The Case for Imposing Equitable Receiverships upon Recalcitrant Polluters

*Jason Feingold**

* B.A. 1990, University of Michigan; J.D. 1993, Harvard Law School. The author is a law clerk for Judge Albert J. Engel, Sixth Circuit Court of Appeals.

I.
INTRODUCTION

Fictitious Widget Factory is located on the banks of the Bountiful River, in the State of Ames. The widget factory, which discharges wastes from its metal plating operations into the river, has a valid, state-issued permit to discharge pollutants into the river, but has never been able to meet the permit's specifications. After a period of operation in violation of the permit's discharge limits, industrial and recreational downstream users of the river notice that the water quality has significantly deteriorated. The river reeks, and the yields of the local fishing community have fallen. As the number of complaints about the contamination of the river rise, the attorney general of Ames initiates legal action against the widget factory. As a result of the attorney general's actions, the widget factory pays a substantial fine and pledges to bring its facility into compliance with the terms of its pollution discharge permit.

Unfortunately, no improvement in the widget factory's environmental compliance results from the attorney general's action. By the time the attorney general initiates further legal measures, the river and the people of Ames have suffered serious harm as a result of the widget factory's persistent environmental violations. When a second, larger fine is imposed on the widget factory, the company declares bankruptcy.

Meanwhile, in the neighboring State of Langdell, Hypothetical Manufacturing Plant is also located on the banks of the Bountiful River. The manufacturing plant, like the widget factory, is also having difficulty complying with the terms of its state-issued pollutant discharge permit. However, when the attorney general of Langdell discovers the manufacturing plant's noncompliance, a novel remedial approach is employed. In a suit against the plant, the attorney general of Langdell asks the court to issue a mandatory injunction requiring the manufacturing plant to achieve environmental compliance within a specific timetable. The attorney general of Langdell also asks the court to retain jurisdiction over the dispute, in the event that further measures to secure compliance become necessary.

When the manufacturing plant subsequently violates the terms of its discharge permit and the mandatory injunction, the plant is held in contempt of court. The court appoints a professor of environmental law as receiver for the manufacturing plant, and directs the receiver to bring the plant into environmental

compliance. Once the receiver completes the task of achieving environmental compliance at the plant, the original management resumes control of operations at the manufacturing plant, and the litigation concludes.

The preceding hypothetical cases contrast two widely divergent resolutions of environmental disputes involving uncooperative, or recalcitrant, polluters. The resolution of the environmental problems in the second hypothetical, where environmental compliance is secured and the company continues its operations, is clearly superior to the resolution of the environmental problems in the first hypothetical, where the company declares bankruptcy without addressing the environmental problems. The primary difference between the remedial strategies employed in these hypotheticals is that the attorney general of Langdell uses a panoply of equitable remedies, whereas the attorney general of Ames relies solely on damage remedies. In Langdell, the attorney general secures environmental compliance without threatening the viability of the defendant's enterprise. In Ames, the attorney general pushes the widget factory into bankruptcy with large fines, which neither solves the river's contamination problems nor preserves the welfare of the local economy.

The preceding hypotheticals are intended to illustrate that where it is appropriate and feasible to invoke the broad powers of a court of equity to address environmental problems, the potential exists to rapidly secure compliance without threatening an enterprise's financial stability. The flexibility and innovation inherent in the remedial authority of a court of equity makes the exercise of equitable powers perhaps the most effective and penetrating source of judicial relief available to an environmental (or any other) plaintiff. The chancellor's ability to fashion a broad range of remedies in pursuit of justice often encourages litigants to seek judicial solutions to society's most complex and intractable problems, such as school segregation and prison overcrowding.[1] Yet the very discretion and latitude in fashioning remedies

1. For a discussion of the use of equitable remedies to address complex social problems, see, e.g., Robert E. Buckholz, Jr. et al., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978) [hereinafter *Institutional Reform Litigation*]; Jaroslawa Z. Johnson, Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161 [hereinafter *Neoreceiverships*]; Note, *Receivership as a Remedy in Civil Rights Cases*, 24 RUTGERS L. REV. 115 (1969).

which enables the chancellor to grant meaningful relief also makes the exercise of equitable powers the most controversial type of judicial activism, often calling into question the legitimacy of the chancellor's proper role in addressing issues of a largely political nature.[2]

Of all the remedial measures available to a court of equity, the imposition of receivership is considered the most drastic of the chancellor's powers.[3] When a judge appoints a receiver, the court may exert complete dominion over the property subjected to receivership, and the receiver is authorized to act in lieu of individuals who are normally entitled to control the property.[4] Recognition of the intrusive nature of receivership renders the imposition of receivership a remedy of "last resort," restricted in application to situations where other, less drastic measures are insufficient.[5] Concern about the administrative burden which a receivership places upon judicial resources also militates against imposition of a receivership where other remedies are adequate.[6]

Several state and federal courts have imposed receiverships upon recalcitrant polluters.[7] Receivers may be appointed to bring an enterprise into environmental compliance,[8] or to over-

2. For a sampling of critical responses to the perceived activist posture of courts of equity in school desegregation and prison reform cases, see *Neoreceiverships*, *supra* note 1, at 1161 n.1.

3. *Institutional Reform Litigation*, *supra* note 1, at 836 (imposition of a receivership "is the most dramatic assertion of federal equitable power possible").

4. *See Court-Created Receivership Emerging as Remedy for Persistent Noncompliance with Environmental Laws*, 10 Envtl. L. Rep. (Envtl. L. Inst.) 10,059, 10,059 (1980) [hereinafter *Receivership Emerging as Remedy*].

5. *Institutional Reform Litigation*, *supra* note 1, at 836.

6. Stuart P. Feldman, *Curbing the Recalcitrant Polluter: Post-Decree Judicial Agents in Environmental Litigation*, 18 B.C. ENVTL. AFF. L. REV. 809, 832 (1991).

7. *See, e.g.*, Town of Greenwich v. Department of Transp., 14 Env't Rep. Cas. (BNA) 1177 (D. Conn. 1980) (receiver appointed to shut down coal-burning utility plant in continuing violation of the Clean Air Act); United States v. City of Detroit, 476 F. Supp. 512 (E.D. Mich. 1979) (waste water treatment plant placed in receivership for continuing water pollution violations); Department of Envtl. Protection v. Emerson, 563 A.2d 762 (Me. 1989) (receiver appointed to alleviate fire hazards at tire disposal facility and to bring facility into compliance with state solid waste management regulations); State *ex rel.* Celebrezze v. Gibbs, 573 N.E.2d 62 (Ohio 1991) (receiver appointed to correct sewage treatment deficiencies at industrial park); Ohio v. Chem-Dyne Corp., 16 Env't Rep. Cas. (BNA) 1854 (Ohio Ct. App. 1981) (receiver appointed to remove hazardous wastes from site); *see also* O'Leary v. Moyer's Landfill, Inc., 677 F. Supp. 807 (E.D. Pa. 1988) (dissolution of receiver previously appointed through consent decree to close sanitary landfill).

8. *See, e.g.*, *Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1177 (receiver appointed to phase out aging utility plant); *City of Detroit*, 476 F. Supp. at 515 (receiver

see remediation at defunct sites.[9] They may be imposed on both publicly-owned[10] and privately-owned entities,[11] and may be established at the request of the offending party,[12] or over the objections of a polluter.[13] Despite the emergence of receivership as a viable remedial option in the past two decades, the presence of less than ten cases imposing environmental receiverships[14] indicates that receivership remains by no means a commonly employed tactic in environmental disputes at this time.

In light of the controversy aroused by the use of receiverships to address complex social problems, this Comment evaluates the case for imposing equitable receiverships upon recalcitrant polluters as a means of addressing our nation's environmental problems. Part II examines the authority of courts to appoint receivers in environmental cases, and proposes a working definition of the modern environmental receivership.[15] Part III identifies possible prerequisites for the appointment of an environmental receiver.[16] Part IV sketches the structure of a model environmental receivership. Part V discusses the advantages and disadvantages of using receiverships to address the problems presented by the recalcitrant polluter, and addresses the advisability of increased use of environmental receiverships.

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appointed to manage waste water treatment plant); *Gibbs*, 573 N.E.2d at 67-68 (receiver empowered to collect rents and supervise tenants at industrial park).

9. *See Chem-Dyne*, 16 Env't Rep. Cas. (BNA) at 1854 (receiver appointed to remove hazardous wastes from site); *see also* Joanne R. Denworth & James Burns, *Moyer's Landfill: Case Study of a Federal Equity Receivership: Prospects for the Continued Use of a Powerful Pollution Clean-Up Tool*, 4 TEMP. ENVTL. L. & TECH. J. 17 (1985) [hereinafter *Moyer's Landfill: Case Study*] (case study of receiver appointed to close sanitary landfill).

10. *See City of Detroit*, 476 F. Supp. at 515-16.

11. *See Gibbs*, 573 N.E.2d at 67-68.

12. *Id.*; *Moyer's Landfill*, 677 F. Supp. at 810; *Gibbs*, 573 N.E.2d at 67-68.

13. *See Emerson*, 563 A.2d at 765.

14. *See supra* note 7.

15. This Comment does not distinguish between the equitable powers of state and federal courts, because the requisite equitable authority exists at both the state and federal level, and issues common to both state and federal courts predominate over any issues which might pertain only to one system or the other.

16. This analysis of the prerequisites for the imposition of a receivership on a recalcitrant polluter relies on general principles of equity and on the rather sparse justifications offered by the handful of courts that have imposed such receiverships. As a result, the ascertainment of bright-line rules must await further experimentation with receivership as a remedy in environmental cases. It is only possible at this point in time to suggest several criteria which may prove persuasive to a court.

II.

THE AUTHORITY OF A COURT OF EQUITY TO IMPOSE RECEIVERSHIP UPON A RECALCITRANT POLLUTER

Plaintiffs seeking to impose equitable receiverships on recalcitrant polluters must establish the legal authority which permits a court to grant such extreme relief. While the receivership is hardly a novelty in equity jurisprudence, the evolution of the common law over the last century has significantly altered the fundamental nature of the receivership and the circumstances in which its imposition is appropriate. This part of the Comment explores the changing use of receiverships over the last two centuries, and seeks to identify the authority relied upon by courts which impose receiverships on organizations which fail to comply with legal obligations.

A. *The Traditional Receivership*

A receiver is an agent of the court appointed to take action with regard to specifically designated property.[17] In its traditional incarnation, receivership was used by courts to preserve property subject to conflicting legal claims.[18] Receivers historically have been appointed as custodians for property deemed to be in jeopardy of loss from improper diversion or destruction.[19] These traditional receiverships were initially applied to disputed property in decedents' estates and to property held in trust for minors or incompetents.[20]

The origination of the receivership as a precautionary measure to prevent harm to property is reflected in Justice Story's treatment of receivership as a "bill quia timet," a writ sought by an individual fearing injury to his rights.[21] As Justice Story explained in his *Commentaries on Equity Jurisprudence*:

> The object of the bill in all such cases is to secure the preservation of the property to its appropriate uses and ends; and wherever there is danger of its being converted to other purposes, or dimin-

17. BLACK'S LAW DICTIONARY 1268 (6th ed. 1990).

18. *See* 1 RALPH E. CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS §§ 4, 11(a) (3d ed. 1959).

19. *See id.* §§ 4-10.

20. *Moyer's Landfill: Case Study*, *supra* note 9, at 21.

21. 2 JOSEPH STORY & W.H. LYON, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA, §§ 1141-1142 (14th ed. 1918); *see generally id.* §§ 1141-1171.

ished or lost by gross negligence, the interference of a Court of Equity becomes indispensable.[22]

B. *The Emergence of the Modern Receivership*

While conceptualization of receivership as a protective custodial measure probably comports with the restrained use of receivers in the nineteenth century,[23] the employment of receivership more recently has been adapted and expanded to achieve much broader remedial ends.[24] The flexibility and innovation which characterize the exercise of all equitable powers have facilitated considerable evolution in the use of receiverships as courts of equity address the problems of an increasingly complex society.

The evolving role of the receivership as an equitable remedy can be traced through several prominent steps. The first major extension in the application of receivership occurred as a response to the railroad insolvencies of the mid-nineteenth century.[25] Balancing a desire to prevent the liquidation of the railroads against a need to honor the railroads' debt obligations, the federal courts created what we now know as the bankruptcy receivership in an attempt to reorganize the railroads' debt structure.[26] While some of the bankruptcy receiver's functions mirror the custodial responsibilities of the traditional receiver,[27] the bankruptcy receiver's active role in altering the terms of payment of the debtor's obligations represents a significant extension of the receiver's powers.

A second major step in the evolution of the receivership occurred at the end of the nineteenth century as courts of equity responded to suits filed by investors holding defaulted bonds issued by municipalities.[28] The use of a receiver to enforce judgements in the municipal bond cases, aside from any substantial need to preserve property subject to a dispute, represents the most significant evolutionary advance towards the use of receiv-

22. *Id.* § 1143.

23. *See Neoreceiverships*, *supra* note 1, at 1166-67.

24. *See* THOMAS K. FINLETTER, PRINCIPLES OF CORPORATE REORGANIZATION IN BANKRUPTCY 1-2 (1937); *see also Neoreceiverships*, *supra* note 1, at 1167-72; *Receivership Emerging as Remedy*, *supra* note 4, at 10,059-60.

25. *See Neoreceiverships*, *supra* note 1, at 1168; *Receivership Emerging as Remedy*, *supra* note 4, at 10,060.

26. *See Receivership Emerging as Remedy*, *supra* note 4, at 10,060.

27. *See Neoreceiverships*, *supra* note 1, at 1169.

28. *See id.* at 1169-72; *Receivership Emerging as Remedy*, *supra* note 4, at 10,060.

ership seen today. In an effort to force the municipalities to fulfill their payment obligations, the courts appointed receivers to levy taxes upon the citizens of the municipalities, and directed the receivers to disburse these funds to the investors as payments on the bonds.[29] In this capacity, receivership was employed primarily as a means to enforce compliance with judgements previously rendered by the courts against the municipalities. In these cases, the custodial dimension that characterized the traditional receivership was largely insignificant.

Relaxation of the traditional custodial focus of the receiver's function allows courts of equity to appoint receivers for purely remedial purposes. Where contempt proceedings are inadequate or inappropriate to address a defendant's disobedience of a court order, receivership enables the court to directly secure the benefits conferred by its judgement.[30] The most dramatic and controversial receiverships of the late twentieth century, the institutional reform cases, exemplify the modern exercise of equitable authority to appoint a receiver to address persistent noncompliance with judicial decrees.[31]

C. *Redefining the Receivership*

The traditional, static definition of receivership does not capture the dynamism of court-appointed officers bringing school systems, prisons, or housing complexes into compliance with the law. The receiver appointed to sequester a parcel of land subject to a dispute hardly resembles the receiver appointed to oversee the operation of a complex organization. In light of the transformation which has occurred in the law of receivers, it may no longer be meaningful to refer to judicial agents simply as receivers without distinguishing between the very different functions such an official can serve.

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29. *See Receivership Emerging as Remedy*, *supra* note 4, at 10,060; *Neoreceiverships*, *supra* note 1, at 1170; *see also*, *e.g.*, Amy v. Watertown, 130 U.S. 320 (1889); Supervisors v. Rogers, 74 U.S. (7 Wall.) 175 (1869).

30. For a discussion of situations in which imposition of receivership may be preferable to contempt proceedings, see *infra* part V.A.

31. *Receivership Emerging as Remedy*, *supra* note 4, at 10,060; *see, e.g.*, Morgan v. McDonough, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977) (appointing receiver to implement court orders requiring school desegregation); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977) (appointing receiver to implement court orders requiring eradication of inhumane conditions at state prison facility); Perez v. Boston Hous. Auth., 400 N.E.2d 1231 (Mass. 1980) (appointing receiver to implement court orders requiring maintenance and repair of public housing apartments).

More precisely, the judicial agent who holds property pending an adjudication can be understood as a "custodial receiver," in contrast to the judicial agent who implements court orders, a "remedial receiver." When an environmental plaintiff seeks to place a recalcitrant polluter into receivership, or when a civil rights plaintiff seeks to appoint a receiver to replace a discriminatory school board, these remedies clearly belong to the category of "remedial receiverships" designed to address persistent noncompliance with the law.

D. *The Authority to Appoint a Remedial Receiver*

The traditional custodial receivership generates little controversy when disputed property, often in the form of cash or real estate, is preserved by the court. Yet the modern remedial receivership may arouse public outrage and harsh criticism as it replaces the management of a private enterprise, or the officials of a public body, with a judicial agent.[32] When the intrusive posture of the remedial receivership is contrasted with the passive role of the custodial receivership, use of the remedial receivership raises new questions as to the propriety of the court's interference with the internal operations of either a private entity or a public institution. To protect the perceived integrity of the court, an environmental plaintiff must carefully establish the legal basis for usurping the legitimate rights of individuals to direct the behavior of an organization.

The authority of a court of equity to impose a remedial receivership on a recalcitrant polluter is "founded in the broad range of equitable powers available to [a] court to enforce and effectuate its orders and judgements."[33] This general authority to enforce judicial decrees empowers a court to deal with persistently noncompliant defendants.[34] A widely quoted passage from a case appointing a receiver to desegregate South Boston High School explains that, "when the usual remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding

32. *See supra* note 2 and accompanying text.

33. United States v. City of Detroit, 476 F. Supp. 512, 520 (E.D. Mich. 1979).

34. Not all commentators agree that a defendant must have violated an injunction to justify the imposition of receivership. *See Receivership Emerging as Remedy*, *supra* note 4, at 10,062 ("There seems to be no reason for a rigid rule requiring as a prerequisite that injunctive relief have been attempted and have failed. Health-threatening situations could conceivably arise in which a court could not accept the risk that an injunction might not prevent a particularly serious or imminent harm from occurring.").

injunction, in turning to less common ones, such as receivership, to get the job done."[35] Courts appointing receivers to secure compliance with the law are characteristically confronted with a sequence of disobeyed orders.[36] In many of these cases, the defendant has already been judged in contempt of court without any progress towards compliance.[37]

While environmental plaintiffs seeking to appoint a receiver may successfully rely upon the common law powers of a court of equity,[38] in some jurisdictions plaintiffs may find statutory authority for placing noncompliant defendants in receivership.[39] The power of a court to secure compliance with its judgement has been codified by some legislatures. In Ohio, for example, "a receiver may be appointed . . . [a]fter judgement, to carry the judgement into effect."[40] A Wisconsin statute empowers judges to appoint receivers for the abatement of nuisances which threaten public health.[41] Other state laws may generally vest judges with the discretion to appoint receivers in the interests of equity and justice.[42] Rule 70 of the Federal Rules of Civil Procedure also appears to authorize the enforcement of judicial decrees through agents appointed by the court.[43]

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35. Morgan v. McDonough, 540 F.2d at 533.

36. *Receivership Emerging as Remedy*, *supra* note 4, at 10,060, 10,062; *see, e.g.*, Morgan v. McDonough, 540 F.2d at 531; Town of Greenwich v, Department of Transp., 14 Env't Rep. Cas. (BNA) 1177, 1178-79 (D. Conn. 1980); *City of Detroit*, 476 F. Supp. at 516-19; Department of Envtl. Protection v. Emerson, 563 A.2d 762, 763-65 (Me. 1989); State *ex rel.* Celebrezze v. Gibbs, 573 N.E.2d 62, 64-66 (Ohio 1991); Ohio v. Chem-Dyne Corp., 16 Env't Rep. Cas. (BNA) 1854, 1855-56 (Ohio Ct. App. 1981).

37. *See, e.g., Emerson*, 563 A.2d at 764-65; *Gibbs*, 573 N.E.2d at 64-66.

38. *See, e.g., Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1180; City of Detroit, 476 F. Supp. at 520; *Emerson*, 563 A.2d at 767.

39. *See, e.g., Gibbs*, 573 N.E.2d at 67-68 (citing Ohio statute, *infra* note 40, authorizing appointment of receiver); *Chem-Dyne*, 16 Env't Rep. Cas. (BNA) at 1855-56 (same).

40. OHIO REV. CODE ANN. § 2735.01(C) (Baldwin 1992).

41. WIS. STAT. § 823.22(1-2) (1990).

42. *See, e.g.*, IND. CODE ANN. § 34-1-12-1 (West 1992); N.C. GEN. STAT. § 1-501 (1992); TENN. CODE ANN. § 17-1-205 (1980).

43. Rule 70 provides that if a "party fails to comply [with a judgement] within the time specified, . . . the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court." Fed. R. Civ. P. 70; *see Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1180 (environmental receiver "is vested with the power and authority provided under Rule 70 of the Federal Rules of Civil Procedure to perform all acts he deems necessary to achieve expeditious compliance"); *City of Detroit*, 476 F. Supp. at 516.

III.

THE PREREQUISITES FOR THE APPOINTMENT OF A REMEDIAL RECEIVER IN ENVIRONMENTAL CASES

A. *Equitable Prerequisites from the Common Law*

The imposition of receivership is an intrusive and controversial exercise of equitable power, and an environmental plaintiff seeking appointment of a receiver should establish that all of the general prerequisites for equity jurisdiction have been met. While a full explanation of all of the nuances in the doctrine of equitable prerequisites as applied to environmental cases is beyond the scope of this Comment,[44] a cursory review of the general prerequisites will identify potential problems which may arise.

The preliminary fundamental requirement of equity jurisdiction is the inadequacy of a legal remedy.[45] The inadequacy prerequisite restricts the exercise of equitable jurisdiction to those cases where damages will not redress the harm suffered by the plaintiff.[46] Historically, the inadequacy prerequisite allocated cases among the English common law and chancery courts.[47] In modern American jurisprudence, the merger of the chancery and common law courts in the federal system has reduced the significance of the inadequacy prerequisite as a means of allocating cases within the court system. However, in a constitutional republic where judicial activism is often scrutinized as a threat to popular sovereignty, the inadequacy prerequisite's preference for damages as a remedy still serves a crucial function: restraining courts from intruding into the daily life of the citizenry except where absolutely necessary to protect litigants' rights.[48]

Before assessing the likelihood of satisfying the inadequacy standard in environmental cases, it is worth pausing to reflect on the proposition that damage remedies can never adequately respond to cases of environmental degradation. Leaving aside any attempt to define which disputes are truly "environmental," it

44. For a comprehensive discussion of equitable prerequisites, see generally OWEN M. FISS & DOUG RENDLEMAN, INJUNCTIONS 59-187 (2d ed. 1984); Note, *Developments in the Law: Injunction*, 78 HARV. L. REV. 994 (1965).

45. *See* FISS & RENDLEMAN, *supra* note 44, at 59.

46. *Id.*

47. *Id.* at 60-62.

48. See generally Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346 (1981), for a discussion of the modern functions performed by the inadequacy requirement.

seems intuitive that many environmental cases involve permanent damage to real property. Courts of equity have traditionally viewed injuries to real property as incapable of being repaired by an award of money judgements. The traditional common law rules permitting the award of specific performance in disputes over conveyances of property,[49] and the historical practice of issuing mandatory injunctions to abate nuisances[50] can be viewed as extensions of the view that certain beneficial attributes inhere in real property which are incapable of monetary compensation.

A threat to public health may render legal remedies inadequate in environmental cases.[51] Monetary compensation for physical affliction, or for the continuing fear of health problems, is obviously problematic. Should courts grant polluters the right to inflict bodily harm after the payment of damages? Unlike the tort plaintiff, who comes to court only after the harmful acts are complete, the environmental plaintiff may file suit while the harmful acts continue to occur. If the court permits health-threatening pollution to continue after exacting a penalty from the defendant, the court is in effect sanctioning the infliction of physical harm upon the affected individuals.

A final argument that financial compensation is always inadequate redress for environmental degradation emphasizes the diffuse impact pollution has over a large population or region. While no single individual may have suffered harm which is concentrated enough to inspire legal action, the aggregate harm to societal welfare caused by the defendant may be severe, and legal damages are incapable of properly allocating an award of damages to the amorphous group of individuals impacted by the defendant's behavior. Ultimately, no award of damages may repair the detriment suffered by individuals who perceive an inherent value in preserving ecosystems intact. As Professor Sax argues:

> Lawsuits seeking money damages for the public, by and large, are of secondary importance in environmental controversies. Most of the interests sought to be protected could not be easily compensated in damages in any event. Clean air and water for public use, scenic vistas, and the maintenance of fisheries and recreation areas, even where demonstrably harmed, rarely matter in significant dol-

49. *See, e.g.,* Henry v. Ecker, 415 So. 2d 137, 140 (Fla. Dist. Ct. App. 1982); Perron v. Hale, 701 P.2d 198, 202 (Idaho 1985); Thompson v. Kromhout, 413 N.W.2d 884, 885 (Minn. Ct. App. 1987).

50. *See* Whalen v. Union Bag & Paper Co., 101 N.E.2d 805, 805 (N.Y. 1913).

51. *See* National Salvage & Serv. Corp. v. Commissioner of the Ind. Dept. of Envtl. Mgmt., 571 N.E.2d 548, 558-59 (Ind. Ct. App. 1991).

> lar amounts to any particular individual citizen. The effects of environmental conditions are diffuse both in space and time, and rarely will a damage suit achieve the results sought. This is not to assert that such suits should be banned — only that they are not appropriately at the cutting edge of the movement for environmental quality.[52]

Environmental plaintiffs, therefore, often suffer harm which is incapable of monetary valuation, especially from the perspective of the individual plaintiff, and which is too widely dispersed to permit collective action even where some value might be estimated.

Notwithstanding the foregoing arguments, chancellors can and have refused to grant injunctions based on a finding that environmental harm is compensable by damages.[53] Therefore, an environmental plaintiff should be prepared to demonstrate the particular inadequacy of a legal remedy in each case. Inadequacy is established by showing that the plaintiff will suffer irreparable harm. In such a situation, the intervention of a court of equity prevents the defendant from interfering with the plaintiff's rights in a way which cannot be redressed by subsequent legal action.[54]

In an environmental case, the plaintiff can often refer to a public health threat as a type of harm which is irreparable.[55] Some environmental cases, however, will be undermined by a defendant's claims that the actual physical threat posed by a certain type of pollution is unknown.[56] In the case of a recalcitrant polluter, the environmental plaintiff may seek to argue that the defendant's continued disregard for legal requirements causes a unique form of irreparable injury to members of society who faithfully

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52. JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 119-20 (1971).

53. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (finding monetary damages sufficient compensation for nuisance caused by dust and raw materials emitted from cement plant).

54. FISS & RENDLEMAN, *supra* note 44, at 58-59 ("An injunction . . . orders [the] defendant to allow [the] plaintiff to enjoy her substantive rights and avoids [damage valuation] problems."); *see also* B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Casualty Co., 549 So. 2d 197, 198 (Fla. Dist. Ct. App. 1989)("For injunctive relief purposes, irreparable harm is not established where the potential loss can be adequately compensated for by a monetary award.").

55. *See National Salvage*, 571 N.E.2d at 559.

56. *See, e.g.*, Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 540 (8th Cir. 1975) (injunctive relief ordering immediate shutdown of defendant's taconite processing plant denied partly on basis of uncertainty of physical threat presented by defendant's pollution).

obey the law and who fully deserve and expect that others will likewise be required to comply with legal requirements.

To establish irreparability, the environmental plaintiff must further show that the feared harm will occur imminently unless equity intervenes.[57] Chancellors will not intervene on mere speculation of harm. Proof of imminence is not problematic where the harm has already begun to occur, as will be the case in many environmental settings. But if the harm has already begun, an additional showing that the harm is likely to recur will be necessary. If the infliction of irreparable harm is complete, as in most tort cases, the exercise of equitable powers cannot provide relief any more meaningful than damages. Proof of recurrence[58] in the case of a recalcitrant polluter depends, as does the appointment of a receiver, on the likelihood that the defendant will continue to fail to comply with the law. In every environmental receivership surveyed in this Comment,[59] the court determined that the defendant had persistently failed to comply with the law, and that no prospects for adequate improvement existed.[60] Where a schedule for compliance has been established, either by the court, a government agency, or a consent decree, the defendant's own behavioral history should sufficiently illustrate the likelihood of recurrent noncompliance.

Like all other equitable remedies, appointment of a receiver in an environmental case is subject to the chancellor's discretion to balance the equities in a particular case.[61] A detailed examination of the doctrine of equitable discretion as applied to environmental cases is beyond the ambit of this Comment,[62] but several issues appear certain to arise.

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57. FISS & RENDLEMAN, *supra* note 44, at 59, 109-32; *see also* Winrock Enters., Inc. v. House of Fabrics, Inc. 579 P.2d 787, 790 (N.M. 1978).

58. For a broad discussion of the recurrence prerequisite, see FISS & RENDLEMAN, *supra* note 44, at 132-76.

59. *See supra* note 7.

60. *See, e.g., City of Detroit*, 476 F. Supp. at 519 ("potential areas of non-compliance in the future loom"); *Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1179 ("The present system for meeting critical dates is not working. It is likely that unless some action is taken the pattern of 'slippage' will continue, seriously jeopardizing a foreseeable completion date.").

61. *See, e.g., In re* State Employee's Unions, 587 A.2d 919, 925 (R.I. 1991) ("Before a [court of equity] will exercise its discretion to issue an injunction, ... the court must balance the equities between the parties: the relief which is sought must be weighed against the harm which would be visited upon the other party if an injunction were to be granted."); FISS & RENDLEMAN, *supra* note 44, at 79-89.

62. For a comprehensive treatment of the issues of equitable discretion in environmental cases, see generally Daniel A. Farber, *Equitable Discretion, Legal Duties,*

It is possible to argue that a court must use its injunctive power to prevent a recalcitrant polluter from continuing violations of the law.[63] However, courts of equity are generally protective of their discretion to balance the equities in each case before granting relief,[64] and an environmental plaintiff should be prepared to argue that the equities of the situation favor the imposition of a receivership.

If a plaintiff establishes the elements of a statutory violation or a common law tort, it should be clear to the court that the plaintiff deserves relief. The defendant, however, may strenuously object to receivership on the grounds that the remedy inflicts serious hardship upon the defendant's enterprise.[65] Admittedly, allowing a receiver to control an enterprise may impede the enterprise's efficient operation during the pendency of the receivership.[66] The plaintiff can respond to concerns about the burden receivership will place on the defendant by reminding the court that the defendant has been operating for a period of time with an undue competitive advantage, by not complying with environmental laws, and that any losses resulting from the receivership are mitigated by the previously-reaped cost savings. Furthermore, the court may doubt the sincerity of the defendant's claim of unfairness where the defendant has exhibited bad faith or egregious conduct during the course of noncompliance.

Both the defendant and the court are likely to raise serious questions of public policy.[67] Opponents of receiverships will emphasize the administrative burden assumed by the court in such

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and Environmental Injunctions, 45 U. PITT. L. REV. 513 (1984); Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524 (1982).

63. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (finding no discretion to refuse to enjoin statutory violation).

64. For a sampling of cases where courts exercised their discretion to allow the defendant to violate legal requirements, see, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (refusing to enjoin Navy's discharge of pollution into the ocean in violation of the Federal Water Pollution Control Act); *Reserve Mining*, 514 F.2d 492 (allowing taconite processing plant to continue operation in violation of environmental protection statutes during conversion of its facilities to abate pollution); Spur Industries, Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972); Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (allowing cement company to legally operate as a nuisance upon payment of permanent monetary damages).

65. *See, e.g., State Employee's Union*, 587 A.2d at 929.

66. *See Receivership Emerging as Remedy*, *supra* note 4, at 10,060 ("appointment of a receiver to assume the day-to-day management of any ongoing entity, whether a school district or a business, is bound to diminish the efficiency of operations because of the receiver's lack of familiarity with the situation").

67. The author's conclusions concerning the desirability of environmental receiverships is presented *infra* part V, which contains a more elaborate analysis of the

an arrangement. The questions of propriety which plague judicial activism in addressing social problems are also likely to surface. Furthermore, concern about the value to the community of the defendant's continuing presence, in terms of jobs or public services, may caution against harsh judicial rebukes in these cases.

All of the preceding policy arguments can be turned against the party opposing the receivership. In terms of the burden on the court, the plaintiff can emphasize the burden placed on the court by the recurrent proceedings addressing the defendant's noncompliance. If the court is concerned about preserving its legitimacy, it may consider the effect that persistent disobedience of its orders has on its stature in the community. The importance to the community of preserving the enterprise can also be characterized as supporting the advisability of imposing receivership, since persistent noncompliance is likely to inflict severe harm on the defendant in the form of cumulative environmental fines, contempt penalties, and civil judgements. Ultimately, the court has sufficient cause to balance the equities in either direction.

B. *Special Prerequisites for the Imposition of Receiverships in Environmental Cases*

Beyond the traditional prerequisites for equity jurisdiction, courts may develop special prerequisites for the imposition of remedial receiverships upon recalcitrant polluters. One such prerequisite requires that a defendant be adjudged in contempt of an outstanding court order before receivership will be considered. A court may wish to afford polluters the opportunity to achieve compliance without judicial intervention. Such a requirement avoids imposing receivership on defendants who are capable of complying on their own. While no explicit requirement for contempt judgements has been established yet, in at least two cases courts have relied heavily on judgements of contempt in considering the imposition of receivership.[68]

Another possible prerequisite is bad faith or egregious conduct on the part of the defendant. This requirement limits the number of circumstances in which receivership would be an appropriate remedy. If receivership is viewed primarily as a punitive mea-

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relevant policy arguments for and against receiverships in these cases. Accordingly, the important policy arguments will only be highlighted at this point.

68. *See, e.g.*, Department of Envtl. Protection v. Emerson, 563 A.2d 762, 767 (Me. 1989); State *ex rel.* Celebrezze v. Gibbs, 573 N.E.2d 62, 67 (Ohio 1991).

sure, a requirement of bad faith might serve to protect the "bumbling" or inadvertent polluter. However, if environmental receivership is viewed as primarily a remedial, rather than punitive, measure, the goal of achieving environmental compliance will be well served by imposing receivership in cases lacking bad faith, if the defendant exhibits persistent inability to comply with the law. Another factor mitigating against a bad faith requirement is the potential for environmental receiverships to be established by consent of the parties,[69] in which case the defendant would not need the protection a bad faith requirement might provide.

Another possible prerequisite for the imposition of receivership might involve the type of environmental offenses committed by the defendant. It is clear from the case law that statutory violations will support the imposition of a receivership.[70] It is not clear, however, whether a receivership might be imposed in response to persistent common law offenses. In three of the cases reviewed in this Comment, the plaintiff alleged public nuisance in combination with other, statutory offenses, but the court gave no indication of the weight, if any, accorded to each offense separately.[71] Further experimentation is required to determine whether common law offenses, such as nuisance or trespass, will support the imposition of receivership.

IV.

THE STRUCTURE OF AN ENVIRONMENTAL RECEIVERSHIP

While the environmental plaintiff is not required to submit a proposal for the structure of the remedial receivership, the litigants may wish to do so. The court may be unfamiliar with remedial receiverships, and the parties' suggestions can help tailor the receivership to the particular exigencies of the case. At the very

69. *See, e.g.,* O'Leary v. Moyer's Landfill, Inc., 677 F. Supp. 807, 810 (E.D. Pa. 1988) (environmental receivership created by consent decree); *Gibbs*, 573 N.E.2d at 67 (interpreting defendant's post-hearing brief as a request that a receiver be appointed to secure environmental compliance, although Mr. Gibbs later disputed seeking the appointment of a receiver).

70. *See, e.g.,* Town of Greenwich v. Department of Transp., 14 Env't Rep. Cas. (BNA) 1177, 1177 (D. Conn. 1980) (involving repeated violations of EPA's regulations promulgated under the Clean Air Act); United States v. City of Detroit. 476 F. Supp. 512, 520 (E.D. Mich. 1979) (violations of Clean Water Act, Clean Air Act, and Michigan statutes).

71. *See, e.g., Emerson*, 563 A.2d at 764; *Gibbs*, 573 N.E.2d at 63; Ohio v. Chem-Dyne Corp., 16 Env't Rep. Cas. (BNA) 1854, 1855 (Ohio Ct. App. 1981).

least, time will be saved by submitting a proposal. A remedial receiver can exercise a diverse array of powers in pursuit of environmental compliance, and the court's flexibility is limited only by the parties' ingenuity and the constraints of propriety.[72]

The court will need to provide for the costs of the receivership. The receiver may be directly empowered to apply the assets of the defendant towards authorized compliance measures, or the receiver may submit a bill of expenses to the court, which would create a lien on the defendant's property.[73]

The selection of an individual to serve as the receiver may or may not present a contentious issue. The court may wish to have the parties suggest potential receivers. Professors, attorneys,[74] or public officials[75] may all be qualified to operate the receivership.

A receiver always remains directly responsible to the court, and the specific powers wielded by a receiver are determined by the court's instructions. The court may wish to restrict the receiver from taking certain actions without prior court approval, or the court may afford the receiver broad discretion.[76] The court can require the receiver to submit a variety of types of reports.[77]

The managers of the defendant enterprise need not be entirely excluded from participation in the management of the enterprise. The court may want the enterprise's original managers to share their expertise with the receiver.[78] This strategy will be particularly useful if the court is concerned that the efficient operation

72. In Ohio, the court's authority to appoint a remedial receiver has been interpreted to "enabl[e] the trial court to exercise its sound judicial discretion to limit or expand a receiver's powers as it deems appropriate." *Gibbs*, 573 N.E.2d at 67-68.

73. In *Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1180, the receiver's powers include "[t]he borrowing of such funds and the pledging of such security of defendant's as he deems necessary to carry out his duties."

74. *See Moyer's Landfill: Case Study*, *supra* note 9 (environmental attorney appointed receiver).

75. In *City of Detroit*, 476 F. Supp. at 515, the court appointed Detroit Mayor Coleman Young receiver. The court also ordered Mayor Young to obtain a full-time executive assistant to help carry out his mandate from the court. *Id.* at 520.

76. *See City of Detroit*, 476 F. Supp. at 516 ("the Administrator herein is vested with the power under Rule 70 of the Federal Rules of Civil Procedure to perform any act necessary to achieve expeditious compliance with the Consent Judgement"); *Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1180.

77. *See, e.g., Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1180 (requiring receiver to prepare an initial report on the defendant's compliance status); *Gibbs*, 573 N.E.2d at 66 (requiring accounts "for all receipts and disbursements" to be submitted to the court).

78. *See Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1180 ("the [receiver] shall forthwith procure the services of those persons and/or organizations deemed

of the enterprise will be adversely affected during the receivership. Another tactic for avoiding losses during the receivership is to restrict the receiver's powers to only those aspects of the enterprise which affect environmental compliance. Areas such as finance or marketing could be operated by the original managers during the pendency of the receivership to limit any inefficiency costs inflicted on the enterprise. The exigencies of each case will determine what powers a receiver needs to achieve environmental compliance.

A receiver charged with the operation of an ongoing enterprise will need the authority to oversee the enterprise's daily management. Receivers with management responsibilities will likely need the authority to collect rents or other receivables owed to the defendant's enterprise.[79] The receiver will also need authority to disburse sums of money in the ordinary course of the defendant's business, in order to meet payroll obligations and other expenses.[80]

Receivers need the authority to take remedial measures at a site in order to achieve environmental compliance.[81] In certain circumstances, the most pressing need is to cease continuing offensive practices. Contractual obligations previously undertaken by the defendant may have to be broken, if fulfillment of these obligations would lead to further noncompliance. For example, a receiver may need the authority to refuse to accept waste delivered to the defendant's site for disposal, if the site already exceeds its safe disposal capacity.[82] Achieving environmental

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necessary by him to carry out the conversion project. To this end the [receiver] may solicit the advice of the parties to this action").

In the design of remedial measures, the court may also want the receiver to consult with appropriate environmental agencies. For example, in O'Leary v. Moyer's Landfill, 677 F. Supp. 807, 813-14, 822 (E.D. Pa. 1988), the court dissolved an environmental receivership at the request of the United States Environmental Protection Agency, which disagreed with the receiver's remediation strategy. To avoid such difficulties, the involvement of the appropriate government agencies may be desirable at the outset of the receivership. However, an increased government regulatory presence may reduce the speed and effectiveness of the receivership as an environmental remedy.

79. The receiver in *Gibbs* was specifically empowered to collect rents from the tenants at the defendant's industrial park. 573 N.E.2d at 66.

80. *See City of Detroit*, 476 F. Supp. at 516 (the receiver's authority includes "the collection of [the plant's] receivables [and] the payment of its debts").

81. *See* Ohio v. Chem-Dyne Corp., 16 Env't Rep. Cas. (BNA) 1854, 1854 (Ohio Ct. App. 1981) (receiver empowered to eliminate hazardous wastes disposed on site).

82. *See, e.g.*, Department of Envtl. Protection v. Emerson, 563 A.2d 762, 765 (Me. 1989) (receiver empowered to prevent disposal of additional tires at the site).

compliance may also require awarding contracts for remedial work,[83] or the employment of new, trained staff at the defendant's operations.[84]

The court will likely want to include in the original order provisions for the termination of the receivership.[85] The court may establish compliance-based goals, which, if achieved, would permit the dissolution of the receivership.[86] The court may wish to limit the duration of the receivership to some definite time period, which could be extended later at the court's discretion or upon motion of a party.[87] The court may allow the parties to petition the court for dissolution of the receivership at some earlier date.[88] As in all other aspects of the composition of the receivership, the court has great latitude in adopting a termination provision. Therefore, an environmental plaintiff is advised to persuade the court to adopt desirable provisions governing the termination of the receivership, mindful always of the desirability of reducing the burden placed on the defendant when possible.

V.

THE CASE FOR THE IMPOSITION OF RECEIVERSHIP UPON RECALCITRANT POLLUTERS

The preceding discussion examined the use of receivership by several courts faced with a defendant's continued disobedience of legal obligations in environmental matters. Thus far I have outlined the doctrinal authority courts may rely on in appointing environmental receivers, and have attempted to identify circumstances in which the appointment of such a receiver may be possible. I have also sketched the structure of a model environmental receivership. My final objective is to assess the

83. *Id.* at 765.

84. *See, e.g., Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1180 (granting receiver the power to hire and fire employees); *City of Detroit*, 476 F. Supp. at 516 (granting receiver authority over the supervision of all employees, including the ability to hire and fire, and to hire special employees or consultants as needed).

85. *Cf.* Morgan v. McDonough, 540 F.2d 527, 535 (1st Cir. 1976) ("The receivership should last no longer than the conditions which justify it make necessary, and the court's utilization of the receivership must not go beyond the . . . purposes which the device is intended to promote.").

86. *See Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1181 (appointing receiver until old power plant was shut down).

87. In *City of Detroit*, 476 F. Supp. at 516, the receiver was appointed for one year.

88. *See Town of Greenwich*, 14 Env't Rep. Cas. (BNA) at 1181 (order may be modified or terminated for good cause).

extent to which it is desirable to promote widespread employment of the remedial receivership as a strategy for environmental protection. This part scrutinizes the imposition of a receivership on recalcitrant polluters by first identifying any potential benefits which might motivate increased use of remedial receiverships in these cases and, subsequently, by stating the argument against this unconventional judicial action as forcefully as possible. Ultimately, this analysis seeks to identify the lines along which such debate can develop, rather than to resolve the novel and complex questions raised by the potential for active judicial responses to the recalcitrant polluter.

A. *The Advantages of Environmental Receiverships*

The primary benefit of receivership as a remedial tool in environmental cases is the speed and effectiveness with which the court can secure environmental compliance. A receivership permits a court to immediately halt environmental degradation, thereby alleviating the harm being caused by the defendant. In terms of human health risks, ecological ramifications, and, ultimately, clean-up costs, the prompt cessation of the infliction of damage gained from the appointment of a receiver presents a potentially massive benefit.

Another major benefit resulting from the appointment of a receiver is the potential for the defendant to avoid the accumulation of large fines, which might increase the defendant's potential for insolvency. If courts are not free to impose receiverships on recalcitrant polluters, courts are likely to impose increasing financial liabilities on firms, either through statutory penalty provisions or in the form of fines for civil coercive contempt. Such large fines will aggravate the already severe problem of bankruptcy faced by firms with substantial environmental liability.

If receivership is imposed as an alternative to large fines, resources which might be allocated to legal fees or penalties can be directed towards remediation and compliance. Ideally, receiverships might even save some entities from declaring bankruptcy. At the very least, receivership can ensure that part of the firm's wealth is directed to clean-ups, thereby thwarting any tendency for recalcitrant polluters to divert funds away from clean-ups into the hands of other claimants in the firm's final days.

When the recalcitrant polluter is a public entity, the efficacy of contempt remedies will be further diminished.[89] Civil fines levied against a public utility or wastewater treatment plant are paid ultimately by taxpayers in the local community, who are generally not responsible for the violations.[90] Public officials may respond slowly to civil penalties, since economic incentives are typically less prominent in public enterprises.[91]

Another notable advantage of receivership, aside from ecological concerns, is the potential to eliminate continued disobedience of a court's authority. The achievement of prompt compliance with court orders sought by receivers protects the legitimacy of the court from the appearance that certain defendants are above the law.

B. *The Disadvantages of Environmental Receiverships*

The prospect of increased use of remedial receiverships in environmental cases will generate avid opposition from libertarians who generally seek to preserve private autonomy. Entities whose economic interests are likely to be threatened by the imposition of receiverships will also oppose increased appointment of environmental receivers. These arguments against the use of receivers in environmental disputes will question both the competence and the propriety of judicial interference in the daily management of the affairs of private firms or public bodies.

Opponents of environmental receiverships will doubt the receiver's competence to handle the economic and scientific matters likely to arise in the daily management of a recalcitrant polluter's enterprise. A receiver with control over an ongoing public facility or a private company must manage the defendant's daily operations without the benefit of the defendant's training or expertise. In addition to complex scientific and public health issues, the receiver will likely have to resolve issues including commercial matters ill-suited to the court's institutional strengths.

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89. *See Receivership Emerging as Remedy*, *supra* note 4, at 10,062 (public officials may well be less responsive to threatened money judgements than their private counterparts whose success is measured more directly in economic terms).

90. *See id.*

91. *Cf. Institutional Reform Litigation*, *supra* note 1, at 839 (suggesting that where the defendant is a public institution, contempt remedies are unlikely to create strong individual incentives to achieve compliance with legal obligations).

In defense of the court's ability to administer these receiverships, lack of expertise does not prevent courts from regularly adjudicating issues requiring a high level of expertise in various rigorous disciplines.[92] While it cannot be denied that a defendant is likely to operate the enterprise more efficiently than the receiver, the efficiency losses can be limited through precautionary measures, and ultimately some level of efficiency cost may be acceptable in pursuit of environmental compliance.[93] Precautionary measures might include the appointment of experts to serve as receivers or advisors. As mentioned in part IV of this Comment, the receiver's responsibilities could be circumscribed to interfere with only those matters essential to compliance, leaving the remainder of the management responsibilities to the defendant.

Opponents of environmental receiverships will express concern over the financial and administrative burden placed on the court by extensive, continued involvement in the management of the defendant's affairs. However, it is unclear how much additional burden is created by the administration of a receivership beyond the burden already imposed by the ongoing litigation and contempt proceedings involving the defendant. The behavior of a recalcitrant polluter may bring an environmental plaintiff back into the courtroom repeatedly during the course of remediation.

Perhaps the most forceful objections to the increased use of receiverships in these cases focuses on the impropriety and intrusiveness of extensive judicial interference in the internal affairs of a private firm or public body. The equitable power of receivership permits a court to severely restrict the defendant's freedom, whereas the logic of traditional coercive contempt allows the defendant to determine whether or not to take certain actions or face certain penalties.[94] Receivership, in contrast, imposes the chancellor's view of the proper state of affairs onto the parties

92. For example, many tort cases test complex scientific theories and many bankruptcy and corporate cases resolve sophisticated economic and commercial questions.

93. *See Receivership Emerging as Remedy*, *supra* note 4, at 10,060 ("Where the receiver has been appointed to reverse serious violations of . . . environmental requirements, some loss of efficiency or competitive position may be of little concern.").

94. It is said that an individual imprisoned for coercive contempt holds the keys to his own cell, because the penalty levied by the court will be lifted if the defendant chooses to take the required actions. *See, e.g.*, People v. Kaeding, 607 N.E.2d 580, 582-83 (Ill. App. Ct. 1993); State v. Garcia, 481 N.W.2d 133, 136 (Minn. Ct. App. 1992).

involved.[95] The court's interference in this fashion addresses highly contested social, political, and economic questions involving considerations of environmental protection and economic development, which seem most appropriately addressed by the legislative and executive branches of government.

To the extent that the court is merely enforcing standards of behavior previously established by a legislature, while resolving litigation often initiated by executive branch officials, the role of the court in these cases comports fairly closely with its constitutional directives. However, the court's insistence on the achievement of mandatory compliance through receivership clearly does limit individual autonomy and is likely to be resisted by individuals of a libertarian bent.

If the defendant is a popularly-elected body, the court may hesitate to directly interfere with the democratic process by commandeering the defendant's operations.[96] If the defendant enterprise exists at the state level, and the litigation proceeds in federal court, the court may be reluctant to usurp the prerogatives of local government.[97] Yet no branch or level of government possesses the right to violate the law, and it is ultimately the court's province to enforce legal obligations.[98]

VI.
CONCLUSION

In terms of speed and effectiveness, the remedial receivership is an attractive option to environmental plaintiffs facing recalcitrant defendants. Admittedly, courts must address important questions of propriety and institutional competence before in-

95. In *Chem-Dyne*, counsel for the defendant argued at oral argument on the motion to appoint a receiver that "'[r]eceivership is dictatorship' and would take away from [the defendant] his right to deal in his corporate capacity with that subject matter [to] which he has devoted all his time and his life." Ohio v. Chem-Dyne, Inc., 10 Envtl. L. Rep. (Envtl. L. Inst.) 20,387, 20,387 (Ohio C.P. 1980). Ultimately, the trial court ruled that the public interest in environmental compliance outweighed the defendant's private interest in asserting dominion over the enterprise. *Id.* at 20,387-88.

96. *See* Morgan v. McDonough, 540 F.2d 527, 535 ("Obviously the substitution of a court's authority for that of elected and appointed officials is an extraordinary step warranted only by the most compelling circumstances.").

97. *See Institutional Reform Litigation*, *supra* note 1, at 866 ("[T]he relief fashioned should not diminish the ability of state and local authorities to function within the federal system."); *see also id.* at 866-69.

98. *See Morgan*, 540 F.2d at 534 ("The fact that a school committee is elected . . . cannot put it beyond the reach of the law. Elected officials must obey the constitution.").

creased use of environmental receiverships can be widely advocated. Yet the harm to the public health and welfare and the disrespect for the court which results from continuing pollution appears to justify this unusual exertion of equitable power in certain circumstances.

As a method of environmental protection, environmental receivership is likely to achieve significant success in specific cases. However, as a strategy for accommodating the conflicting demands of ecology and economy, it is possible that alleviation of the problems at the worst environmental sites through receiverships will diffuse the momentum for wide-ranging solutions to intractable environmental problems. Receiverships imposed through ad hoc litigation are unlikely to forge a coherent national environmental policy. But, if environmental policy must ultimately result from the ungainly process of legislative and litigative bursts, the courts should not overlook the potency of environmental receivership.