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Recovering Costs for Cleaning Up Hazardous Waste Sites: An Examination of State Superlien Statutes

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NOTES

RECOVERING COSTS FOR CLEANING UP HAZARDOUS WASTE SITES: AN EXAMINATION OF STATE SUPERLIEN STATUTES

INTRODUCTION

As the number of hazardous waste sites and the danger posed by them become more widely known, the pressure on state environmental agencies to clean up the sites will undoubtedly increase. The United States Congress has passed environmental legislation which provides federal funds for cleanup of hazardous waste sites. However, this federal legislation has not adequately met states' needs for protecting the environment and recovering costs for cleaning up hazardous waste sites. Consequently, many states have passed environmental legislation modeled upon the federal acts. When a state environmental agency cleans up a hazardous waste site, the agency tries to recover the costs of cleanup from the owner or other party responsible for the site. Because of the conflicting policy goals of environmental legislation

1. For a statutory definition of hazardous waste, see Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987 (1982) [hereinafter RCRA or RCRA of 1976]. Generally, the definition includes waste which may cause or contribute to death, or serious illness.

2. The number of hazardous waste sites listed by the EPA was reported to be approximately 26,000, while the General Accounting Office has estimated that the number could reach 368,000 if a more thorough inventory were taken. Marcotte, Toxic Blackacre: Unprecedented Liability for Landowners, 73 A.B.A. J., Nov. 1987, at 66, 67. See also S. Epstein, L. Brown & C. Pope, Hazardous Waste in America 302 (1984) (estimating between 32,000 and 51,000 potentially hazardous waste sites identified in the United States) [hereinafter S. Epstein].


5. See id. (listing and discussing state law equivalents to CERCLA and their interaction with the federal law).

and bankruptcy laws, however, state environmental agencies have encountered difficulties in recovering costs of cleanup when the party responsible for the hazardous waste site has declared bankruptcy.\(^7\)

The Bankruptcy Reform Act of 1978\(^8\) is intended to provide the debtor with a “fresh start” while still assuring equitable treatment of creditors.\(^9\) Several provisions in the Bankruptcy Code (or the Code) afford financial protection for an entity with liabilities for hazardous waste cleanup.\(^10\) Use of these various provisions of the Code to avoid hazardous waste liability has caused much discussion and debate concerning the conflict of bankruptcy law and environmental protection policy.\(^11\)

In an effort to ensure that state environmental agencies can recover costs for cleaning up hazardous waste sites when the party responsible for the site has declared bankruptcy, at least three states have enacted statutes which

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10. 11 U.S.C. § 362(a) (1982 & Supp. III 1985) (the Automatic Stay Provision—see infra notes 29-52 and accompanying text); id. § 554 (the Abandonment Provision—see infra notes 53-70 and accompanying text); id. § 105(a) (the Discretionary Stay Provision—see infra notes 71-82 and accompanying text). See also Drabkin, Moorman, & Kirsch, supra note 3, at 10,171-73.
give the state a priority lien against the bankrupt party. Under these priority liens, or "superliens," the holder of the lien (the state) collects reimbursement costs for cleaning up the hazardous waste site before other creditors are satisfied.

These priority liens, however, raise certain constitutional questions. First, do such liens work to effect a "taking" without just compensation in contravention of the fifth amendment of the United States Constitution, as applied to the states via the fourteenth amendment, or do they represent a valid exercise of the states' police powers and thus relieve the states from any obligation to pay compensation? The fifth amendment provides in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." The United States Supreme Court has held the police power "to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance." Because of the high cost of cleaning up a hazardous waste site, there is the possibility that after cleanup costs are recovered by the state, there will be no money left in the bankrupt's estate for creditors to recover. The inquiry must focus on whether the creditors have suffered a taking without just compensation.

The second issue presented is whether the state superliens act as an unconstitutional impairment of contract rights. Article I of the Constitution provides in part that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." In this context, creditors argue that by lending money to hazardous waste site operators, the creditors have contracted for repayment of the money. The state superlien statutes, the argument continues, destroy or impair this right because once the state's lien takes priority, there is nothing left in the estate to allow creditors to recover their money, thus effectively destroying the contract between the creditor and the operator. The contracts clause issue also forces the courts to examine the states' police

13. The exact wording of the statute is important in determining against whom the lien applies. See infra notes 83-113 and accompanying text.
14. U.S. Const. amend. V. The fifth amendment's restriction on taking property was made applicable to the states through the fourteenth amendment in Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).
15. U.S. Const. amend. V.
17. The Environmental Protection Agency has estimated the average expenditure per superfund site at close to $12 million. Drabkin, Moorman, & Kirsch, supra note 3, at 10,169 (citing 49 Fed. Reg. 40,320, 40,325 (1984)).
19. Id.
powers. Answering the police powers question necessarily involves courts in an examination of the dangers posed by the particular hazardous waste site and the interests protected by the bankruptcy code.

This Note first examines the relevant protections offered by the Bankruptcy Code to debtors with hazardous waste liabilities\(^\text{20}\) and the outer limits of two of those protections as determined by two recent Supreme Court decisions.\(^\text{21}\) The Note next examines superlien statutes passed by state legislatures and the differences in language among the statutes.\(^\text{22}\) The Note then addresses the constitutional problems posed by superlien statutes.\(^\text{23}\) The "taking" question and the contracts clause question will be examined in the light of \textit{Keystone Bituminous Coal Association v. DeBenedictis},\(^\text{24}\) a recent Supreme Court decision discussing the relevant analysis under these constitutional provisions. The Note concludes that, with the exception of secured creditors who have a property interest of value which was perfected before the enactment of the state's priority lien statute, the superlien provisions can meet constitutional requirements and therefore represent a positive step toward alleviating the problems posed by hazardous waste sites.

\section{I. Bankruptcy Code Protections from Hazardous Waste Liability}

When examining the Code, it is important to keep in mind the policies it is intended to promote. The primary purpose of the Code is to conserve the debtor's estate\(^\text{25}\) for the benefit of the debtor's creditors.\(^\text{26}\) The Code is also designed to allow debtors breathing room to recover from their financial difficulties and re-attain commercial success.\(^\text{27}\) Furthermore, the Code serves to ensure an orderly and equitable presentation of creditors' claims.\(^\text{28}\)

\subsection{A. Section 362: The Automatic Stay Provision}

When a bankruptcy petition is filed, section 362 of the Code creates an automatic "stay" on any further proceedings which might disrupt a creditor's

\begin{footnotesize}
\begin{itemize}
  \item \(20\). \textit{See infra} notes 25-82 and accompanying text.
  \item \(22\). \textit{See infra} notes 83-113 and accompanying text.
  \item \(23\). \textit{See infra} notes 114-206 and accompanying text.
  \item \(24\). 107 S. Ct. 1232 (1987).
  \item \(26\). \textit{See In re McGoldrick}, 121 F.2d 746, 751 (9th Cir.), cert. denied, 314 U.S. 675 (1941) ("The fundamental purpose of the acts relating to bankruptcies is to conserve the properties for the benefit of debtor and creditors alike or to reduce the assets to cash for distribution among the creditors." (quoting \textit{In re Ostlind Mfg. Co.}, 19 F. Supp. 836, 838 (D. Or. 1937))).
  \item \(27\). Lockett, \textit{supra} note 25, at 869-70.
  \item \(28\). \textit{Id.} at 869.
\end{itemize}
\end{footnotesize}
position relative to a debtor's estate. The automatic stay provision has given rise to most of the conflicts between bankruptcy law and environmental regulations. This section of the Code was designed to prevent a "race to the courthouse" by creditors hoping to cash in their claims on a first-come first-served basis. Section 362, however, does allow various exceptions to the automatic stay provision.

Of the various exceptions to the section 362 automatic stay provision, there are two situations where claims involving environmental concerns may be excepted. First, if a governmental unit commences or continues an action to enforce its police or regulatory powers to protect public health or safety, the automatic stay does not apply. Second, if the action is to enforce a judgment which is not a "money judgment," where such non-money


(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the [bankruptcy] case . . . .

Id.

30. See Drabkin, Moorman, & Kirsch, supra note 3, at 10,182.


33. Section 362(b) states in pertinent part:

The filing of a petition under section 301, 302 or 303 of this title . . . does not operate as a stay—

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

Id. § 362(b)(4), (5) (1982). For an examination of how courts have interpreted and applied these exceptions, see Comment, Bankruptcy Law—When Is a Governmental Unit’s Action to Enforce Its Police or Regulatory Power Exempt from the Automatic Stay Provisions of Section 362, 9 FLA. ST. U.L. REV. 369 (1981).


35. 11 U.S.C. § 362(b)(4) (1982). The legislative history of section 362 indicates that Congress intended environmental laws to be considered police and regulatory powers. See H.R. Rep. No. 595, 95th Cong., 2d Sess. at 343, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6299 ("[W]here a governmental unit is suing a debtor to prevent or stop violation of . . . environmental protection . . . safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.").
judgment is obtained as a result of a legitimate exercise of police or regulatory powers, the automatic stay will not be enforced.\textsuperscript{36} Thus, if the government is merely pursuing an action to protect its pecuniary interests in the debtor's property, the stay will not apply.\textsuperscript{37} Some courts have held that if a state seeks to enforce an injunction which serves to protect the public's health, safety, or welfare, this order will not be subject to the automatic stay.\textsuperscript{38}

The United States Supreme Court recently held, in \textit{Ohio v. Kovacs},\textsuperscript{39} that a pre-petition order against an individual debtor to force him to clean up his hazardous waste site constituted a "money judgment." Therefore, the debt was dischargeable\textsuperscript{40} under section 362, where the bankrupt debtor had been dispossessed of the site by a state appointed receiver. In \textit{Kovacs}, Ohio sued the Chem-Dyne Corporation and its senior officer, William Kovacs, for violations of Ohio's environmental laws arising from operation of a hazardous waste site.\textsuperscript{41} Kovacs then signed a stipulation and judgment entry which required him to clean up the waste site.\textsuperscript{42} When Kovacs failed to comply within the cleanup obligations, the state appointed a receiver to take control of Kovacs' assets and to implement the judgment to clean up the waste site.\textsuperscript{43}

After the appointment of the receiver, but before the cleanup order was completed, Kovacs filed for bankruptcy.\textsuperscript{44} Ohio filed a motion in state court to determine Kovacs' income and assets, hoping to develop a basis for requiring Kovacs' post-petition income to be applied toward carrying out

\textsuperscript{36} 11 U.S.C. § 362(b)(5) (1982). \textit{See} Lockett, \textit{supra} note 25, at 871. A "money judgment" has been defined as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be transferred or restored." United States Fidelity & Guarantee Co. v. Fort Misery Highway Dist., 22 F.2d 369, 372 (9th Cir. 1927). In \textit{Ohio v. Kovacs}, the Supreme Court held that an individual debtor's obligation to clean up a hazardous waste site amounted to a money judgment and was dischargeable under the Code. 469 U.S. 274 (1985). \textit{See infra} notes 39-52 and accompanying text.

\textsuperscript{37} \textit{See Note, Priority Lien Statutes, supra note 11, at 382.}

\textsuperscript{38} \textit{See, e.g.}, Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984). In \textit{Penn Terra}, the court held that an order forcing Penn Terra, a bankrupt coal mine operator, to restore strip-mined property was not a money judgment, and therefore was not dischargeable under section 362(b)(5). The court decided that the injunctive order was intended to prevent future harm to the environment, rather than compensation for past damage. \textit{Id.} at 277. For a general discussion of the conflicts and discrepancies of court decisions interpreting the meaning of section 362 of the Code, see Comment, \textit{supra} note 11, at 989-96.

\textsuperscript{39} 469 U.S. 274 (1985).

\textsuperscript{40} As stated by the Court: "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. [11 U.S.C.] § 727(b)." \textit{Kovacs}, 469 U.S. at 278.

\textsuperscript{41} \textit{Id.} at 275.

\textsuperscript{42} \textit{Id.} at 276.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} Kovacs initially filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1145, but converted the petition to a Chapter 7 liquidation proceeding, \textit{id.} § 112. \textit{Kovacs}, 469 U.S. at 276 n.1.
the clean-up order. In reply, Kovacs invoked section 362 of the Bankruptcy Code and requested the bankruptcy court to stay the state court proceedings; the bankruptcy court granted the stay. Ohio claimed that the enforcement order was not a "claim" for a money judgment and therefore should not be dischargeable. The bankruptcy court rejected Ohio’s argument and the Sixth Circuit Court of Appeals affirmed, holding that Ohio essentially sought a monetary judgment from Kovacs and that such monetary judgments are dischargeable under the Bankruptcy Code. The Supreme Court affirmed.

The importance of the Kovacs decision for the purposes of this Note lies in the concurring opinion of Justice O’Connor. Sensing that the Court’s decision might be misinterpreted as precluding any effective action by states to enforce environmental actions, Justice O’Connor pointed out that:

[b]ecause “Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law,” the classification of Ohio's interest as either a lien on the property itself, a perfected security interest, or merely an unsecured claim depends on Ohio law. . . . Thus a state may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims.

The various state superlien statutes discussed in Section II below are examples of the statutory liens to which Justice O’Connor refers in her concurrence.

45. Id. at 276.
46. Id.
47. Id. at 277.
48. In re Kovacs, 717 F.2d 984 (6th Cir. 1983). However, in Penn Terra, Ltd. v. Department of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984), the court held that section 362 did not apply to the state's request for an injunction against a bankrupt to require compliance with the environmental laws. In Penn Terra, the state action was held to be an effort to enforce the police power of the state, not a suit to enforce a money judgment. Id. at 277.
In Kovacs, the Supreme Court distinguished Penn Terra stating, “in [Penn Terra] there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision . . . is another matter.” Kovacs, 469 U.S. at 283 n.11.
49. Kovacs, 469 U.S. at 274. The Court, however, was careful to limit its holding and pointed out what it was not deciding. First, Kovacs' discharge would not shield him from prosecution for having violated the environmental laws of Ohio, nor for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine been imposed prior to bankruptcy, the act of filing bankruptcy would not have relieved Kovacs of the obligation for that fine. Third, the Court did not address 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. Fourth, the Court did 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; the Court only addressed the affirmative duty to clean up the site and the duty to pay money to that end. Finally, the Court stated that it did not question that anyone in possession of the site would have to comply with the environmental laws of Ohio. Id. at 284-85.
51. Id. (citation omitted). See also Baird & Jackson, supra note 11, at 1205-08.
52. See infra notes 82-113 and accompanying text.
B. Other Protections Afforded by the Bankruptcy Code

1. Section 554: The Abandonment Provision

Under section 554 of the Code, a trustee or any party in interest may, on motion and after notice and hearing, abandon any property of the bankrupt estate which is "burdensome" or of "inconsequential value to the estate." "Burdensome" property is property that is essentially worthless because it is heavily subject to taxes, liens, or other encumbrances, while "inconsequential" means the debtor lacks equity in the property. Section 554, however, does not give a trustee or the bankruptcy court the authority to avoid compliance with pertinent nonbankruptcy law. The United States Supreme Court recently addressed the question of a trustee's power of abandonment in *Midlantic National Bank v. New Jersey Department of Environmental Protection*. In *Midlantic*, the Court held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."

In *Midlantic*, the debtor, Quanta Resources Corporation, owned and operated waste oil processing centers in New York and New Jersey, which were regulated by state environmental agencies. Nearly 500,000 gallons of PCB-contaminated oil were improperly stored at the facilities. The New Jersey Department of Environmental Protection ordered Quanta to cease operations, and Quanta and the state began negotiating the cleanup of the facilities. Before the conclusion of the negotiations, however, Quanta filed

55. 11 U.S.C. § 554 (1982). Section 554(a) provides: "After notice and a 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." Id. § 554(a) (1982).
56. See Note, *Priority Lien Statutes*, supra note 11, at 384 (citing Martin, supra note 54, at 34).
60. Id. at 496-97.
61. Id. at 497. More than 400,000 gallons of the oil contaminated with PCBs (polychlorinated biphenyls, highly toxic carcinogens) were found at the New Jersey site, while over 70,000 gallons of contaminated oil were found at the New York Facility. Id.
62. Id.
for reorganization under Chapter 11 of the Bankruptcy Code and one month later changed the action to a liquidation proceeding under Chapter 7. Pursuant to Chapter 7, a trustee was appointed to oversee the estate. No party disputed the trustee's claim that the contaminated oil was "burdensome" to the estate. The state, however, argued that abandonment would threaten the public health and safety, pointing out that when a trustee abandons burdensome property, the interest in the property reverts to the debtor corporation. Because the corporation's assets had become the property of the estate, however, the corporation did not have the financial resources to comply with the requirements of the New York environmental laws requiring cleanup of the waste site. Consequently, if the trustee were allowed to abandon the property, that action would amount to an illegal disposal of hazardous waste under New York law. The state also argued that allowing abandonment would be contrary to public policy, as evidenced by local and state environmental laws, and by the requirement of section 959(b) of the Judicial Code, which states that the trustee "shall manage and operate the property in his possession ... according to the valid laws of the State." In a 5-4 decision, the Supreme Court disallowed the abandonment, opting for environmental protection over strict application of the abandonment provision. Although the Midlantic decision indicates a policy choice away from unlimited protection of bankrupt entities toward protecting the public from the dangers posed by hazardous wastes, recent bankruptcy decisions have attempted to narrow the scope of the decision. The conflict, therefore, continues between protecting the bankrupt and his creditors and protecting the public health.

63. Id.
64. Id. ("Since the mortgages on [the New York] facility's real property exceeded the property's value, the estimated cost of disposing of the waste oil plainly rendered the property a net burden to the estate.").
65. Quanta, 739 F.2d at 914.
66. Id.
67. Id. citing N.Y. ENVTL. CONSERV. LAW § 71-2702 (McKinney Supp. 1982).
68. Midlantic, 474 U.S. at 498. Section 959(b) of the Judicial Code provides:
Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.
69. The majority's decision is vigorously attacked by Justice Rehnquist in his dissent. Midlantic, 474 U.S. at 507-17 (Rehnquist, J., dissenting). For a general discussion of the Midlantic decision, see Klein, supra note 11.
70. See, e.g., In re Oklahoma Refining Co., 63 Bankr. 562 (Bankr. W.D. Okla. 1986) (bankruptcy court should consider, but not be strictly bound by, state environmental laws when deciding whether to permit abandonment); In re Franklin Signal Corp., No. BKY 4-85-935 (Bankr. D. Minn. 1986) (where hazardous wastes posed no imminent danger to public health and safety, abandonment allowed).
2. Section 105: The Discretionary Stay

If an automatic stay is not issued under section 362, a debtor may seek a discretionary stay under section 105(a) of the Code. This provision allows a bankruptcy court to stay actions, including environmental protection lawsuits, if the stay is necessary to carry out other provisions of the Code. The discretionary stay, however, should only be granted after some type of adjudicatory hearing applying the traditional rules for obtaining a preliminary injunction.

Perhaps in keeping with the spirit of section 105, courts have exercised considerable discretion in granting such stays. Generally, courts have allowed the stay where an enforcement action is likely to imperil the estate's assets and the creditors' priorities. When the debtor has been violating environmental laws, however, courts have been less willing to grant the stay. But stays have been issued in cases which could be viewed as contrary to public safety and welfare, and when this happens, the stay may be challenged as a violation of section 959(b) of the Judicial Code. The use of the discretionary stay does not appear to be as active an area of avoidance in bankruptcy law as either the automatic stay or the abandonment provision.

State environmental agencies are faced with the same question in dealing with all three provisions of the Bankruptcy Code: How can the state ensure reimbursement for its cleanup efforts once the party responsible for the hazardous waste site has declared bankruptcy? State superlien statutes

73. See Morris, supra note 57, at 10143-44. See also Penn Terra, 733 F.2d at 273.
74. See S. REP. No. 989, 95th Cong., 2d Sess. 51, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5837; H.R. REP. No. 595, 95th Cong., 2d Sess. 342, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6298 (“By excepting an act or action from the [section 362] automatic stay, the bill simply requires that the trustee move the court into action.... [T]he court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.”).
75. See, e.g., NLRB v. Jones (In re Bel Air Chateau Hosp., Inc.), 611 F.2d 1248, 1251 (9th Cir. 1979).
76. See Morris, supra note 57, at 10145.
77. Id. (citing Turner Brothers, Inc. v. Oklahoma Dep't of Mines, No. 85-0053 (Bankr. E.D. Okla. 1985)).
78. 28 U.S.C. § 959(b) (1982) (for the text of the statute, see supra note 68). But see Quanta, 739 F.2d at 926 n.5 (Gibbons, J., dissenting) (arguing that section 959(b) should not apply to Chapter 7 proceedings).
79. See supra notes 29-52 and accompanying text.
80. See supra notes 53-70 and accompanying text.
81. Under CERCLA, the federal government pays 90% of cleanup costs and the state pays 10%. But this funding only applies for sites which qualify under CERCLA, and given the high cost of cleaning these sites, 10% is no small sum. See Warren, supra note 4, at 10,357.
represent an attempt by the states to address the problems of protecting the environment and recovering costs for hazardous waste cleanup.82

II. State Superlien Statutes: Language and Operation

The Bankruptcy Code provides for an orderly presentation of creditors' claims and attempts to prioritize those claims.83 State superlien statutes represent an attempt by the states to place the state ahead of other creditors in collecting money under the Code. At least three states have passed some form of superlien statute.84 The statutes vary somewhat in their language, and these differences can be used to point out the problems associated with the statutes. Three important factors to consider when examining superlien statutes are the time at which the lien becomes effective, the types of costs recoverable under the lien, and the particular property to which the lien attaches.85

Determining when a lien becomes effective is important for at least two reasons. First, the time at which a lien becomes perfected determines whether a trustee may "avoid" the lien under section 545(2) of the Code.86 Section 545(2) allows a trustee to avoid any statutory lien which is not perfected before the bankruptcy petition is filed.87 Liens which arise under the state priority lien legislation are statutory liens.88 If the lien is avoided under section 545, the lien becomes an unsecured claim, and the government's claim would receive low priority under the Code, possibly precluding the

82. On the federal level, Rep. James Florio introduced a bill, in 1983, H.R. 2767, which would have given the federal government a superlien. There were problems associated with the bill and the superlien provision was ultimately dropped. See Schwenke, Public Notice and Governmental Liens for Hazardous Waste Site Cleanups, 14 ABA Prob. & Prop. No. 1, at 7 (1985). See also Lockett, supra note 25.
84. See, e.g., statutes cited supra note 12.
86. 11 U.S.C. § 545(2) (1982). Section 545(2) states in relevant part:
   The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—
   
   (2) is not perfected or enforceable on the date of the filing of the petition against a bona fide purchaser that purchases such property on the date of the filing of the petition, whether or not such a purchaser exists; . . . .
   
   Id.
87. Id.
88. Section 101(39) of the Bankruptcy Code defines a statutory lien as a:
   lien arising solely by force of a statute on specified circumstances or conditions . . . but does not include security interests or judicial lien whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.
   
   Id. § 101(39) (1982).
state from any recovery at all, thus defeating the whole purpose of the superlien provision.  

Under all three superlien statutes, the state’s lien becomes perfected when the lien is filed by the state with the appropriate state official. As long as the state’s lien is recorded before the filing of the bankruptcy petition, the trustee may not avoid the lien under section 545(2). There are, however,

89. See Lockett, supra note 25, at 883.
90. A lien is perfected when its right of priority is secured. See Developments in the Law—Toxic Waste Litigation, supra note 85, at 1600 n.161 (citing J. Eddy & P. Winship, Commercial Transactions 100-01 (1985)).
91. The relevant portions of these statutes are set out below. Chapter 147-B:10-b III of the New Hampshire Revised Statutes provides in pertinent part:

III. The priority of the lien created by this section shall be as follows:

(a) As to the real property on which the hazardous waste or hazardous material is located, the lien shall constitute a first priority lien against such real property prior to all encumbrances, whether of record or inchoate, when the notice of lien is recorded in the registry of deeds for the county in which such real property is located and the notice of lien identifies the record owner of such real property.

(b) As to the business revenues generated from the facility on which hazardous waste or hazardous material is located, the lien shall constitute a first priority lien against such business revenues or personal property, prior to all encumbrances, whether of record or inchoate when the notice of lien is filed with the secretary of state and the notice of lien identifies the owner of such personal property.


Section 58:10-23.11f(f) of the New Jersey Statute provides in pertinent part:

Any expenditures made by the administrator pursuant to this act shall constitute in each instance, a debt of the discharger to the fund. The debt shall constitute a lien on all property owned by the discharger when a notice of lien, incorporating a description of the property of the discharger subject to the cleanup and removal and an identification of the amount to cleanup, removal and related costs expended from the fund is duly filed with the clerk of the Superior Court. . . . Upon entry [of the notice of the lien filed by the state] by the clerk, the lien, to the amount committed by the administrator for cleanup and removal, shall attach to the revenues and all real and personal property of the discharger, whether or not the discharger is insolvent.

The notice of lien filed pursuant to this subsection which affects the property of a discharger subject to the cleanup and removal of a discharge shall create a lien with priority over all other claims or liens which are or have been filed against the property, except if the property comprises six dwelling units or less and is used exclusively for residential purposes, this notice of lien shall not affect any valid lien, right or interest in the property filed in accordance with established procedure prior to the filing of this notice of lien.


Chapter 21E, section 13, of the Massachusetts Laws provides in pertinent part:

Any lien recorded, registered or filed pursuant to this section shall have priority over any encumbrance theretofore recorded, registered or filed with respect to any site, other than real property the greater part of which is devoted to single or multi-family housing, . . . but as to all other real property shall be subject to encumbrances or other interests recorded, registered or filed prior to the record, registration or filing of such statement, and as to all other personal property shall be subject to the priority rules [of the Massachusetts Laws].


two situations in which a trustee may be able to avoid a superlien under section 545(2). First, if the bankruptcy petition is filed before the cleanup activities begin, then the state will not satisfy the requirement that the lien be filed before the filing of the bankruptcy petition. In most cases, however, initiation of cleanup activities has begun before the filing of bankruptcy petitions, so this scenario seems unlikely to occur. The second, and perhaps more likely, situation is that in which the state begins cleanup of a hazardous waste site, but simply neglects to file its lien as required under the superlien statute. If the owner of the hazardous waste site files for bankruptcy before the state records its lien, then presumably the bankruptcy trustee may avoid the lien under section 545(2). Here again, however, assuming a reasonable amount of diligence by state officials, this seems unlikely to occur.

The second reason for the importance of establishing when the lien becomes effective may be demonstrated by examining a problem that arose under the original version of the Massachusetts superlien law. The Massachusetts statute has probably created the greatest amount of controversy and publicity surrounding superlien statutes. Under the original version, after the state had incurred expenses cleaning up hazardous waste, there was a ninety-day period during which the state could file a claim describing the property to which the lien would apply. The ninety-day filing period caused problems, however, because there was a gap of up to ninety days during which a buyer of property could not determine his or her ownership position. Because of the uncertainty surrounding real estate purchases, the ninety-day provision was eliminated from the statute, and the statute now provides that the lien is perfected when filed.

Establishing the types of costs recoverable under a priority lien is important because those costs indicate what limitations are placed on the state environmental agencies in obtaining money ahead of other creditors. Under the Massachusetts statute for example, the state may file a priority lien to recover not only expenses incurred in cleaning up a waste site, but also may charge twelve percent interest per year on the debt. The New Jersey and New Hampshire statutes, on the other hand, allow recovery only for expenses

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93. See, e.g., Ohio v. Kovacs, 469 U.S. 274 (1985); Midlantic Nat'l Bank v. New Jersey Dept' of Envtl. Protection, 474 U.S. 494 (1986). In both of these cases, the cleanup activities had begun before the bankruptcy petition was filed.

94. For a quotation of the original version of the statute, see Schwenke & Lockett, Superlien “Solutions” to Hazardous Waste: Bankruptcy Conflicts, Q. NEWSLETTER oF TnE ABA STAnDG COMMITTEE ON ENVTL. LAW 1, 4 n.6 (Winter 1983-84).

95. Id. at 3.

96. See id.

97. Id.


99. Id. See also Schwenke & Lockett, supra note 94, at 3.
incurred pursuant to cleaning up the waste site, and do not include penalties or interest charges.\textsuperscript{100}

The third characteristic of superlien statutes to consider—the type of property to which the lien attaches—has a direct bearing on how likely it is that the state will actually recover its expenses. Under the original Massachusetts statute, the state could file a lien against all real and personal property of the liable person, including property presently owned or after acquired.\textsuperscript{101} The broad language as to what property could be affected by the liens caused the Federal Home Mortgage Corporation to withdraw from certain real estate markets in Massachusetts\textsuperscript{102} and led to a revision of the act.\textsuperscript{103} The revised act affects only property on the hazardous waste site; it does not apply to subsequently acquired property owned by the liable party, or other real or personal property.\textsuperscript{104} Under this approach, the state is limited in the amount of reimbursement it can recover because the value of the hazardous waste site may be limited.

The New Jersey Spill Compensation and Control Act is perhaps the strongest superlien provision enacted thus far.\textsuperscript{105} Proper recordation of the lien creates a lien which “shall attach to the revenues and all real and personal property of the discharger,” and “shall create a lien with priority over all other claims or liens which are or have been filed against the property,” with an exception for certain residential property.\textsuperscript{106} Thus, if the costs of cleanup exceed the value of the contaminated site itself, the state can recover from other property of the discharger as well. By providing that the lien may attach to other property of the discharger, and that the lien will have priority over other claims or liens, the New Jersey legislature appears to


\textsuperscript{101} See Schwenke & Lockett, supra note 94, at 3.

\textsuperscript{102} Id. The Federal Home Loan Mortgage Corporation withdrew from the condominium and apartment secondary mortgage market in Massachusetts, and threatened other withdrawals if the legislature failed to amend the superlien statute.


\textsuperscript{104} Id.


\textsuperscript{106} Id. The statute provides in relevant part:

Upon entry [of the notice of the lien filed by the state] by the clerk, the lien, to the amount committed by the administrator for cleanup and removal, shall attach to the revenues and all real and personal property of the discharger, whether or not the discharger is insolvent.

The notice of lien filed pursuant to this subsection which affects the property of a discharger subject to the cleanup and removal of a discharge shall create a lien with priority over all other claims or liens which are or have been filed against the property, except if the property comprises six dwelling units or less and is used exclusively for residential purposes, this notice of lien shall not affect any valid lien, right or interest in the property filed in accordance with established procedure prior to the filing of this notice of lien.

\textit{Id.}
have understood that the cost of cleanup might exceed the value of the waste
site and took steps to ensure that the lien take priority ahead of secured
creditors. Although the New Jersey superlien statute affects all real
and personal property of the discharger, it is important to realize that the statute
is limited to the discharger, and does not apply to subsequent purchasers
of the contaminated property. The New Jersey superlien has survived a
challenge to its constitutionality in state courts.

Under the New Hampshire superlien provision, the lien may attach to
business revenues and all real and personal property of any person liable
under the state's hazardous waste fund law. The statute grants the state
a first priority lien, prior to all encumbrances, against the hazardous waste
site itself, as well as any business revenues generated from the facility which
is located on the site, and any personal property located on the site. As
to all other property which is not located on the site, the lien is an ordinary
lien without first priority.

Having examined the operation of the superlien statutes, it is now possible
to explore the constitutional challenges to the statutes under the fifth amend-
ment's "taking" clause and the contracts clause.

III. CONSTITUTIONAL CONSIDERATIONS

Although Justice O'Connor's concurring opinion in Ohio v. Kovacs in-
dicates that states may protect their interests in enforcing environmental laws
by giving cleanup judgments the status of statutory liens or secured claims,
that opinion begins, rather than ends, the inquiry. There are still potential constitutional barriers to the operation of the statutes which must be addressed.

A. Fifth Amendment "Taking" Problems

Perhaps the most serious constitutional question concerning superlien statutes is whether they constitute a governmental "taking" without just compensation in violation of the fifth amendment as applied to states via the due process clause of the fourteenth amendment. The argument in this context is that given the high cost of cleaning up a hazardous waste site, once the government recoups its cleanup expenses, there will be nothing left of the estate to satisfy the claims of other creditors. Therefore, because the creditors have been deprived of their property (their repayment money) for a public use (reimbursing the state environmental agency for its cleanup) without just compensation, an unconstitutional taking has occurred.

1. General Considerations

When examining the effects and constitutionality of a superlien statute, it is first necessary to determine whether the lien is operating against (or being challenged by) an unsecured creditor or a secured creditor. The secured creditor has both recognized property rights in the collateral as well as contractual rights to repayment. The unsecured creditor, however, has only contractual rights and thus has no property rights to be protected by the fifth amendment. It is the secured creditor, then, who is entitled to challenge a superlien statute as violating the fifth amendment's taking clause.

Once a secured creditor challenges the superlien statute as violating the taking clause, it is necessary to determine whether the superlien takes priority over other liens only on the contaminated property or on uncontaminated property as well. At the same time, of course, it is necessary to find out exactly what property interest the secured creditor has. If the security interest

115. U.S. Const. amend. V ("No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.").

116. One estimate puts the average cost of final disposal of hazardous wastes at $25.9 million per site. S. Epstein, supra note 2, at 203. See Note, The Bankruptcy Code and Hazardous Waste Cleanup, supra note 9, at 165 n.1.

117. See generally Paige, supra note 31, at 380-83 (discussing the rights of secured and unsecured creditors).


120. See Drabkin, Moorman, & Kirsch, supra note 3, at 10,179.
affected involves only the contaminated property, it is still possible to avoid a constitutional challenge by arguing that the government’s action in cleaning up the site actually restored or improved the value of the property. The New Jersey Superior Court made this very point in *Kessler v. Tarrats*, a recent case which held that the New Jersey superlien statute did not effect a taking. The *Kessler* court further held that the statute did not impair the contract rights of the assignee of a mortgage which was recorded before the statute was enacted. In its discussion, the court stated:

> The presence of the [hazardous waste] in a real sense destroyed what economic value the premises may have had until it was removed.

> The work done by [the New Jersey Department of Environmental Protection] had the effect of restoring the economic value to the subject premises. . . .

> In a realistic sense, the priority provision prevents some from enjoying a windfall at the expense of the public.

The court noted that priority lien statutes have been analogized to maritime and mechanics’ liens; these liens are given priority because they add or preserve value with respect to the property involved. The principle in this situation is one of preventing unjust enrichment of the secured creditor who has had the value of the collateral increased from nothing or nearly nothing to a greater value. Thus, because the value of the creditor’s collateral is actually increased, there can be no taking. On appeal, the New Jersey Appellate Court affirmed and stated that “[w]hatever diminution in value may have occurred to affect plaintiff’s security interest was as the result of the acts of polluting the property. Therefore, whatever property, if any, was ‘taken’ was taken by the dischargers of the hazardous substances and not by the State.”

A similar situation, which also would militate against a finding of an unconstitutional taking, is that in which the secured creditor again has security only in the contaminated land. In this case, however, the bankruptcy petition is filed before any cleanup activities occur on the land. Because the value of the secured creditor’s interest is determined at the time of the

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123. *Kessler*, 191 N.J. Super. at 288, 466 A.2d at 589. Since the assignee took the mortgage after the effective date of the statute, the rights associated with the mortgage were not impaired by any law subsequently enacted.
125. *Kessler*, 191 N.J. Super. at 300-01, 466 A.2d at 597. See also Lockett, supra note 25, at 889 (“In this context, the concept underlying superpriority is essentially one of avoiding . . . unjust enrichment . . . .”).
127. The value of a secured interest “shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property.” 11 U.S.C. § 506(a) (1982).
filing of the bankruptcy claim, if the contaminated waste site is determined to have no value, there can be no taking of the property.

A constitutional problem does arise, however, if the superlien statute is applied toward a secured creditor who has a property interest of value which was secured before the enactment of the statute. The United States Supreme Court held in *Louisville Joint Stock Land Bank v. Radford* that retroactive application of a bankruptcy provision against a secured creditor violates the taking clause of the fifth amendment. *Radford* involved the Frazier-Lemke Act, which operated retroactively to allow a debtor to purchase his own property from the mortgagee bank at less than fair market value. The Court held that the Act effected a “taking of substantive rights in property acquired by the Bank prior to” enactment. In *Radford*, the Court stated that “the Fifth Amendment commands that, however great the Nation’s need, private property shall not be thus taken even for a wholly public use without just compensation.”

Another case, *Armstrong v. United States*, supports the argument against retroactive application of the superlien statutes. In *Armstrong*, materialmen delivered materials to a prime contractor for use in building Navy boats. Under state law, the materialmen obtained liens in the vessels. The prime contractor defaulted on his obligations to the United States, and the government took possession of the uncompleted hulls and unused materials. This made it impossible for the materialmen to enforce their liens. In holding the government’s action to constitute a taking, the Court stated that “[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment ‘taking’ and is not a mere ‘consequential incidence’ of a valid regulatory measure.”

The Court’s position in *Radford* and *Armstrong* was recently reaffirmed in *United States v. Security Industrial Bank*. The case involved the retroactive application of section 522(f)(2) of the Bankruptcy Code. Section 522(f) invalidates nonpossessory, nonpurchase-money liens on certain prop-

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128. See Lockett, supra note 25, at 887.
129. This situation raises the possibility that the trustee may be able to avoid the statutory superlien under section 545(2) of the Code. See supra notes 86-93 and accompanying text.
133. Id. at 590.
134. Id. at 602.
136. Id. at 48.
property, including household appliances and furnishings. In *Security Industrial Bank*, the bank challenged the retroactive application of section 522(f) to certain liens the bank held, claiming such retroactive application would violate the taking clause of the fifth amendment. Although the case was ultimately decided on statutory construction grounds, the majority expressed doubt that a secured creditor may be constitutionally dispossessed of his property retroactively without just compensation.

The Supreme Court, in deciding *Security Industrial Bank* on statutory grounds, relied on the principle that legislation should not be applied retroactively unless Congress expresses a clear and unequivocal intent to the contrary. Although *Security Industrial Bank* involved retroactive application of a federal bankruptcy statute, the principle and rationale requiring legislative intent for retroactive application is equally forceful when applied to state laws. Therefore, where the state legislature has failed to specify clearly that the superlien statute is to be applied retroactively, it may be possible for a secured creditor who has a lien which was perfected before the enactment of the statute to contest the statute on statutory construction grounds, thereby avoiding the constitutional question altogether.

2. The *DeBenedictis* Decision and Its Implications for Superlien Statutes

When viewed in light of the recent Supreme Court decision of *Keystone Bituminous Coal Association v. DeBenedictis*, state superlien statutes should

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139. See *Security Indus. Bank*, 459 U.S. at 72. See also *Zarin*, supra note 11, at 350.


141. *Id.* at 78. In discussing the constitutional issue, the Court stated that although the bundle of rights that accrues to a secured party is smaller than that which accrues to an owner in fee simple, a secured interest does amount to property, thus affording the interest protection under the fifth amendment. *Id.* at 76.

142. *Id.* at 79. The Court stated:

[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. ... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

*Id.* (quoting *Union Pacific Ry. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)).

143. See *Kessler*, 194 N.J. Super. at 143, 476 A.2d at 329-30. In *Kessler*, the court stated:

When considering whether a statute should be applied prospectively or retroactively, [the court's] quest is to ascertain the intention of the Legislature. In the absence of an express declaration to the contrary, that search may lead to the conclusion that a statute should be given only prospective effect. Conversely, when the Legislature has clearly indicated that a statute should be given retroactive effect, the courts will give it that effect unless it will violate the constitution or result in a manifest injustice.

*Id.* (citations omitted). See also *Zarin*, supra note 11, at 351-55.

144. In *Kessler*, the court held the priority lien provision of the New Jersey Spill Act to apply retroactively. 194 N.J. Super. at 142-43, 476 A.2d at 329-30 ("The legislature has expressly declared that the Spill Act should be given retroactive effect.").

survive constitutional attack, except, again, in the case of a secured creditor who has a property interest of value which was secured before enactment of the statute. In DeBenedictis, the Court held that a Pennsylvania land use regulation requiring coal operators to leave a certain amount of coal in the land to prevent subsidence did not effect a taking under the fifth amendment.\(^{146}\) The Court first distinguished on two grounds the landmark taking case of Pennsylvania Coal v. Mahon,\(^{147}\) which, sixty-five years ago, held that a similar statute did effect a taking.\(^{148}\) First, said the DeBenedictis majority, the nature of the government action in Mahon was different than that in DeBenedictis. In Mahon, the Court noted, the statute was designed to protect private property, and the damage complained of was not common or public.\(^{149}\) Furthermore, the regulation in Mahon denied the coal company economically viable use of its property.\(^{150}\) In DeBenedictis, by contrast, Pennsylvania was acting pursuant to its police powers “to arrest what it [saw as] a significant threat to the common welfare.”\(^{151}\) Additionally, in DeBenedictis, there was nothing in the record to indicate that the Act prevented the coal company from profitably engaging in its business or that there was an undue interference with investment-backed expectations.\(^{152}\)

In DeBenedictis, the Court discussed the nature of inquiry under the taking clause, recognizing that there is no “set formula” for determining when a taking has occurred.\(^{153}\) The Court did, however, identify factors it has relied upon in past cases involving taking questions: (1) the character of the government action, (2) the economic impact of the regulation, and (3) the regulation’s interference with reasonable investment-backed expectations.\(^{154}\) When the superlien statutes are viewed in light of the factors discussed in DeBenedictis, the state superlien legislation appears to be constitutional, except when applied retroactively to secured creditors.

Looking at the nature of the government action necessarily involves a discussion of the state’s police powers and the policies underlying those powers. Where the state is acting pursuant to its police powers to protect the general public in some way, the Court has been hesitant to find a taking.\(^{155}\) In traditional nuisance cases, the Court has been reluctant to find that

\(^{146}\) Id.

\(^{147}\) 260 U.S. 393 (1922).

\(^{148}\) Id.

\(^{149}\) DeBenedictis, 107 S. Ct. at 1242.

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) Id. Chief Justice Rehnquist joined by three other members of the Court dissented, finding the majority’s attempt at distinguishing Pennsylvania Coal unpersuasive. Id. at 153-61 (Rehnquist, C.J., dissenting).

\(^{153}\) Id. at 1247 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

\(^{154}\) Id.

\(^{155}\) See id. at 1245.
governmental restraints on property use amount to a compensable taking. The police power argument is based on cases which deal with situations where the affected party is directly responsible for, or involved in the activity which must be abated for the good of the community. The justification for allowing the government to restrict the use of property rests upon the idea that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." When the owner fails to live up to that obligation, the state is empowered to step in and take the necessary steps to abate the nuisance. Thus, with superliens, it is clear that when superliens are applied to parties directly responsible for creating the dangerous condition at the hazardous waste site, the parties would be precluded from claiming that a taking has occurred, because pursuant to its police powers, the state is empowered to take action to prevent the nuisance from continuing.

In In re Quanta Resources Corp., the majority addressed the police power issue only in passing in a footnote and stated:

[W]e are not persuaded by the Trustee's argument that an unconstitutionl taking could result from forbidding abandonment here. . . . [T]he state's enforcement of its environmental protection laws cannot be characterized as a taking; rather it is a permissible exercise of the state's regulatory power to promote the public good, under a long line of cases dealing with just that distinction.

Justice Gibbons, dissenting, criticized the majority for its conclusory statement concerning the police power and said the cases cited by the majority

156. See id. at 1244-45 nn.18, 20. In DeBenedictis, the Court quoted Mugler v. Kansas, and stated:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

DeBenedictis, 107 S. Ct. at 1244 (quoting Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)).

157. DeBenedictis, 107 S. Ct. at 1256 (Rehnquist, C.J., dissenting) ("[W]e have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use."). See, e.g., Goldblatt v. Hempsted, 369 U.S. 590 (1962) (town ordinance limiting the use of land for mining held not to be a taking); Miller v. Schoene, 276 U.S. 272 (1928) (statute requiring landowner to destroy diseased trees held not to be a taking).


159. See Mugler, 123 U.S. at 664-65.

160. See Note, Priority Lien Statutes, supra note 11, at 395.


162. Id. at 922 n.11 (citations omitted).
in support of its position did not address the issue of an obligation on the part of innocent third-party creditors to undertake compliance with the police power statutes.\textsuperscript{163} The Supreme Court did not address the police power issue when it decided the appeal of the \textit{Quanta} case.\textsuperscript{164}

Secured creditors who acquired their secured interest after the passage of the superlien statute present a compelling, but not insurmountable, challenge to superliens. Although the secured creditor might argue that enforcing the superlien provision would interfere with the creditor’s reasonable investment-backed expectations, this argument is not persuasive. So long as the superlien provision is enacted before the creditor lends money to the hazardous waste operator, the creditor will be deemed to have constructive notice of the legislation.\textsuperscript{165} Therefore, the creditor is on notice that its claim or lien may be subordinated to the state in the event the state cleans up the hazardous waste site. Because the creditor knows, or should know, of this possibility, it should figure this factor into its investment expectations and assess the risks accordingly. Such risks may be passed on to consumers (borrowers) in the form of higher interest rates.

By allowing the state’s claim to take priority over the secured creditors who had notice, beneficial consequences and policies are promoted. First, because the creditor knows that its claim may be subordinated to the government, it will be more likely to conduct a thorough background investigation to determine whether the hazardous waste operator is complying with applicable regulations.\textsuperscript{166} The creditor is also more likely to ensure that the operator is operating his site in accordance with the law.\textsuperscript{167} Furthermore, because the operator knows that lenders will be more diligent and cautious both in their background investigations before lending money and in their ongoing relations with the operator, the operator will have a greater incentive to comply with the law.

In \textit{DeBenedictis}, the majority indicated that the regulation in question was a permissible exercise of the state’s police power because the statute did not simply involve the balancing of private economic interests of the coal companies against the interests of surface owners.\textsuperscript{168} Instead, by examining the legislative purpose of the Act,\textsuperscript{169} as well as its operation, the Court agreed

\begin{itemize}
\item \textsuperscript{163} \textit{Id.} at 925 n.3 (Gibbons, J., dissenting).
\item \textsuperscript{164} \textit{Midlantic}, 474 U.S. 494.
\item \textsuperscript{165} See, \textit{e.g.}, Texaco, Inc. v. Short, 454 U.S. 516 (1982) (legislature need do nothing more than enact and publish the law and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply).
\item \textsuperscript{166} See Comment, \textit{supra} note 11, at 1009.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{DeBenedictis}, 107 S. Ct. at 1242.
\item \textsuperscript{169} Section 2 of the Pennsylvania Coal Subsidence Act provides:
\begin{quote}
This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people
\end{quote}
\end{itemize}
with both the District Court and the Court of Appeals that the Commonwealth was "acting to protect the public interest in health, the environment, and the fiscal integrity of the area."170 The coal company argued that a provision of the Act that required the company to pay money to surface owners for reclamation of their land was unnecessary because the Commonwealth administered an insurance program which would reimburse the owners for any expenses they incurred in repairing their land.171 The Court rejected this argument, however, because the argument presumed that the statute was designed to protect private parties' rights.172 The Court found that the purpose underlying the statute was to prevent the damage from occurring in the first place and to encourage restoration of the land if damage did occur.173 Placing the financial responsibility on the coal operators, the Court said, would accomplish this goal more effectively than simply relying upon an insurance fund to reimburse the owners.174 The Court, therefore, rejected the company's taking claim, holding that the government's action was amply justified by the public purposes served by the Act.175

In a similar way, some may argue that the better way to ensure that hazardous waste sites are cleaned up would be to increase the amount of money that industry is required to contribute to a state "superfund" used to pay for cleaning up waste sites.176 Assuming that at least one of the goals of the superlien statutes is to prevent or reduce unsafe waste disposal practices, the argument fails for the same reason the majority found the coal company's argument unpersuasive in DeBenedictis. Simply requiring industry to pour additional money into a cleanup fund does nothing to deter operators from their unlawful conduct. As discussed above, notifying lenders that the state's lien may take priority provides incentives for both the operators and lenders to be more cautious and diligent in their practices with hazardous waste operations. Furthermore, in examining the purposes of legislation, the Court's "inquiry into legislative purpose is not intended as a license to judge

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171. Id.
172. Id.
173. Id. at 1243, 1253.
174. Id.
175. Id. at 1243, 1251.
the effectiveness of legislation. . . . 'Whether in fact the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature rationally could have believed that the [Act] would promote its objective.' 177 Under this deferential standard, it seems highly unlikely that a court would find that the state legislature could not have rationally believed that the superlien would promote its objective.

In the case of a secured creditor who acquired a security interest of value before the enactment of the superlien, allowing the state's lien to take priority would violate the fifth amendment. Even if the argument in this context relying upon Radford, Armstrong, and Security National Bank is not accepted, an analysis under DeBenedictis compels a finding that, if applied retroactively, the superliens violate the fifth amendment. In DeBenedictis, the Court said that there was no showing that the petitioner's reasonable investment-backed expectations had been materially affected by the statute.178 With a secured creditor who acquires a security interest of value before the enactment of the statute, however, the creditor's investment-backed expectations are not simply unduly interfered with, they are completely frustrated. The secured creditor has no notice of the possibility that the state's lien might take priority. As a result, without Delphic powers, there is no reason for the creditor to figure this risk into the investment calculations. Because the creditor has no knowledge of the possible retroactive application of the statute, the reason for applying the statute to other secured creditors does not apply in this case.179 The creditor does not know that the state's lien could take priority, and consequently, the creditor has no incentive to be more diligent in its background investigation or ongoing relations with the hazardous waste site operator.

While some may argue that the superlien statutes represent only an attempt to protect the state's pecuniary interest, and do not enable the state to clean up a waste site,180 this view is rather short-sighted. Given the expense of cleaning up a waste site,181 it seems unlikely the state could continue cleaning up waste sites without recovering the costs of previous or ongoing cleanups. Thus, allowing superliens to take priority against secured creditors with notice of the statute enables the state to continue to perform its vital role of protecting the public from the dangers of hazardous wastes, and does not constitute a taking.

178. Id. at 1249-50.
179. See Zarin, supra note 11, at 355.
180. See Note, Priority Lien Statutes, supra note 11, at 395.
181. See supra note 17.
B. Contracts Clause Problems

An issue which is closely related to the takings question is whether enactment and enforcement of the state superlien statutes violates the contracts clause of the Constitution. In DeBenedictis, the Court rejected a challenge to the Pennsylvania Coal Subsidence Act under the contracts clause of the Constitution. The Coal Company claimed that it had obtained damage waivers for a large percentage of the land surface protected by the Subsidence Act, but that the Act removed the surface owners' contractual obligations to waive damages. The Court began its discussion by pointing out that "it is well-settled that the prohibition against impairing the obligation of contracts is not to be read literally." The Court went on to explain that the contracts clause was not intended to destroy the states' police powers, which protect the general public's health and welfare.

In examining the legislation, the DeBenedictis Court followed the approach taken in Energy Reserve Group, Inc. v. Kansas Power and Light Co., which set out a three-tiered standard for determining whether an unconstitutional impairment of contract has occurred. The first step is to identify the particular contractual right impaired, and the nature of the impairment. The Court found there to be a substantial impairment of a contract right of waiver, and proceeded to the next step, justifications for the impairment. The Court examined the purpose or interest that the legislation was designed to serve and found that Pennsylvania had a "strong public interest" in preventing the destruction of property and water courses, which would have occurred had the subsidence been allowed.

Under the final step, a court must determine whether the legislation is based upon reasonable conditions and is appropriate to the purpose of its

183. DeBenedictis, 107 S. Ct. at 1251-53. Because Chief Justice Rehnquist argued in his dissent that the Pennsylvania Act violated the fifth amendment's taking clause, he did not address the contracts clause issue. Id. at 1261 n.9.
184. Id. at 1252.
185. Id. at 1251 (citing W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934)).
186. The Court stated:
   It is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. . . . [The police power] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.
DeBenedictis, 107 S. Ct. at 1251-52 (quoting Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 445 (1934)).
189. Id.
190. Id. at 1252.
191. Id.
adoption. In this inquiry, the DeBenedictis Court showed considerable deference to the state legislature: "[W]e have repeatedly held that unless the State is itself a contracting party, courts should, 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " The Court found that the purpose underlying the statute was to prevent damage from occurring to the land in the first place and to encourage restoration of the land if damage did occur. Relying upon its earlier discussion of the Commonwealth's goals in passing the Subsidence Act, the Court found that requiring coal operators to repair damage or pay landowners for the damage done was an appropriate and reasonable action by the legislature to accomplish its goals of deterrence and protecting the environment from future harm. The Court refused to second-guess the Commonwealth's determination that placing the financial responsibility on the coal operators would accomplish these goals more effectively than simply relying upon an insurance fund to reimburse the owners. The Court, therefore, rejected the company's contract clause claim, holding that the impairment was amply justified by the public purposes served by the Act.

Examining the superliens in light of DeBenedictis, they would appear to survive constitutional challenge under the contracts clause. The first inquiry under the test—whether a substantial impairment of a contract right has occurred—is rather easily satisfied. The superliens interfere with, or impair, the creditor's right to repayment, for which it contracted. Under the second step of the test, it is necessary to determine what interest the state is promoting, and whether that interest is significant or legitimate. A forceful argument certainly exists that a state has a "strong public interest" in remedying the dangers posed by abandoned hazardous waste sites. Although it may be argued that the states are simply protecting a pecuniary interest in the property, the very fact that the states have passed such legislation is at least some evidence that the provision is necessary to ensure cleanup of other waste sites in the future. Furthermore, given the Supreme Court's finding in DeBenedictis that preventing subsidence in coal mining operations satisfies the requirement that the statute be significant or legitimate, it seems

192. Id. at 1253 (quoting Energy Reserve Group, 459 U.S. at 412).
193. Id. at 1253 (quoting Energy Reserve Group, 459 U.S. at 418 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977))).
194. Id.
195. See supra notes 168-75 and accompanying text.
197. Id.
198. Id. See also supra note 175 and accompanying text.
199. See Blaisdell, 290 U.S. at 431 ("The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them and impairment, ... has been predicated of laws which without destroying contracts derogate from substantial contractual rights." (citation omitted)).
200. See Note, Priority Lien Statutes, supra note 11, at 395.
doubtful that a court would find that an effort to protect the public from the dangers posed by poorly managed hazardous waste sites does not satisfy that requirement.

Superlien statutes also meet the third requirement under the contracts clause analysis—that the legislation be based upon reasonable conditions and is appropriate to the purpose of its adoption. The underlying consideration which must be remembered is the Supreme Court's great deference to the judgment of the state legislature concerning the necessity and reasonableness of a particular measure. State legislatures have recognized the dangers posed by poorly managed waste sites and have sought to protect the public from those dangers by cleaning up the sites. Allowing the state's lien to take priority enables the state to recover its costs, ensuring that the state can continue its cleanup activities in the future, as well as providing a deterrent to mismanagement of waste sites. While some might argue that there are other less intrusive methods of accomplishing the legislature's goals, that argument is off the mark because it ignores the deference to be given to state legislatures by a reviewing court. Under this deferential standard, the question essentially is whether the legislature could rationally believe that the superlien statutes could accomplish the goal of protecting the environment by ensuring the state is reimbursed for hazardous waste site cleanups and by deterring future mismanagement of waste sites. It seems unlikely that a court would find that the legislature could not rationally believe that superliens would serve the purposes being pursued.

In Kessler v. Tarrats, the appellate court of New Jersey affirmed the trial court's holding that New Jersey's superlien provision did not constitute an unconstitutional impairment of contract. The court held the legislature's action to be a valid exercise of the police powers:

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201. See supra notes 177, 193 and accompanying text.
202. See supra notes 165-67 and accompanying text.
203. One possibility is to increase the amount of money industry must contribute to state cleanup funds (superfunds). See Note, Priority Lien Statutes, supra note 11, at 398. The author implies that the state must prove that there is "no feasible alternative" to the superlien in order for it to survive a contracts clause challenge. Id. at 393 ("The state may find it difficult to argue that there are no feasible alternatives to the superlien."). This is a stricter standard than courts have applied. See, e.g., DeBenedictis, 107 S. Ct. at 1253.
204. Although the rational relationship test has applied in the taking clause analysis rather than in the contracts clause analysis, the DeBenedictis Court relied at least in part on its taking analysis in deciding that the legislation was appropriate and reasonable. See supra note 177 and accompanying text. It does not seem to be a great leap, therefore, to assert that in a challenge under the contracts clause, the Court will apply the same or a similar, rational belief test to the legislature's act as it does under the taking analysis. Some commentators argue that the analysis under the taking clause and the contracts clause is basically the same. See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 695 (1960).
205. See Zarin, supra note 11, at 352 (arguing that courts will defer to legislative judgment unless the results are unduly arbitrary and unjust).
The [superlien] provision serves the legitimate public purpose of enhancing the Spill Fund's remedial capabilities by increasing the opportunities to recoup clean up expenditures. Even if the application of that priority lien provision results in some impairment of contract, it may nevertheless be permitted because of the strong police power and public interest rationale underlying the enactment.\textsuperscript{206}

Thus, at least one court has found the superlien statute to be an appropriate way to remedy the dangers of poorly managed hazardous waste sites, without unconstitutionally impairing contracts.

CONCLUSION

Until Congress acts to amend the Bankruptcy Code in a way that would more likely ensure that state governments can recover their costs for cleaning a hazardous waste site, states should take the necessary action of ensuring reimbursement by passing statutory liens giving them a priority lien against a bankrupt estate. When applied to operators or responsible parties of hazardous waste sites or secured creditors whose interest was perfected after the passage of the superlien legislation, the superlien statutes should be held to be a valid exercise of the states' police powers, and not constitute a taking under the fifth amendment. The overarching goal of protecting the public from the dangers of hazardous waste is furthered by ensuring that the state will be able to recoup its cleanup expenses, thus allowing cleanups to continue in the future. Furthermore, by allowing the state's lien to take priority over a secured creditor who has notice of the superlien statute, lenders will be encouraged to lend money only to operators who are complying with the law. Similarly, because operators are, or should be, aware of the increased diligence by lenders, the operators will be encouraged to be responsible in their waste storage practices in order to ensure they can obtain necessary loans.

Examined in light of the Supreme Court's recent decision concerning taking analysis, an unconstitutional taking does occur when the superlien statutes are applied to secured creditors who have a property interest of value which was secured before the passage of the statute. The creditor has no idea that it might, in the future, have its lien subordinated to the state's. In this situation, the lender's investment-backed expectations are destroyed, because the lender has no reason to figure this risk into its calculations when determining how much money to lend and at what interest rate. Furthermore, there is no deterrent effect to be gained from telling a lender after the fact that its lien will be subordinated to the state.

Although analysis under the contracts clause is very similar to that under the taking clause, courts appear to give greater deference to states under

\textsuperscript{206} Kessler, 194 N.J. Super. at 146, 476 A.2d at 331-32.
contracts clause analysis. As a result, application of a superlien even to a secured creditor who had a secured interest before the enactment of the statute probably would not violate the contracts clause, since a court could rather easily assert that the legislation is reasonable and appropriate under the circumstances, and represents a valid exercise of the state’s police powers.

Given the large number of hazardous waste sites in the country and the staggering costs involved in cleaning them up, states should take whatever steps are necessary and permissible to ensure the public safety. Properly drafted state superlien statutes represent a step in the right direction toward eliminating the problems of ensuring cost recovery for cleaning up hazardous waste sites. In drafting these statutes, state legislators should keep certain considerations in mind. First, to avoid the constitutional challenge by a secured creditor whose interest was perfected before the statute was passed, the superlien statute should perhaps include some type of grandfather clause which would exempt such creditors from the operation of the statute. Second, the statute should provide that the state’s lien is perfected on the date it is filed with the proper state official. This eliminates any confusion surrounding property purchases. Finally, the statutes should be unambiguous as to the types of costs recoverable under the liens and the particular property to which the lien attaches. Addressing these issues should help minimize the difficulties which arise regarding these statutes.

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