely,

T.M.
T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 27, 1984

No. 83-1020

Ohio v. Kovacs

Dear Byron,

I agree.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 28, 1984

Re: No. 83-1020 - Ohio v. William Lee Kovacs

Dear Byron,

I join.

Regards,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 28, 1984

Re: No. 83-1020, Ohio v. Kovacs

Dear Byron:

Please join me.

Sincerely,

Harry

Justice White

cc: The Conference

83-1020 Ohio v. Kovacs (Dan)

BRW for the Court 10/5/84
1st draft 12/17/84
2nd draft 12/31/84
Joined by JPS 12/18/84
LFP 12/18/84
WHR 12/19/84
SOC 12/19/84
WJB 12/27/84
TM 12/27/84
HAB 12/28/84
CJ 12/28/84

SOC concurring
1st draft 1/2/85