Expanding the Reach of the Bankruptcy Code's Automatic Stay Exception: City of New York v. Exxon

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EXPANDING THE REACH OF THE BANKRUPTCY CODE'S AUTOMATIC STAY EXCEPTION: CITY OF NEW YORK v. EXXON

I. INTRODUCTION

The Bankruptcy Code (Code) was developed to protect a debtor from his or her creditors. The Code provides for a stay of all actions which have been commenced or could have been commenced pre-petition, and provides exceptions so that the automatic stay does not apply to certain actions. Most courts have extended the exception to the stay to include actions for the recovery of environmental cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The main purpose of CERCLA is the rapid cleanup of hazardous waste followed by reimbursement from the responsible party. CERCLA covers all costs of removal or remedial action incurred by the United States Government or a state, any necessary costs of response incurred by a private person, damages to natural resources and the costs of any health assessment.

The Code exists to protect a debtor's estate and insure its equitable distribution. However, the exception to the stay allows recovery of costs by a governmental unit exercising its police and regulatory power. This exception permits an action for the recovery of CERCLA costs which would otherwise be stayed. Thus, bankruptcy's goal of a true equitable distribution may be infringed upon.

In the recent case of City of New York v. Exxon, the Second Circuit held that cities, as well as private parties, are exempt from the automatic stay. Exxon extended the reach of the exception, permitting even more plaintiffs to recover while a party is in bankruptcy. This note will examine the effect of the expansion of the automatic stay exception on CERCLA recovery actions. The note will also examine the applicability of the automatic stay and its use.

5. 932 F.2d 1020 (2d Cir. 1991).
by "private" and "public" plaintiffs in light of City of New York v. Exxon.6

II. BACKGROUND

A. History of CERCLA

Congress enacted CERCLA as a response to the tremendous concern over the severe environmental and public health threat resulting from improper disposal of hazardous wastes and other hazardous substances.7 The statute is designed to facilitate the prompt cleanup of hazardous waste sites by providing a means of financing government and private responses, and by placing the ultimate expense on those responsible for the danger.8 CERCLA imposes liability for hazardous waste sites on any party who contributes to a hazardous condition in any manner.9 All "potentially responsible parties" (PRPs)10 could be held liable. CERCLA also provides for joint and several liability.11

CERCLA provides that the Environmental Protection Agency (EPA) can cleanup a hazardous waste site on its own initiative.12

6. 932 F.2d 1020 (2d Cir. 1991). Private actions are actions brought under section 9607(a)(4)(B) of CERCLA. This section specifically includes municipalities as private parties. Public actions arise under section 9607(a)(4)(A) of CERCLA and include states and the federal government. 42 U.S.C. § 9607(a)(4)(A) & (B) (1988).


11. 42 U.S.C. § 9607(a) (1988); Manolopoulos, supra note 9. Under joint and several liability the full judgement could be brought to bear against one defendant. See United States v. R.W. Meyer, Inc, 932 F.2d 568, 569-70 (6th Cir. 1991). That defendant would then have a right of contribution from other responsible parties. Id. See 42 U.S.C. § 9613(f)(1). Thus, the party bringing suit could recover against whatever responsible party could pay the judgement, even if one party paid more than its share. Meyer, 932 F.2d at 569. Under this method the plaintiff is virtually assured of full recovery of its judgement without regard to which defendants are proportionally responsible. Id.

12. 42 U.S.C. § 9604 (1988). Thus, the EPA can cleanup a hazardous waste site and then bring suit for the reimbursement of its expenses. Where this claim falls in the priority of bankruptcy claims is a divided question. If the costs are incurred after the bankruptcy filing, some courts treat the claim as an administrative expense. Under the Code, administrative expenses are entitled to be paid
Under CERCLA, Congress created a Superfund from which EPA can draw funds for hazardous waste cleanups.\textsuperscript{13} Superfund was created from a tax levied on the petroleum and chemical manufacturing industries to pay for these cleanups.\textsuperscript{14} However, the Superfund financing does not make the government solely responsible for the financial aspects of a hazardous waste cleanup. CERCLA provides for EPA to obtain reimbursement of its cleanup costs from PRPs.\textsuperscript{15} This reimbursement is accomplished by allowing the government to sue the PRPs directly to recover the costs of cleanup.\textsuperscript{16} Private parties can also bring an action under CERCLA to recover damages incurred from the cleanup of hazardous wastes.\textsuperscript{17}

B. Bankruptcy Code and the Automatic Stay


In order for a private person to bring an action under CERCLA: (1) he or she must fall within one of four categories of covered persons; (2) there must have been a release or threatened release of a hazardous substance from defendant's facility which caused the plaintiff to incur response costs; and (3) the plaintiff's costs must be necessary costs of response which are consistent with the national contingency plan. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st Cir. 1989).

18. In re Chateaugay Corp. v. LTV Corp., 944 F.2d 997, 1002 (2d Cir. 1991). The "fresh start" occurs when a debtor, after bankruptcy, receives a discharge of all remaining debt. 11 U.S.C. §§ 523-524, 727 (1988). A debtor's creditors are paid off with whatever assets are left in the debtor's estate to accomplish the discharge. 11 U.S.C. § 507 (1988). As a result of the discharge, the debtor may begin business again without the constraints of overwhelming debt. When the automatic stay does not apply, a party can obtain a judgement against the debtor and receive a portion of the estate as reimbursement. See 11 U.S.C. § 362(b) (1988).
lieved of his or her duty to pay debts\textsuperscript{19} and his creditors are paid to the fullest possible extent with whatever assets are in the debtor's estate.\textsuperscript{20}

Once the debtor files a petition in bankruptcy, the debtor is protected from creditors by the automatic stay provision of the Code.\textsuperscript{21} The automatic stay operates as a bar to proceedings\textsuperscript{22} and enforcement actions\textsuperscript{23} to reach the debtor's estate,\textsuperscript{24} which include actions against the debtor, the debtor's property and the property of the estate. However, the state does not apply to acts against property which is neither the debtor's nor the estate's.\textsuperscript{25} The purpose of the automatic stay is to preserve the bankruptcy

\textsuperscript{21} 11 U.S.C. § 362(a) (1988). Section 362(a) states as follows: (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or 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 judgement obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

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

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

\textit{Id.}

estate and assure equitable liquidation of all debts.\textsuperscript{26} Commentators have noted that the automatic stay's scope is extremely broad and covers any type of formal or informal action against a debtor or the property of his estate.\textsuperscript{27} The relief to the debtor of the automatic stay is available even against those claims that are later found to be secured and payable in full.\textsuperscript{28}

The automatic stay is limited, however, by several exceptions,\textsuperscript{29} enumerated in section 362(b) of the Code.\textsuperscript{30} The major exception involving CERCLA is the "police and regulatory power" exception.\textsuperscript{31} This exception states that the automatic stay does not apply to the "commencement or continuation of an action or proceeding by a governmental unit to enforce such gov-


\textsuperscript{28} See Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 271 (3d Cir. 1984). The relief of the stay is allowed for secured claims since it protects the debtor's estate and assures an equitable and orderly distribution of the estate. \textit{Id.} If secured claims were satisfied haphazardly, it would be easier for problems to develop in the distribution of the debtor's estate.

\textsuperscript{29} See 11 U.S.C. § 362(b)(4) & (b)(5). Sections 362(b)(4) & (b)(5) state as follows:

- (b) The filing of a petition filed under section 301, 302, or 303 of this title, or of an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), 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 judgement, other than a money judgement, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

\textit{Id.}

\textsuperscript{30} For the text of § 362(a)(4) see \textit{supra} note 21.

ernmental unit’s police or regulatory power.” Governmental entities have used this exception to the automatic stay to bring several types of actions against debtors who have entered bankruptcy.

The use of the police and regulatory exception to the automatic stay is limited, however, to cases that seek to create or enforce a non-money judgment. Section 362(b)(5) creates an “exception to the exception” since actions to enforce a money judgment are still barred by the automatic stay even if accomplished pursuant to a state’s police powers. The definition of the term “money judgment” has been a source of much contro-


The inapplicability of the automatic stay does not necessarily provide for full reimbursement costs. As the court in Exxon stated, the lifting of the stay only provides for the entering of a money judgment, not for the enforcement of such a judgment. See City of New York v. Exxon, 932 F.2d 1020 (2d Cir. 1991). Thus, even though a judgment could be obtained, its enforcement would be denied and the plaintiff would not receive money. When entered, the money judgment will be dischargeable as a “claim” in bankruptcy. In re Chateaugay Corp. v. LTV Corp., 944 F.2d 997, 1002 (2d Cir. 1991).


34. 11 U.S.C. § 362(b)(5). See also City of New York v. Exxon, 932 F.2d 1020 (2d Cir. 1991). A police power money judgement is one obtained under section 362(b)(4) such as a specific amount of money to be paid for environmental cleanup reimbursement. Id.

35. 11 U.S.C. § 362(b)(5). See also Penn Terra, 733 F.2d at 272.

The legislative history of section 362(b)(5) clarifies the scope of the “exception to the exception.” That history states as follows:

Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a government unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

versy. Some courts have held that only a definite fixed sum could be a money judgment, while others hold that any order which requires the expenditure of funds is a money judgment.

The purpose of the governmental legal action must also be ascertained before the exception to the stay will be permitted. To that end, the purpose must be for the conservation of public health, safety, or welfare. The automatic stay will remain in effect if the focus of the police power is solely on the debtor's financial obligations rather than health and safety concerns. If the focus is on money, section 362(b)(4) will not apply and the stay will be enforced under section 362(b)(5).

Whether government suits for the recovery of response costs fall under the police power exception to the automatic stay will determine if such suits may be commenced. If the exception is allowed, suits may proceed to judgment without delay. However, if the automatic stay still applies, the claim is stayed and is most likely dischargeable in bankruptcy.

39. See, e.g., Environmental Waste Control Inc., 131 B.R. at 421; In re Sampson, 17 B.R. 528 (Bankr. D. Conn. 1982); In re Ryan, 15 B.R. 514 (Bankr. D. Md. 1981). This division arises because if the government is suing to recover a "money judgment" section 362(b)(5) will keep the stay intact. However, if the government suit is to protect the public health, (i.e. protect persons from the present danger of a hazardous site) the action would not be deemed brought to enforce a money judgment and the automatic stay would not apply. The definition of "money judgment" has been difficult for many courts to determine. Some courts have held that only a definite fixed sum could be a money judgment while others hold that any order which requires the expenditure of funds is a money judgment. See Penn Terra, 733 F.2d at 274; United States v. Kovacs, 469 U.S. 274 (1985).
42. The applicability of the automatic stay would prevent a suit under CERCLA from proceeding to judgment. 11 U.S.C. § 362(a) (1988). Without a judgment the party would most likely not have a "claim" which is enforceable in the bankruptcy proceeding, leaving the costs of the cleanup to be wholly discharged. See In re Chateaugay Corp. v. LTV Corp., 944 F.2d 997, 1002 (2d Cir. 1991); Penn Terra, 733 F.2d at 274; United States v. Kovacs, 469 U.S. 274 (1985). If the stay is inapplicable, however, a party may receive a judgment in its favor and then present such judgment in the bankruptcy court. See United States v.
C. CERCLA and the Automatic Stay

The law concerning the application of the automatic stay to CERCLA cost recovery actions has been uniformly applied. Courts have generally held that a CERCLA action is an exercise of the government’s police or regulatory power and is not subject to the automatic stay.\textsuperscript{43} The main thrust of the case law regarding the exception to the stay is that if the governmental agency is acting to protect the public interest and not from a purely pecuniary perspective, the exception to the stay will be permitted. If the purpose of the governmental unit’s action is to protect the state’s pecuniary interest, the exception will not apply.\textsuperscript{44} However, all of the cases which have been decided to date have involved the enforcement of the exception by a state or by the United States Government.\textsuperscript{45} No court has ruled on the enforcement of the stay by a city under CERCLA.\textsuperscript{46}

In \textit{Penn Terra Ltd. v. Department of Environmental Resources},\textsuperscript{47} the United States Court of Appeals for the Third Circuit held that the exception to the automatic stay should be applied broadly so as to afford states the maximum use of its police and regulatory power.\textsuperscript{48} The “exception to the exception” of section 362(b)(5) was construed narrowly to limit the application of the stay strictly to actions enforcing a money judgment.\textsuperscript{49} The court reasoned that an order to cleanup a hazardous waste site was an “obvious exercise of the state’s power to protect the health, safety, and welfare of the public.”\textsuperscript{50} The court also decided that the relief sought was not a strict money judgment, but an injunction “meant to

\begin{footnotesize}
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\item \textsuperscript{44} See In Re Nejberger, 112 B.R. 714 (Bankr. E.D. Pa. 1990).
\item \textsuperscript{45} 42 U.S.C. § 9607(a)(4)(A) (1988). These are considered “public” parties under § 9607(a)(4)(A) of CERCLA.
\item \textsuperscript{46} An action by a city under CERCLA is argued in \textit{Exxon} by Refinement to be a strictly “private” action. Under this theory the governmental exception to the automatic stay could not apply, and the action for reimbursement could not be brought.
\item \textsuperscript{47} 733 F.2d 267 (3d Cir. 1984).
\item \textsuperscript{48} \textit{Id.} at 273. \textit{Penn Terra} was decided under various state environmental statutes. \textit{Id.} However, the decision regarding the automatic stay is applicable to CERCLA actions.
\item \textsuperscript{49} \textit{Id.} at 273. However, even if the automatic stay is inapplicable, the bankruptcy court may, in its discretion, issue an appropriate injunction applying the stay. \textit{Id.}
\item \textsuperscript{50} \textit{Id.} at 274.
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prevent future harm to, and to restore, the environment." Therefore, this action was properly deemed an exercise of the police and regulatory power and not subject to the automatic stay.

Similarly, in United States v. MacKay, the District Court for the Northern District of Illinois, while implying that the police power exception to the automatic stay was a narrow one, nevertheless held that the exception to the stay applied in actions under CERCLA to recover response costs. This was the first court to directly address the issue of the application of the automatic stay to an action under CERCLA for reimbursement of hazardous waste site cleanup costs. The court relied solely on the legislative history of the Bankruptcy Act of 1978 to find that the automatic stay was inapplicable.

MacKay was reinforced one year later by the court in United States v. Mattiace Industries, Inc. Mattiace also involved the application of the stay to an action under CERCLA. While conceding that the exception to the stay applied to an action for injunctive relief and fines, the debtor argued that to the extent reimbursement for response costs were sought, the exception did not apply since such an action would be stayed by the "pecuniary interests" rule. The court noted that the pecuniary interests doctrine had never been applied to an action under CERCLA and ruled that, since a CERCLA action is by its very nature for the protection of

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51. Id. at 278.
52. Id.
54. Id. at 3.
55. MacKay involved a suit brought by the United States to recover the costs of stabilizing hazardous waste storage trailers. Id. Defendant MacKay sought to have the action stayed due to the filing of a petition for involuntary bankruptcy. Id.
56. Id. at 4. The legislative history states as follows:

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

57. 73 B.R. 816 (E.D.N.Y. 1987).
58. Id.
59. Mattiace, 73 B.R. at 818. The pecuniary interests rule states that if the only purpose for the government action is to protect its pecuniary interests, then the action will be stayed notwithstanding the exception to the automatic stay.
the public health and welfare, the exception will control.60

Similarly, in United States v. Nicolet, Inc.,61 the Third Circuit held the exception to the automatic stay applicable to CERCLA actions by the United States to recover costs expended and to be expended in the future for the cleanup of an asbestos site.62 After the suit for recovery was filed, Nicolet filed for bankruptcy.63 The EPA then sought to have the proceedings declared exempt from the automatic stay of section 362.64 The court reasoned that merely reducing the claim to judgment would not be an impermissible enforcement of a money judgment under section 362(b)(5) of the Code.65 The court went on to declare that since the United States was suing not to redress a private wrong but to protect the health, welfare and safety of the public under CERCLA and its police and regulatory power, the exception to the automatic stay would ensure that the responsible parties would be held liable for environmental wrongs.66 To that end the court stated “it was Congress' intent that proceedings such as this be exempt from the automatic stay up to and including the entry of a monetary judgment.”67

Several cases demonstrate the limitations on the exception to the automatic stay. In United States (EPA) v. Environmental Waste Control, Inc.,68 a private citizens group sought a declaration that the automatic stay did not apply due to the applicability of the 362(b)(4) exception.69 The court denied the motion, reasoning that actions by private citizens can not benefit from the stay exception of 362(b)(4) even if the judgment sought would be payable to the government.70 The court retained the narrow focus of

60. Id. at 819.
61. 857 F.2d 202 (3d Cir. 1988).
62. Id.
63. Id. at 203.
64. Id.
65. Id.
66. Nicolet, 857 F.2d at 210. The court indicated that without the exception to the automatic stay, entities could simply violate the law, seek protection under the bankruptcy code, and thus never be held responsible for its environmental damage. Id.
67. Id.
68. 131 B.R. 410 (N.D. Ind. 1991).
69. The citizens group sought the exception to the stay since the proceeds of any suit would be payable to the government and in essence the citizens group was equal to a governmental plaintiff. Id.
the stay limiting it to “governmental authorities seeking to enforce regulations violated by the debtor.”

In United States v. Seitles, the Bankruptcy court found the exception to the automatic stay inapplicable when there was no threat of harm to the public. The court determined that absent the presence of continuing harm or the threat of harm, the stay must be enforced. The decision turned on the fact that without an act purporting to protect the public from harm, there was no need for an exception to the continuance of the stay.

1. Cities and the Automatic Stay

Although courts have not ruled on the city-state issue in the bankruptcy context, several courts have reviewed this issue in a strict CERCLA only action. For example, in Mayor and Board of Aldermen v. Drew Chemical Corp., the District Court of New Jersey held that a city would be encompassed in the definition of a state under section 9607(a)(4)(A) of CERCLA. The court reasoned that while a strict reading of the statute would exclude a city from 9607(a)(4)(A), such a conclusion would undermine CERCLA’s goals. The court relied on the legislative history and a broad reading of the term “state” to allow the city to bring suit under

73. While Seitles involved the False Claims Act, its interpretation of the automatic stay is applicable to all cases involving section 362(b)(4).
74. Id. at 39. The court used the pecuniary interests test and the public policy test to determine whether the stay applied. Under the pecuniary interests test the court found that the government’s interest was of a monetary nature, not of a motive involving public safety. Id. Under the public policy test, the court relied on the reasoning of the courts in the Chateaugay, and Wellham cases. Those cases state that while the government could articulate a public policy reason, it was not necessarily the primary motivation for continuing the action. In re Chateaugay, 115 B.R. 28 (Bankr. S.D.N.Y. 1988) aff’d 944 F.2d 997 (2d Cir. 1991); In re Wellham, 53 B.R. 195 (Bankr. M.D. Tenn. 1985). As a result, the court found the exception to the stay did not apply. Seitles, 106 B.R. at 39.
75. Seitles 106 B.R. at 39.
77. Id. The policy of CERCLA would be undermined because the Act was enacted to allow for the efficient cleanup of hazardous waste. See Nicolet, 1989 U.S. Dist. LEXIS 9576, at *16; City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982). If the court allowed only a state to sue, then only a state could cleanup hazardous wastes. This conclusion would leave a city with the difficult task of attempting a cleanup as a private party. If the city is treated as a private party it would not receive the benefit of the exception and would be out of court. See supra note 66. CERCLA certainly was not enacted to protect only “state waste” as opposed to “city waste.” Its purpose was and is to clean up all hazardous waste as efficiently as possible.
9607(a)(4)(A).\textsuperscript{78}

After the decision in *Drew Chemical*, two cases disagreed with the District Court of New Jersey. In *City of Philadelphia v. Stepan Chemical Co.*,\textsuperscript{79} the court read section 9607(a)(4)(A) strictly and excluded a city from the definition of a state. The court specifically disagreed with *Drew Chemical*, finding no support for a broadening of (a)(4)(A) in either the strict statutory reading or the legislative history. Similarly, in *Town of Bedford v. Raytheon Corp.*,\textsuperscript{80} the United States District Court for Massachusetts held that the "primary focus must be on the statute itself"\textsuperscript{81} and thus a city could not come under the term state.\textsuperscript{82}

The recent decision of the Second Circuit Court of Appeals in *City of New York v. Exxon*,\textsuperscript{83} extended the protection from the automatic stay to a city in the exercise of its police and regulatory power. *Exxon* also was the first case to extend the exception to the automatic stay to cases brought under both section

\textsuperscript{78} Id.


\textsuperscript{81} Id. at 475. The court held that any interpretation of the statute must come from a strict and direct reading of the statute. Id. As a result, the court would simply not permit any outside evidence or inferences to bear on its interpretation.

\textsuperscript{82} The court viewed as controlling Judge Ditter's comment in *Stepan Chemical*, that there is "a concern on the part of Congress that unwise and excessive cleanup activity be restrained." 713 F. Supp. at 1488 n. 12. This allowed the court to dismiss the policy arguments of *Drew Chemical* and *Exxon*.

\textsuperscript{83} 932 F.2d 1020 (2nd Cir. 1991).
While a city has the same interests as a state in protecting the public health and safety, CERCLA treats a city as it would a private citizen. This difference seems to make it more important to protect a state's citizens than for a city to protect its citizens. In permitting a city to sue as a state, the court eliminates this dichotomy and permits the goals of CERCLA to be served. This extension of protection to cities themselves will allow all governmental units to obtain a judgement for CERCLA cleanup costs against a bankrupt debtor.

III. DISCUSSION

A. Facts of City of New York

In City of New York, the City brought suit against Refinemet Corporation and fourteen other defendants under CERCLA to recover the costs of removing hazardous wastes generated by the

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84. 42 U.S.C. § 9607(a)(4)(A) states as follows:
   Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
   (4) any person who accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
   (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

Id.

85. 42 U.S.C. § 9607(a)(4)(B) states as follows:
   Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
   (4) any person who accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
   (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

Id.

86. The difference between public and private is generally important in that a private party (one under section 9607(a)(4)(B)) could not use the police power exception. See 42 U.S.C. § 9607(a)(4)(B).

87. As written and according to the legislative history, section 9607(a)(4)(B) would encompass municipalities such as New York, while section 9607(a)(4)(A) would include states and the United States Government, but not cities.

88. The Exxon court overlooked this distinction and looked to bankruptcy law as determinative of the application of the automatic stay.
The City claimed that the defendants hired waste hauling companies who illegally dumped at the landfills. The City sought recovery pursuant to CERCLA section 9607(a)(4)(A) and (B) for the costs incurred and to be incurred in the future for the removal of these hazardous wastes from the landfills. In October of 1987, Refinemet filed for reorganization under Chapter 11 of the Bankruptcy Code. In September of 1989, the City moved for summary judgment on Refinemet’s liability for the landfill cleanup costs. On March 30, 1990, the district court, finding the automatic stay inapplicable to the City’s action, granted the City’s summary judgment motion. Refinemet appealed on several issues, including the holding that the automatic stay did not apply to the City’s recovery action.

89. Exxon, 932 F.2d at 1022.
90. Id. The operator of one of the waste hauling companies, Russel Mahler, had bribed a city sanitation officer to gain access to the dumpsite. Id. In addition to generating some of these wastes, defendant Refinemet wholly owned one of the waste hauling companies, Newtown Refining Corporation, during the period that Newtown was dumping waste in the City’s landfills illegally. Id.
91. Id. at 1022. The City also sought a declaratory judgement under § 9607(a)(4)(A) and (B) that Refinemet was liable for future costs of investigations and remedial action at the sites, and damage to natural resources under § 9607(a)(4)(C). Id. In June 1985, Refinemet moved to dismiss the complaint for lack of personal jurisdiction; this motion to dismiss was denied along with the other defendants’ dismissal motions. Id. See City of New York v. Exxon Corp. (Exxon I), 633 F. Supp. 609 (S.D.N.Y. 1986).
92. Exxon, 932 F.2d at 1022. The bankruptcy filing was made in the district court for the Central District of California. Id. The action was then “referred” to the bankruptcy court under 28 U.S.C. § 157(a) Id. In June 1988, the City filed a timely proof of claim in the California bankruptcy proceeding and informed the court of its New York recovery action. Id. at 1023. On November 23, 1988, Judge Conboy approved a consent judgement settling the suit against seven defendants. Id. See City of New York v. Exxon Corp. (Exxon II), 697 F.Supp. 677 (S.D.N.Y. 1988). In May 1989, two more consent judgements were approved against six other defendants leaving only Refinemet and Alcan Aluminum Corporation as defendants. Id.
93. Exxon, 932 F.2d at 1023. The City made this motion in New York. Id. After obtaining several adjournments to the motion, Refinemet moved in the California proceeding for a determination of its liability under CERCLA. Id. Refinemet followed that motion with a letter to the district court in the New York action that asked the court to “strike” the City’s summary judgment motion. Id. The City responded under 28 U.S.C. § 157(d) by moving to withdraw those parts of the California Chapter 11 proceeding which dealt with the City’s CERCLA claims to the New York district court. Id.
94. Exxon, 932 F.2d at 1023. The court also enjoined the parties from litigating the remaining damage issues in the California bankruptcy proceeding and denied the City’s motion to withdraw the California court’s reference on jurisdictional grounds. Id. See City of New York v. Exxon, 112 B.R. 540 (S.D.N.Y. 1990). It is this order from which Refinemet appealed.
95. Exxon, 932 F.2d at 1023. The issues of liability and the legality of the
The Second Circuit found that the City's action was clearly within the scope of the exception to the automatic stay provision of the Bankruptcy Code. 96

B. Analysis

The Second Circuit relied almost exclusively on the legislative history of section 362(b)(4) 97 in finding that the automatic stay was inapplicable to environmental actions under CERCLA. 98 The court noted that the availability of a reimbursement action encouraged a quick response to environmental crisis by a government, which it termed a "direct exercise of a government's police power to protect the health and safety of its citizens." 99 The court, citing the rationale of Seitles, emphasized the need to continue effective deterrent actions during the pendency of the bankruptcy petition. This deterrent aspect is consistent with the enforcement of police or regulatory powers. 100 These actions furthered the purpose of the regulatory exemption to the automatic stay: to avoid the frustration of necessary governmental functions by refuge of the debtor in bankruptcy court. 101

Refinemet argued that actions for cleanup costs were subdivided between "public" actions under section 9607(a)(4)(A) and "private" actions under section 9607(a)(4)(B). 102 Refinemet claimed that "public" plaintiffs are limited to the United States Government or a State or an Indian tribe, while plaintiffs under subsection (B) can be any person, including municipalities. 103 Subsection (A) allows for recovery of all costs of removal that are "not inconsistent with the national contingency plan" while sub-injunction against further litigation in the California proceeding were also appealed. City of New York v. Exxon, 112 B.R. 540 (S.D.N.Y. 1990). They are not considered for purposes of this Note.

97. The legislative history explicitly stated that action to prevent or fix damages for a violation of environmental protection is excepted from the automatic stay. For the text of the legislative history see supra note 56.
98. Exxon, 932 F.2d at 1024.
99. Id.
100. Exxon, 932 F.2d at 1024.
101. Id. The allowance of suit for the recovery of costs allows the city or state to cleanup a site freely without worry of reimbursement. The deterrent effect derives from the fact that a polluter cannot simply file for bankruptcy and be free of the damage. The responsibility for environmental damage continues to be his or her responsibility. Presumably when one knows he will always be responsible for his actions he will attempt to restrict and stop them. See discussion of Seitles supra notes 72-75 and accompanying text.
102. Exxon, 932 F.2d at 1025.
103. Id.
section (B) limits recovery to "any other necessary costs of response" which are consistent with the national contingency plan.\textsuperscript{104} Refinemet argued that the action by the City must be deemed an action by a person under subsection (B) since the City was acting in its own interest in cleaning up the property, and a "public" subsection (A) action is only available to the United States Government or a State or an Indian tribe.\textsuperscript{105} Thus, Refinemet argued that the City's action should not be deemed a "public" action to enforce its police and regulatory power, and the exception to the automatic stay should not apply.\textsuperscript{106}

The Exxon court dismissed Refinemet's argument that since the action was brought under section 9607(a)(4)(B)\textsuperscript{107} of CERCLA and was thus a "private" action by a person for the "necessary costs of response," the exception to the automatic stay did not apply.\textsuperscript{108} The court reasoned that for CERCLA actions it is not important under what section the action is brought, only what entity is bringing it and for what purpose.\textsuperscript{109} The court ruled that section 362(b)(4) of the Code controlled rather than section 9607(a)(4)(A) or (B) of CERCLA.\textsuperscript{110} The court adopted a broad definition of governmental unit without regard to the form of the unit.\textsuperscript{111} According to the court, all that was necessary was that the suit "be one that 'enforce[s]' that governmental unit's 'police or regulatory powers.'"\textsuperscript{112}

The court's reasoning relates to what most courts have held regarding the automatic stay.\textsuperscript{113} The court looks more to the entity bringing the suit (governmental or private) and the purpose,
rather than the requirements of section 9607(a). This rationale is similar to the theory behind Penn Terra\(^{114}\), MacKay\(^{115}\), Mattiace\(^{116}\), and Nicolet\(^{117}\) in that the relevant inquiry is whether the action in recovery goes to protect the public health, welfare and safety.\(^{118}\) In Exxon, the cleanup of the site was obviously to protect the public. Thus, the stay could be deemed for the benefit of the public welfare and not limited as a mere pecuniary interest.

These previous cases have not dealt with the issue of a city suing for reimbursement for costs incurred in cleaning up a hazardous waste site. The cases have only considered a state or the United States Government as plaintiff. A dearth of direct case law exists on the argument proposed by Refinemet. It is logical, however, that the decision reached by the Exxon court follows from Drew Chemical\(^{119}\) and the automatic stay cases. The court was more concerned with protecting public health than the identity of the governmental unit which had brought the suit. The court recognized that had it accepted Refinemet's argument it would be put in the position of allowing the protection of the public by a state but not by a "mere" city. In reaching its decision, the Second Circuit disavowed the strict reading of the statute applied by the Stepan Chemical and Town of Bedford courts.\(^{120}\)

The result reached under Stepan Chemical and Town of Bedford is patently absurd and would clearly frustrate the purpose of CERCLA and the Code's automatic stay exception. In treating a city as the same type of plaintiff as a state, both CERCLA's goal of environmental cleanup and the exception to the automatic stay's goal of protecting the police power are accomplished. Allowing a city to sue will deter a "would be" violator and foster the aims of both CERCLA and the exception to the automatic stay of the Bankruptcy Code.\(^{121}\)

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114. 733 F.2d 267 (3rd Cir. 1984).
117. 857 F.2d 202 (3d Cir. 1988).
118. For a discussion of these cases, see accompanying text and notes 47-67 supra.
121. The aims of CERCLA, namely to protect the public welfare and safety, are met since the suit is allowed to proceed. The Bankruptcy Code's aim of protecting actions under a governmental unit's police and regulatory power is also met since the action of a governmental unit, a city, is now excepted from the action of the automatic stay.
IV. Conclusion

The state of reimbursement actions under CERCLA has been enhanced by the inclusion of cities and other § 9607(a)(4)(B) parties in the scope of the automatic stay exception. This decision opens up an entirely new group of parties that may bring actions under CERCLA and avoid the automatic stay. Governmental units, including municipalities, can now have environmental issues tried outside the scope of the bankruptcy courts. If the action was brought under the governmental unit's police and regulatory power, it can be continued while the defendant is in bankruptcy.

The court has retained the well known environmental exception to the automatic stay and expanded its reach. This expansion can only help the public at large while further frustrating the availability of a "fresh start." However, this frustration must be balanced against the conflicting purpose of CERCLA. In Exxon the Second Circuit has placed CERCLA and the safety of the public above the protection of the insolvent debtor.

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