NOTE

AT THE CROSSROADS OF ENVIRONMENTAL LAWS AND THE BANKRUPTCY CODE:
ABANDONMENT AND TRUSTEE PERSONAL LIABILITY*

I. INTRODUCTION

The adoption of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") by Congress in 1980, coupled with the enactment of more expansive environmental legislation by state and federal governments, has amplified the present conflict between environmental laws and the Bankruptcy Code ("Code"), resulting in a proliferation of litigation. It is clear that these two areas of law continue to conflict on both a theoretical and practical level, causing protracted and often costly legal disputes.4

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3. See, e.g., In re Quanta Resources Corp., 739 F.2d 912, 915 (3d Cir. 1984) (holding that the purposes of the Bankruptcy Code and state environmental laws "cannot be reconciled where the trustee legitimately invokes his power to abandon" contaminated property of the estate), aff'd sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986); Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 269 (3d Cir. 1984) (noting that the policies of the Bankruptcy Code and state environmental laws potentially conflict); In re Hemingway Transp., Inc., 73 B.R. 494, 499 (Bankr. D. Mass. 1987) (The court noted that it was confronted with a "problem result[ing] from two competing governmental concerns, namely concern for debtors and concern for the environment."); In re Distrigas Corp., 66 B.R. 382, 384 (Bankr. D. Mass. 1986) ("[T]wo important governmental concerns appear to be in conflict.").

4. See William N. Hedeman et al., Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme, 21 ENVTL. L. REP. 10,413, 10,414 (1991). As Justice O'Connor recently noted, "An entity in bankruptcy can ill afford to waste resources on litigation; every dollar spent on lawyers is a dollar creditors will never see." Pioneer Inv. Servs.
Two important federal policies have collided at the crossroads of environmental law and bankruptcy law. CERCLA evidences congressional intent that the costs of cleaning up hazardous waste should be assessed against those responsible for creating that waste. Where the party responsible for creating hazardous waste files for bankruptcy protection, however, the goals of CERCLA are in direct conflict with the policy of providing a debtor with a "fresh start" under the Code. For example, the Environmental Protection Agency ("EPA") is often granted relief from the automatic stay that is triggered upon the filing of a bankruptcy petition. The application of § 362(a) of the Code, the automatic stay provision, to government suits to enforce cleanup orders has generated much controversy. The provision is subject to explicit exceptions for governmental actions to enforce police or regulatory power, or to enforce a non-monetary judgment in such an action or proceeding. However, although the provision's...
legislative history plainly indicates that Congress considered a state’s enforcement of an environmental order an exercise of its “police or regulatory power,” some courts have disregarded the automatic stay and have been generous in discharging environmental claims in bankruptcy proceedings.13

Although extensive legislative histories exist both for the 1978 Bankruptcy Reform Act and the federal environmental laws, Congress did not consider how certain provisions of the Code might apply in the environmental cleanup area. Further, the confusion in the case law reflects the failure of courts to reconcile the competing policies underlying the Code and environmental enforcement statutes with any consistency. Consequently, a major dilemma is created when hazardous waste site owners use the Code to shield themselves from environmental cleanup duties. On the one hand, strong policies favor preserving the bankruptcy estate for the bankrupt’s creditors and, to some extent, for the debtor. On the other hand, strong policies favor protecting the public health and the environment from hazardous waste. Federal and state governments have enacted statutes furthering both policies; however, these statutes do not effectively resolve the conflict that arises when these policies clash. Congress’s myopia with respect to the potential intersection of these policies16 has forced

12. The Senate Report states that “where a governmental 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,” or affects the “enforcement of an injunction,” the action should not be stayed under the automatic stay. S. REP. No. 989, 95th Cong., 2d Sess. 52 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5838 (emphasis added); see also H.R. REP. No. 595, 95th Cong., 2d Sess. 343 (1978) reprinted in 1978 U.S.C.C.A.N. 5963, 6299 (identical to S. REP.).

13. See In re Chateaugay Corp., 944 F.2d 997, 1006 (2d Cir. 1991) (holding any right to payment, including government’s claim for CERCLA response costs, was dischargeable in bankruptcy); United States v. Whizco, Inc., 841 F.2d 147, 150 (6th Cir. 1988) (holding any injunctive claim that could be construed as requiring debtor to spend money was dischargeable).


16. See Richard I. Aaron, Bankruptcy Stays of Environmental Regulation: Harvest of
courts to weigh the competing concerns and to resolve the conflict with less than adequate consistency. These conflicts have generated considerable confusion, inconsistency, and disagreement in cases and commentary.

Assume that a debtor in bankruptcy has improperly disposed of toxic waste on its property prior to becoming bankrupt, and has failed to comply with a state or federal judicial or administrative order to clean up the property. Who pays for the cleanup? There seems to be no entirely satisfactory answer. If the debtor or trustee is required to comply with the order, cleanup costs will come out of estate assets otherwise available to creditors. In effect, the creditors will be paying for the cleanup. This result may conflict with the system of priorities in the Code, which specifies what kinds of debt are paid, and in what order, out of the assets of the estate. That the state is not explicitly accorded a priority for costs associated with a regulatory order, such as environmental cleanup costs, suggests that Congress did not intend them to be shifted to the unsecured creditors. However, if the debtor or trustee is not required to comply with the order, the state or federal government is likely to bear the financial burden of the cleanup via the taxpayers.

The beneficial aspects of the environmental status, the complexity of the environmental regulatory scheme, the expense of compliance with the environmental statutes, and the severity of liabilities for non-compliance have all contributed to a substantial body of bankruptcy case law. Federal courts have had to interpret the Code in connection with a variety of environmental issues. Some of these issues include: whether a bankruptcy trustee can abandon property from a bankruptcy estate; who should pay for the cleanup of contaminated property; and whether a bankruptcy trustee can be held personally liable for the cleanup of contaminated property. This Note will review the case law related to the foregoing issues.

When a conflict arises between the Code and other federal statutes, the proper approach to the resolution of the conflict is not clear. In general, courts try to construe apparently conflicting statutes so

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18. If the federal government pays for the cleanup, funds will be taken from Superfund, consisting largely of money paid by polluting industries. See infra note 36. If the state bears the burden of cleanup, costs will effectively come from the public (taxpayers).
that both provisions will stand,\(^{19}\) avoiding a construction that might impair the operation of other laws Congress probably did not intend to repeal.\(^{20}\) Thus, to carry out the will of Congress, courts examine the statutory schemes and their underlying policies as a whole.\(^{21}\) When a bankruptcy law arguably conflicts with another statute, however, the courts will give effect to a more specific provision over a more general one,\(^{22}\) and then to the more recent statute if the conflict is otherwise irreconcilable.\(^{23}\) Most importantly, in any conflict resolution, courts must interpret the statutes in light of the original purpose that prompted Congress to legislate.\(^{24}\)

This Note will focus primarily on the interplay between two federal statutes, CERCLA\(^ {25}\) and the Code.\(^ {26}\) First, this Note will briefly examine both the bankruptcy process and the environmental process. After addressing the history of abandonment, this Note will focus on the language and effect of § 554 of the Code (the trustee’s power to abandon). This Note will then explore *Midlantic National Bank v. New Jersey Department of Environmental Protection*\(^ {27}\) emphasizing the opinion elaborated in Justice Rehnquist’s dissent. It will further examine the abandonment power in light of *Midlantic*. The primary focus will be to examine the principal bankruptcy issues encountered by a trustee who must administer an estate which has potential CERCLA liability. Despite the *Midlantic* decision, does a trustee still have the power to abandon a contaminated site? After exhausting *Midlantic*’s holding, this Note will focus on subsequent decisions and exceptions which have evolved from *Midlantic*. Finally, this Note will examine those situations where a bankruptcy trustee could be held personally liable in a bankruptcy proceeding involving assets of a debtor which are contaminated by hazardous waste.

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23. See Posadas v. National City Bank, 296 U.S. 497, 503-04 (1936) (holding that, although disfavored, an implied repeal will be found if the conflict is sufficiently direct).
II. THE ENVIRONMENTAL PROCESS

CERCLA was enacted by Congress in response to the environmental and public health hazards posed by improper disposal of hazardous waste. While the earlier Resource Conservation and Recovery Act ("RCRA"), provides "cradle to grave regulation of hazardous substances" in operating facilities, CERCLA provides for the cleanup of inactive or abandoned hazardous waste sites. Passed in the eleventh hour as a compromise bill, CERCLA suffers from poor drafting, inconsistent provisions and vague terminology. The paucity of useful legislative history further complicates the task of interpreting the statute. Nevertheless, the overall structure of the statute is clear. Section 104 of CERCLA authorizes the government, under the auspices of the EPA, to clean up hazardous waste sites using


30. See Scott Wilson, Book Note, When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup, 38 HASTINGS L.J. 1261, 1263 n.16 (1987); see also Arlene E. Minsky et al., The Interface Between Bankruptcy and Environmental Laws, 46 BUS. LAW 623, app. A at 673 (1991) ("CERCLA is not a 'regulatory statute.' It is left to other statutes, such as [the RCRA] to serve the prospective goal of prevention.").

31. Wilson, supra note 30, at 1263 n.17. One court surmised that the statute's drafting was "a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions" which, almost invariably, places courts in the "undesirable and onerous position of construing inadequately drawn legislation." United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 838-39 n.15 (W.D. Mo. 1984), modified, 810 F.2d 726 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987); see also Maryland Bank & Trust Co., 632 F. Supp. at 578 (finding that "the structure of section 107(a), like so much of this hastily patched together compromise Act, is not a model of statutory clarity").


the Superfund\textsuperscript{36} and then to seek cost reimbursement from potentially responsible parties ("PRP’s")\textsuperscript{37} pursuant to § 107.\textsuperscript{38}

CERCLA holds four groups of "persons"\textsuperscript{39} liable for the costs incurred by the government in responding to an environmental hazard: (1) present owners and operators of a "facility" where hazardous substances are located; (2) any person who owned or operated the facility at the time of the disposal of "hazardous substances"; (3) any person who generated hazardous waste or arranged for the transport or disposal of hazardous waste; and (4) any person who accepted hazardous substances for transport to a treatment facility or disposal site.\textsuperscript{40} This liability structure enables the government to impose retroactive,\textsuperscript{41} strict,\textsuperscript{42} and joint and several\textsuperscript{43} liability on located po-

and involves temporary measures to contain dangers to the public health and environment. A remedial action is a more permanent response to prevent or minimize present or future harm to the public health or environment. 42 U.S.C. § 9604(a) (1988); FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 615 (2d ed. 1990).


37. PRP is a term of art not defined under CERCLA but used to cover the four categories of parties listed in § 107(a)(1)-(4). The policy underlying CERCLA is to place the ultimate responsibility for cleanup on "those responsible for problems caused by the disposal of chemical poison." Dedham Water Co. v. Cumberland Farms Dairy Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); see also Florida Power & Light Co., v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989).

38. CERCLA, supra note 1, § 107, 42 U.S.C. § 9607.

39. The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body. CERCLA, supra note 1, 42 U.S.C. § 9601(21).

40. CERCLA, supra note 1, 42 U.S.C. § 9607(a)(1)-(4).

41. See, e.g., United States v. Monsanto Co., 858 F.2d 160, 173-74 (4th Cir. 1988)
ially responsible parties, allowing the government to either recover the agency’s response costs or force a PRP to fund the corrective action. Moreover, liability will still attach even when a PRP’s nex-

(holding that CERCLA’s retroactivity is consistent with due process), cert. denied, 490 U.S. 1106 (1989). Retroactive liability means that if a company contributed waste to a site before Superfund’s enactment in 1980 it can be held liable for cleanup, even though its actions may not have been illegal at the time of disposal. Daniel M. Abuhoff et al., Superfund Reform Now Rests in Hands of GOP, Nat’l L.J., Dec. 5, 1994, at C10.

42. Although no provision explicitly imposing strict liability exists in CERCLA, “it is now well settled that each of the four groups of responsible parties [under CERCLA] is strictly liable.” EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA reprinted in 55 Banking L. Rep. (BNA) 636, 636 (Oct. 15, 1990); see In re T.P. Long Chem., 45 B.R. 278, 282 (Bankr. N.D. Ohio 1985) (“The liability imposed by section 107(a) of CERCLA is strict liability.”); George Pendygraft et al., Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation, 21 Ind. L. Rev. 117, 122-23 (1988) (noting that “[c]ourts have unanimously concluded that the standard of liability imposed under [CERCLA] is strict liability”); see also Monsanto, 858 F.2d at 167 (“We agree with the overwhelming body of precedent that has interpreted [CERCLA] section 107(a) as establishing a strict liability scheme.”); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (noting that “Congress intended to impose a strict liability standard subject only to the affirmative defenses listed in section 107(b)”); United States v. Price, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983) (citation omitted).

43. Recently, the courts of appeals in the Second, Third, and Fifth Circuits have addressed the scope of joint and several liability under CERCLA. United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993); In re Bell Petroleum Servs., 3 F.3d 889 (5th Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252 (3d. Cir. 1990). Joint and several liability means each PRP is liable for all cleanup costs at a site, unless the PRP can show that the environmental injury is divisible and there is a reasonable basis to divide the harm. But see United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987) (showing reluctance to limit PRP’s joint and several liability and concluding that it was “simply impossible to determine which defendants’ waste contributed in what specific manner to the releases and continuing threat of further releases”). However, it is important to note that the Supreme Court has yet to confirm joint and several CERCLA liability. See ANDERSON, supra note 35, at 634.

44. 42 U.S.C. §§ 9606, 9607 (1988). Section 9607(a) provides, in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility, . . . shall be liable for—

(4) all costs of removal or remedial action incurred by the United States Government or a State. . .

42 U.S.C. § 9607(a). Section 9601(9) defines a “facility” as:

(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.]

42 U.S.C. § 9601(9) (emphasis added); see supra note 37.

45. CERCLA, supra note 1, § 107, 42 U.S.C. §§ 9607(a), 9612(c).

46. 42 U.S.C. § 9606. CERCLA’s liability structure often leads to increased litigation.
us with a site is minimal. Hence, the government need make only a rudimentary prima facie case. Consequently, liability under § 107(a) will be satisfied if the government merely shows: (1) the site is a "facility"; 47 (2) a "release" or "threatened release" of any "hazardous substance" from the site has occurred; (3) the release or threatened release has caused the United States to incur "response costs"; 49 and (4) the defendant is one of the persons designated as a party liable for costs. 51 In addition, the EPA may procure an injunction ordering a PRP to clean up the site and/or cease its contaminating activity. 52

III. THE BANKRUPTCY PROCESS

A debtor in financial difficulty has various options under the federal bankruptcy laws. One is to liquidate its assets, usually under chapter 7 of the Code, 44 and repay as many debts as possible with the proceeds of the estate. The other option, under chapter 11 of the Code, is to restructure its debt, remain in business, and attempt to repay a portion of the debt over an extended period of time. 55 For the most part, corporations reorganize under chapter 11 of the Code, however, individuals can reorganize under either chapter 11 or chapter 13. 56 Whichever form of relief is pursued, the bankruptcy process commences when a bankruptcy petition is filed either by the debtor
voluntarily, or by the debtor’s creditors. Once the court accepts the petition, a trustee is appointed to oversee the debtor’s estate.

The date of the filing is of vital importance. First, it triggers the “automatic stay,” which immediately halts all creditor collection activity. Second, it determines what claims against the debtor and what assets of the debtor will be administered in the bankruptcy. Generally, pre-petition assets become part of the bankrupt estate, while post-petition assets do not. Similarly, pre-petition claims are handled in the bankruptcy proceeding, but post-petition claims are not. Upon commencement of a bankruptcy petition, a new legal entity comes into existence, the debtor’s estate, and this new entity is wholly separate and distinct from the debtor. The debtor is simply the person (or municipality) concerning whom a bankruptcy case has been commenced. The estate is the aggregate of certain properties in which the debtor had an interest at the time the bankruptcy case commenced. Thus, the assets of the debtor are placed into the bankruptcy estate. The estate consists of all property (less certain specifically excepted property) in which the debtor had any interest at the

59. In a chapter 7 proceeding, an interim trustee must be appointed when a petition for relief is filed. 11 U.S.C. § 701(a)(1) (1993). It is the duty of the Office of the United States Trustee to elect a trustee from the members on its panel of trustees. The interim trustee serves only until a regular trustee is appointed. Id. § 701(a)(2)(b). Once a regular trustee is appointed the trustee will take possession of the debtor’s assets, which comprise the bankruptcy estate. Id. § 704(1). It should be recognized that the Bankruptcy Reform Act of 1994 abrogates the United States Trustee’s powers in appointing a trustee in chapter 11 proceedings, thereby bringing the trustee election process back to the old system under the Act. See Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106 (1994) (to be codified as amended in scattered sections of Title 11, 18 and 28 of United States Code) [hereinafter Reform Act, 1994]. However, this Note will not address the process of electing a trustee in chapter 11 proceedings.
60. 11 U.S.C. § 362(a) (1993); see also supra note 8.
61. Id. § 541.
62. Id.
63. Id. § 541(a). However, some post-petition assets may become part of the estate if they have some significant relationship to the pre-petition assets. See id. § 541(a)(5).
64. See 11 U.S.C. §§ 507, 508 (1993). Some post-petition claims are treated as administrative expenses and given first priority in bankruptcy. Administrative expenses are those necessary to the preservation of the estate, such as post-petition wages, insurance premiums, and the like.
65. Id. § 541(a).
66. Id. § 101(13).
67. Id. § 541.
commencement of the case.\textsuperscript{69} Therefore, the moment the debtor's estate is created through the commencement of the bankruptcy proceeding, the debtor is legally stripped of its interests in all property which becomes part of the estate.\textsuperscript{70} Upon appointment of a bankruptcy trustee, the trustee becomes the representative of the estate, rather than the debtor.\textsuperscript{71} Moreover, if assets of the estate are too burdensome or of inconsequential value to the estate, the trustee may abandon them.\textsuperscript{72} Abandoned property will revert back to any person or entity, including the debtor, who has a possessory interest in it.\textsuperscript{73}

A chapter 7 liquidation entails both the conversion into cash of all of the debtor's assets not exempted by the Code and the distribution of such proceeds to creditors.\textsuperscript{74} However, the underlying purposes of the Code are to provide the bankruptcy debtor with a "fresh start"\textsuperscript{75} and to facilitate the dispensation of the creditors' claims against the debtor.\textsuperscript{76} In addition, the Code is designed to provide the debtor with relief from and eventual discharge of its debts, thus allowing the debtor to begin anew.\textsuperscript{77} At the same time, by expediting

\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id. § 323(a).
\textsuperscript{72} Id. § 554. A full analysis of the trustee's power to abandon property is discussed, infra part IV.
\textsuperscript{73} See \textit{In re Cruseturner}, 8 B.R. 581, 590-92 (Bankr. D. Utah 1981); see also infra notes 95-99 and accompanying text.
\textsuperscript{74} 11 U.S.C. §§ 701-66 (1993). Exemptions under the Code are dealt with in § 522. \textit{Id.} § 522. These exemptions are designed for the individual or chapter 13 debtor, and are not relevant to a debtor facing environmental liability. \textit{Id.}
\textsuperscript{75} Burlingham v. Crouse, 228 U.S. 459, 473 (1913). However, the present Bankruptcy Code enacted in 1978, does not allow the debts of "non individuals"—corporations and partnerships—to be discharged under chapter 7 of the Code. 11 U.S.C. § 727(a)(1) (1993) ("The court shall grant the debtor a discharge, unless . . . the debtor is not an individual.") Thus, for corporate debtors, the fresh start purpose of chapter 7 has been rescinded. \textit{In re Quanta Resources Corp.}, 739 F.2d 912, 915 n.7 (3d Cir. 1984) \textit{aff'd sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection}, 474 U.S. 494 (1986); see also Stephen B. Kong, \textit{A Chapter 7 Trustee's Abandonment of Environmentally-Impaired Property: Midlantic, Post-Midlantic Interpretation and the Plague of Results-Oriented Legal Analysis}, 5 \textit{FORDHAM Envtl. L.J.} 231 (1993) ("[T]he only thing left in the end is a worthless corporate carcass."); Leonard J. Long, \textit{Burdensome Property, Onerous Laws, and Abandonment: Revisiting Midlantic National Bank v. New Jersey Department of Environmental Protection}, 21 \textit{HOFSTRA L. REV.} 63, 106-07 (1992) (recognizing that once chapter 7 liquidations are complete, the corporate debtor ceases to exist, therefore, "[a] non-entity cannot be held liable for the cost of an environmental cleanup").
\textsuperscript{76} Kothe v. R.C. Taylor Trust, 280 U.S. 224 (1930). "The broad purpose of the Bankruptcy Act is to bring about equitable distribution of the bankrupt's estate among creditors holding just demands. . . ." \textit{Id.} at 227.
\textsuperscript{77} See \textit{Burlingham}, 228 U.S. at 473.
the collection and liquidation of the debtor’s assets, the Code seeks to maximize the amount of the debtor’s estate available for creditors, before final discharge of their claims.78

A bankruptcy trustee obtains certain powers, duties, and obligations under the Code which it is required to carry out.79 Under § 323, a trustee is the “representative of the estate,” and “has the capacity to sue or be sued.”80 Additionally, § 363 authorizes the trustee to “use, sell, or lease” property of the estate.81 Under chapter 7, the main duty of a trustee is to “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest.”82 Accordingly, a chapter 7 trustee’s actions are carried out with the intent of collecting, liquidating, and distributing as much of the debtor’s property to creditors as possible.83

IV. ABANDONMENT

Historically, the principal rationale for bankruptcy abandonment has been the notion that the creditors of the debtor would be better off if the individual charged with administering the bankruptcy estate for the creditors’ benefit (ie., the bankruptcy trustee) did not have to administer those properties which tended either to decrease the aggregate value of the estate or add no real value to the estate.84 General-

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78. Kothe, 280 U.S. at 227.
80. Id. Under the Code, the trustee does not technically hold title to the property of the estate, but nonetheless has “certain powers associated with ownership.” In re T.P. Long Chem., 45 B.R. 278, 283 (Bankr. N.D. Ohio 1985); see also infra notes 95-99 and accompanying text.
82. 11 U.S.C. § 704(1) (1993). In addition, § 704 enumerates eight other duties of a trustee in the bankruptcy proceeding. See id.
83. See Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930); In re Quanta Resources Corp., 739 F.2d 912, 915 (3d Cir. 1984) (“The purpose of a liquidation proceeding under Chapter 7 . . . is to provide a fair distribution of the debtor’s assets among the creditors . . . ”), aff’d sub nom. Midlantic Nat’l Bank v. New Jersey Dep’t of Envtl. Protection, 474 U.S. 494 (1986). To the extent necessary to carry out the liquidation, a chapter 7 trustee has the limited power to operate the debtor’s business, but such power must first be authorized by the bankruptcy court. 11 U.S.C. § 721 (1993).
84. See Midlantic, 474 U.S. at 508, (Rehnquist J., dissenting).

By analogy to the trustee’s statutory power to reject executory contracts, courts had developed a rule permitting the trustee to abandon property that was worthless or
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ly, when a trustee abandons property, it is usually abandoned to the debtor as if the bankruptcy case never commenced. However, if someone other than the debtor has a possessory interest in the property the trustee may abandon to that person. Moreover, several courts have held that unless the property is concealed from the trustee or is unscheduled, abandonment by the trustee is final and irrevocable.

The concept of abandonment means simply that the property abandoned will not be administered as part of the bankrupt estate.

A. The History of Abandonment

At the turn of the century, it was generally accepted that abandonment of burdensome property was simply a logical extension of the trustee’s common law power to reject executory contracts, and

not expected to sell for a price sufficiently in excess of the encumbrances to offset the cost of administration. . . . This judge-made rule served the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor’s property to money, for equitable distribution to creditors. . . . Forcing the trustee to administer burdensome property would contradict the purpose, slowing the administration of the estate and draining its assets.

Id. (citations omitted).


86. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 368 (1977) (emphasizing that “abandonment may be to any party with a possessory interest in the property abandoned”). Although Congress amended section 554(c) of the Code in 1984 to emphasize that unadministered property is abandoned “to the debtor,” the subsection continues to provide “unless the court orders otherwise.” Id.; see also In re Butler, 51 B.R. 261 (Bankr. D.D.C. 1984); WEINTRAUB & RESNICK, supra note 85, at ¶ 4.06.

87. See, e.g., In re Brio Ref., 86 B.R. 487 (Bankr. N.D. Tex. 1988) (holding the abandonment of property irrevocable even after it was discovered that the property was potentially hazardous); In re Wornell, 70 B.R. 153 (Bankr. W.D. Mo. 1986) (abandonment of real estate held irrevocable regardless of later discovery that property had greater value); In re Burch Co., Inc., 37 B.R. 273 (Bankr. D.S.C. 1983). But see In re Lintz W. Side Lumber, 655 F.2d 786 (7th Cir. 1981); In re Alt, 39 B.R. 902 (Bankr. W.D. Wis. 1984) (abandonment revoked if trustee overlooked available information when making abandonment decision and then sought to correct mistake).

88. This concept obviously seems attractive to the debtor in bankruptcy who holds title to contaminated property. If the debtor can abandon the contaminated property it will not be included in the bankrupt estate and the debtor will only be required to fund environmental compliance to the extent the debtor owns assets separate from the bankruptcy estate. If the debtor does not have assets separate from the estate sufficient to pay the cost of cleanup, the abandoned property will sit until the taxpayers pay for the needed environmental remediation.
therefore, should be authorized. Yet, within the Bankruptcy Act of 1898 ("ACT"), no relevant provision specifically addressed this abandonment threshold. Nonetheless, courts began to recognize the trustee's abandonment desires by creating "an implicit realization to abandonment," thus "serv[ing] the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors."

Under the Act, abandoned property would be conveyed back to the debtor, as if no bankruptcy action had been filed. This analysis appears to be consistent with the current state of the law.

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89. 4 COLLIERS ON BANKRUPTCY, ¶ 554.01 at 554-2 (L. King et al. 15th ed. 1993) [hereinafter COLLIERS]; see also Kong, supra note 75 at 221 (addressing trustee's abandonment power).

90. Pub. L. No. 55-541, 30 Stat. 544 (1898) [hereinafter "ACT"].

91. 4 COLLIERS, ¶ 554.01 at 554-1 n.1 (describing §§ 64a(4), 70a(2) & 70b of ACT).


93. Abandonment does not completely terminate the automatic stay; it only terminates the stay with respect to the trustee's or the estate's interest in the property. Consequently, although the debtor is revested with the property, the creditors may not pursue their non-bankruptcy remedies without first obtaining permission from the court through relief from the automatic stay. 11 U.S.C. § 361 (1993). Moreover, when a trustee abandons property of the estate, "any encumbrances against the property (security interests, mortgage liens, tax liens, judgment liens, etc.) continue to encumber the property." Long, supra note 75, at 93. Effectively, the trustee's abandonment "does not itself function to extinguish any non bankruptcy rights or obligations the debtor has with respect to [the] . . . property." Id. at 93-94.

94. The court in In re Cruseturner, 8 B.R. 581, 59-92 (Bankr. D. Utah 1981) stated: Subsection (b), enacted as Section 554(c), was changed in the final draft by deleting references originally made which stated that abandonment under this section would be made specifically to the debtor. Thus, it appears that abandonment under any subsection of 554 will be to a party with a "possessor's interest." Generally, a "possessor's interest" is defined as a "right to exert control over" or a "right to possess" property "to the exclusion of others." This legislative reference and attendant definition are in keeping with cases under former law which hold that title and right to the property reverts to its pre-bankruptcy status. Thus, whoever had the possessory right to the property at the filing of bankruptcy again reacquires that right. Normally this party is the debtor, but it is conceivable that a creditor (or the EPA) may be entitled to possession instead if, by the exercise of its con-
TRUSTEE PERSONAL LIABILITY

The language of § 554 of the Code is couched in unconditional terms: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." The statute, on its face, suggests that a determination that property is burdensome or of inconsequential value is sufficient grounds for abandonment, and that no balancing or weighing of additional factors is necessary. Fur-

B. Statutory Language

The language of § 554 of the Code divests the estate of control of the property and usually returns it to the debtor, along with all pre-petition rights and obligations. The debtor is then treated as having owned the property without interruption. Essentially, title is regarded as belonging to the bankrupt debtor just as if he had never been in bankruptcy, and stands as it did before filing.

96. Prior to 1978 the trustee took legal title to the estate property. Under 11 U.S.C. § 541 the trustee no longer takes legal title to the property, but only controls it. See 4 COLLIER, supra note 89, ¶ 554.02[2]. One commentator recognized that bankruptcy courts are unwilling to say that actual title is transferred or even affected by the process of abandonment. For these courts, abandonment is not regarded as the "divesting and revesting of title to property." See Long, supra note 75, at 91-92 n.83. Instead, "it is now viewed as a divesting and revesting of control over on the property." Id.; see also In re R-B-Co. of Bossier, 59 B.R. 43, 45 (Bankr. W.D. La. 1986) ("The Court does not believe that abandonment can be used, as a means of effecting a transfer of title.... Under section 554, upon abandonment, the trustee or debtor-in-possession is simply divested of control of the property because it is no longer property of the estate.") (quoted in Long). But see In re Ark Indus. Inc. 122 B.R. 43 (Bankr. W.D. La. 1986) (holding trustee cannot abandon property to anyone but debtor because bankruptcy court cannot convey title to real property in abandonment proceeding); First Carolina Fin. Corp. v. Caron, 50 B.R. 27 (Bankr. N.D. Ga. 1984) (§ 554 abandonment may not determine issue of ownership and possession of property).

97. See supra notes 86, 94-95 and accompanying text.


99. See Mason v. Comm'r, 646 F.2d 1309, 1310 (9th Cir. 1980); 4 COLLIER, supra note 89, ¶ 554.01.


101. As Justice Rehnquist reasoned:

This language, absolute in its terms, suggests that a trustee's power to abandon is limited only by consideration of the property's value to the estate. It makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations.
thermore, nothing in the House and Senate Reports of the provision provides any indication that Congress intended to limit a trustee's statutory authority to abandon if abandonment adversely affects state police and regulatory powers. Some commentators have argued that the clear language of § 554(a), coupled with the lack of legislative history seems to indicate only one result: "the trustee's cost-benefit analysis should be the sole consideration in abandonment decisions." Effectively, if the property is deemed burdensome or of inconsequential value to the estate resulting in a detriment to the unsecured creditors, the property should be abandoned by the trustee. However, it is apparent that Congress did not anticipate the conflict between § 554 and both state and federal environmental laws.

C. Congress Did Not Intend to Limit Section 554

The legislative history of this statute does not reveal a congressional intent to incorporate judge-made exceptions to abandonment. The normal rule of statutory construction is that if Congress


103. See, e.g., Joseph L. Cosetti & Jeffrey M. Friedman, Midlantic National Bank, Kovacs and Penn Terra: The Bankruptcy Code and State Environmental Law-Perceived Conflicts and Options for the Trustee and State Environmental Agencies, 7 J.L. & COM. 65, 75 (1987) [hereinafter Cosetti & Friedman]. Cosetti and Friedman noted:

Prior to Midlantic and Quanta Resources, the two well-recognized bankruptcy treatises, "Norton Bankruptcy Law & Practice" and "Collier on Bankruptcy," do not mention any public health and safety exception to abandonment under section 554(a) that is based on state law. Professor Norton notes that "[t]he best interests of the estate and not the interests of the debtor and creditors will determine whether property should be abandoned.

Id. (quoting 2 NORTON, 39.01 (1984)); see also Kong, supra note 75, at 228; Midlantic, 474 U.S. at 513 (Rehnquist, J., dissenting).

104. Kong, supra note 75, at 228; see also Midlantic, 474 U.S. at 513 ("T[h]e relevant inquiry at an abandonment hearing [is] to be limited to whether the property is burdensome and of inconsequential value to the estate."). (Rehnquist, J., dissenting).

105. See Perkins, supra note 92, at 1563 n.1 ("Neither the Bankruptcy Code nor Bankruptcy Rule 6007 places a time limitation on the trustee [for abandonment]. Under the pre-code rule, however, the trustee had to abandon within a reasonable time."); see also Kong, supra note 75; D. Ethan Jeffrey, Comment, Personal Liability of a Bankruptcy Trustee Since Midlantic National Bank v. New Jersey Department of Environmental Protection: the Environmental Law and the Bankruptcy Code Conflict Threatens to Engulf Bankruptcy Trustees, 2 VILL. ENVTL. L.J. 403 (1991).

intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. Thus, had Congress intended to restrict a trustee’s abandonment power in § 554(a), it could have provided for express exceptions. For example, unlike § 554, the automatic stay section contains specific exceptions which limit its applicability. Similarly, § 1170(a)(2) of the Code provides an express exception which limits abandonment. Indeed, § 554(a) is among the few provisions of the Code that do not provide explicit exceptions. The lack of such exceptions in § 554(a) implies that Congress did not intend to limit the section’s operation.

V. MIDLANTIC NATIONAL BANK v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

In 1986 the Supreme Court was faced with the question of whether the judicially developed doctrine of abandonment that protected certain state and federal interests was incorporated into the codification of the abandonment power through § 554 of the Bankruptcy Code. The Supreme Court’s decision in Midlantic evidences the conflict encountered by the courts between the Code and state and federal environmental laws.

The New Jersey Department of Environmental Protection (“NJDEP”) had ordered Quanta Resources, Corp. (the debtor), a processor of waste oil with facilities in New York and New Jersey, to cease operation at the New Jersey site, after more than 400,000 gal-


107. See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-267 (1979); see also Swarts v. Hammer, 194 U.S. 441, 444 (1904) (stating that “the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt”).


109. See supra note 8 and accompanying text.

110. Section 1170 of the Code provides that “[t]he court, after notice and a hearing, may authorize the abandonment of all or a portion of a railroad line if such abandonment is . . . (2) consistent with the public interest.” 11 U.S.C. § 1170(a)(2) (1982 & Supp. IV 1986).


113. Id.
Ions of PCB-contaminated waste oil were discovered. As a result, Quanta filed a chapter 11 petition (subsequently converted to chapter 7) in New Jersey. Subsequent to the bankruptcy filing in New Jersey, however, 70,000 gallons of contaminated oil were discovered at the New York facility. After an unsuccessful attempt to sell the property, the trustee notified the Bankruptcy Court in New Jersey of his intention to abandon the property. New York objected to abandonment, arguing that it would threaten the public’s health and safety in violation of state and federal environmental laws. Nevertheless, the Bankruptcy Court allowed abandonment, reasoning that New York was better able to protect the public from any possible danger or harm than either the trustee or the debtor. Shortly thereafter, the trustee moved to abandon the New Jersey property, which was also approved by the Bankruptcy Court. This decision and the earlier District Court decision were appealed directly to the United States Court of Appeals for the Third Circuit, which reversed the lower courts, holding that a bankruptcy trustee did not have the power under the Code to abandon property of a bankruptcy estate in contravention of state environmental protection laws.

The Supreme Court affirmed, finding that, before the passage of the 1978 Bankruptcy Code, any power a trustee had to abandon property was given to him by the courts. Through the enactment of

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114. Id. at 497.
115. Id.
116. Id.
117. Id.
118. Id. at 498. New York based its argument on § 959(b) of the Judiciary Code, 28 U.S.C. § 959(b), which requires in pertinent part:
   (b) [A] trustee, receiver or manager appointed in any cause pending in any court of the United States, . . . shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated. . . .

Id.

Threats to the public included the removal of a 24-hour guard set up by the trustee to prevent vandalism and public entry, a shut down of the emergency fire system, unsealed deteriorating tanks of PCB-contaminated waste oil and explosives on the premises. See Midlantic, 474 U.S. at 498-99.

119. Midlantic, 474 U.S. at 498. The District Court for the District of New Jersey affirmed the bankruptcy court's decision. Id.
120. Id.
121. In re Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984). The court also found that the pre-Code exceptions to abandonment had been codified in § 554 through the passage of the 1978 Bankruptcy Code. Id. at 918.
122. Midlantic, 474 U.S. at 500.
§ 554 of the Code in 1978, the Court determined that Congress had intended to codify this judge-made power. The Court posited that since there were well recognized restrictions on a trustee’s abandonment power and no such specific intent in the legislative history existed, “Congress . . . presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws.” The Court’s reasoning was satisfied by looking to the normal rule of statutory construction, that “if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” Additionally, the Court determined that if Congress intended to grant a trustee an exception from non-bankruptcy law, “the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.” Accordingly, the Court held that “a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identifiable hazards.”

In a stinging dissent, Justice Rehnquist, joined by Chief Justice Burger and Justices White and O’Connor, criticized the majority’s

123. The Court made this determination by looking to the Third Circuit’s analysis of this judge-made law. The Third Circuit held that the pre-Code abandonment power was limited by state police powers protecting the public interest: “Where important state law or general equitable principles protect some public interest they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their suppression by the abandonment power.” Quanta, 739 F.2d at 918.

124. Midlantic, 474 U.S. at 501. Other evidence presented by the Court to support its position included: (1) the legislative history of § 362, which provides an exception to automatic stay for governmental units to enforce its police power, see 11 U.S.C. § 362(b)(5) (1993); (2) looking to 28 U.S.C. § 959(b) (1993), which provides that a trustee must operate property in his possession pursuant to valid state law; (3) the judge-made law restricting a trustee’s abandonment power established through three pre-Code cases, see infra note 131.

125. Midlantic, 474 U.S. at 501 (citing Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979)).

126. Midlantic, 474 U.S. at 501 (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)); see also Palmer v. Massachusetts, 308 U.S. 79, 85 (1939) (“If this old and familiar power of the states [over local railroad service] was withdrawn when Congress gave district courts the powers over railroads, we ought to find language fitting for so drastic a change.”).

127. Midlantic, 474 U.S. at 507 (footnote omitted). In a footnote, the Court narrowed its holding slightly, to protecting the public from “imminent and identifiable harm,” as opposed to future harm or environmental violations that were speculative in nature. Id. at n.9. The Court neglected to give any guidance, however, as to how to determine which laws are “reasonably designed to protect the public health or safety,” and simply stated that the exception is a “narrow one” only exacerbating the conflict. See id. at 516 (Rehnquist, J., dissenting).
opinion as being unsupported by the law and contrary to the goals of the Code. 128

The principal and only independent ground offered—that Congress codified “well-recognized restrictions of a trustee’s abandonment power”—is particularly unpersuasive. It rests on a misreading of the three pre-Code cases, the elevation of that misreading into a “well-recognized” exception to the abandonment power, and the unsupported assertion that Congress must have meant to codify the exception (or something like it). 129

Significantly, Justice Rehnquist analyzed each argument offered by the majority in support of their position and opined that the Court’s analysis was unsupported and wholly unpersuasive. The majority found that § 554 was meant to codify prior case law, citing three pre-Code cases. 130 However, the dissent elaborated on these cases and reasoned that “the majority misapplied the true holdings of those courts.” 131 Second, the Court relied on 28 U.S.C. § 959(b) as

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128. Id. at 507 (Rehnquist, J., dissenting).
129. Id. at 507-08.
130. Id. at 500.
131. Id. at 510. Justice Rehnquist reviewed the three pre-Code cases and found that the established corollary the majority relies on is not supported by a close reading of those cases:

In Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952), the Court of Appeals held that a trustee could not abandon worthless barges obstructing traffic in Baltimore Harbor when the abandonment would have violated federal law. The Court concluded that the “judge-made rule [of abandonment] must give way” to “an Act of Congress in the public interest.” Id. at 290. Ottenheimer thus depended on the need to reconcile a conflict between a judicial gloss on the Bankruptcy Act and the commands of another federal statute. . . . In addition, the Court of Appeals relied heavily on the fact that the pre-Code law of abandonment was judge-made. . . .

. . .

In re Lewis Jones, Inc., 1 BCD 277 (Bankr. E.D. Pa. 1974) was a Bankruptcy Court decision concluding that the principle of Ottenheimer did not apply because there was no conflicting statute. But because the right to abandon was based on judge-made law, the court nonetheless found itself free to protect the public interest by requiring a trustee seeking abandonment to first spend funds of the estate to seal manholes and vents in an underground pipe network . . . .

. . .

In In re Chicago Transit Co., 129 F.2d 1 (7th Cir. 1942), cert. denied sub nom. Chicago Junction R. Co. v. Sprague, 317 U.S. 683 (1942), the District Court, sitting in bankruptcy, had authorized the bankrupt to abandon a lease of a rail line, and a lessor appealed. The bankrupt did not appeal the District Court’s imposition of conditions on the abandonment. . . . So while there may be dicta in the Court of Appeals’ opinion that would support some limitation on the power of abandonment, the holding of the case certainly does not. In short, none of these cases
statutory support for applying a balancing test to § 554. Here, Justice Rehnquist criticized how unpersuasive § 959(b) is to liquidation cases. Finally, the Court attempted to read a qualification into § 554 since environmental objectives were elevated elsewhere in the Code. Even here, Justice Rehnquist evinced: "We have previously expressed our unwillingness to read into unqualified statutory language exceptions or limitations based upon legislative history unless that legislative history demonstrates with extraordinary clarity that this was indeed the intent of Congress." Accordingly, "Congress's failure to so qualify section 554 [suggests] that it intended the relevant inquiry at an abandonment hearing to be limited to whether the property is burdensome and of inconsequential value to the estate." Therefore, he reasoned, the absence of such provisions in § 554 indicates Congress had no intention to so restrict the trustee's power. Moreover, disallowing abandonment and forcing a cleanup would effectively place the environmental statutes' interests in protecting the public ahead of the claims of other creditors. It is axiomatic that Congress did not intend "section 554 abandonment hear-

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132. Id. at 510-12.
133. Id. at 505.
134. Id. at 514; see also Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.), 963 F.2d 1449 (11th Cir. 1992) (maintaining assets of estate for later distribution is not "managing or operating" property within purview of § 959(b)); In re Corona Plastics, 99 B.R. 231 (Bankr. D.N.J. 1989) (holding § 959(b) not applicable where trustee or debtor in possession is only liquidating estate); In re Microfab, Inc. 105 B.R. 161 (Bankr. D. Mass. 1989) (following Walker v. Maury County (In re Scott Hous. Sys.), 91 B.R. 190 (Bankr. S.D. Ga. 1989)); Walker, 91 B.R. 190; In re Security Gas & Oil Co. 70 B.R. 786 (Bankr. N.D. Cal. 1987). But see In re Wall Tube & Metal Products Co., 831 F.2d 118 (6th Cir. 1987) (holding § 559(b) applicable in context of public's welfare, regardless of trustee's status as liquidator or reorganizer); In re Stevens, 68 B.R. 774 (Bankr. D. Me. 1987) (holding that chapter 7 trustee must comply with § 959(b)).
137. Justice Rehnquist points out that nowhere in the legislative history does it suggest "Congress intended to limit the trustee's authority to abandon burdensome property where abandonment might be opposed by those charged with the exercise of state police or regulatory power." Id.
138. Id. at 516 (Rehnquist, J., dissenting).
ings... [to] be used to establish the priority of particular claims in bankruptcy."

A. The Effect of Midlantic

Several decisions following the Supreme Court’s decision in *Midlantic* have emphasized that the Court did not intend to strictly preclude abandonment of property whenever state environmental laws and regulations would be violated. In a well-reasoned opinion, the bankruptcy court in *In re Franklin Signal Corp.*, professed that “the Supreme Court intended only to place limits on a trustee’s power of abandonment by holding that the bankruptcy court cannot authorize abandonment of property in contravention of state law unless conditions are formulated that will adequately protect the public health and safety.” However, ironic as it may be, the Supreme Court failed to direct courts as to what conditions should be utilized in evaluating a trustee’s attempt to abandon contaminated property. Taking the bull

139. *Id.* at 517 (Rehnquist, J., dissenting). Justice Rehnquist noted that he “appreciate[s] the Court’s concern that abandonment may aggravat[e] already existing dangers by halting security measures that prevent[ ] public entry, vandalism, and fire.” *Id.* at 515 (quoting *Midlantic*, 474 U.S. at 498, n.3). However, Justice Rehnquist agreed with the bankruptcy court that “[t]he City and State are in a better position in every respect than either the trustee or debtor’s creditors to do what needs to be done to protect the public against the dangers posed by” a contaminated facility. *Id.* at 515.

140. A number of courts have permitted abandonment when asked by a trustee to abandon contaminated property, notwithstanding the Supreme Court’s directive in *Midlantic*. See, e.g., *In re L.F. Jennings Oil Co.*, 4 F.3d 887, 890 (10th Cir. 1993) (holding that abandonment was not improper because no imminent harm to public health); *In re Smith-Douglass, Inc.*, 856 F.2d 12, 16 (4th Cir. 1988) (holding that a debtor only needs to eliminate imminent harm to be able to abandon); *In re H.F. Radandt, Inc.*, 160 B.R. 323, 328 (Bankr. W.D. Wis. 1993) (allowing abandonment because state failed to show imminent danger and had taken no remedial action); *In re Better-Brite Plating*, 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989) (holding that abandonment is allowed if no imminent harm and no unencumbered assets available to fund cleanup); *In re FCX*, 96 B.R. 49, 54-55 (Bankr. E.D.N.C. 1989) (holding that abandonment allowed if there is no immediate harm); *In re Brio Ref.*, 86 B.R. 487, 489 (Bankr. N.D.Tex. 1988) (finding no restriction on abandonment if environmental problems unknown at time of abandonment); *In re Purco, Inc.*, 76 B.R. 523, 532-22 (Bankr. W.D. Penn. 1987) (holding that abandonment is permitted if no imminent harm); *In re Franklin Signal Corp.*, 65 B.R. 268, 272 (Bankr. D. Minn. 1986) (holding that abandonment is allowed if no imminent danger to public); *In re Oklahoma Ref. Co.*, 63 B.R. 562, 565 (Bankr. W.D. Okla. 1986) (holding that abandonment is permitted since no imminent harm); *In re Pierce Coal and Constr.*, 65 B.R. 521, 528 (Bankr. N.D. W. Va. 1986) (holding that abandonment is permitted if no imminent harm); see also *WEINTRAUB & RESNICK supra* note 85, ¶ 4.06.


142. *Id.* at 271 (emphasis added).
by the horns, so to speak, something the Supreme Court apparently did not feel a need to do, the bankruptcy court in *Franklin Signal* proposed a balancing test to weigh the competing interests of environmental protection and the Bankruptcy Code. The court posited five factors to be considered in determining whether hazardous waste may be abandoned in violation of state law: (1) The imminence of danger to the public health and safety; (2) the extent of the probable harm; (3) the amount and type of hazardous waste; (4) the cost to bring the property into compliance with environmental laws; and (5) the amount and type of funds available for cleanup. Despite violations of Wisconsin environmental laws, the court held that the trustee could abandon fourteen drums of hazardous waste. Similarly, the Fourth Circuit has refused to impose the *Midlantic* duty to cleanup polluted assets before abandonment where the estate does not have any unencumbered assets. In *Smith-Douglass*, the court permitted

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143. *Id.* at 272.

144. Although there is no set answer to what conditions should be formulated, the court believed that these five factors should be considered. Consequently, considering these factors in setting the conditions for abandonment will effectively balance the competing interests. *Id.* at 272.

145. *Id.* at 272. In a footnote, the court stressed how a strict application of *Midlantic* to preclude abandonment in all cases in which state environmental laws are violated could lead to illogical results if the cost of compliance is greater than available funds:

"In some cases, a strict application of the *Midlantic* holding is not practical, or even possible. For example, in a Chapter 7 no-asset case the trustee is rendered helpless. On the one hand, the trustee has no funds—secured or unsecured—to pay for the hazardous waste cleanup. On the other hand, the court cannot authorize an abandonment under § 554(a) if it would contravene state environmental laws. The ironic quirk in a strict application of *Midlantic* is that the property would ultimately be abandoned by default pursuant to 11 U.S.C. § 554(c) . . . . Because a strict application of *Midlantic* would simply side-step the problem, it is entirely logical to conclude that the majority did not intend such a result." *Id.* at 272 n.5 (citation omitted).

146. The court elaborated:

Even though the drums are in a deteriorating condition, they are not a threat to public safety. The State of Wisconsin has been informed of the situation from the outset, and has not found it necessary to take any further precautionary measures. Even if *Midlantic* dictates complete compliance with state law, the trustee would not have the requisite funds. The estate currently has $10,000 in unencumbered cash. The trustee already has spent $500 of estate funds for the environmental report, and it would cost approximately $20,000 for the initial cleanup. Under the circumstances, an abandonment is appropriate.

*Id.* at 274.

147. *In re Smith-Douglass*, Inc., 856 F.2d 12, 17 (4th Cir. 1988); see also supra note 141. The court in *In re Oklahoma Ref. Co.*, 63 B.R. 562 (Bankr. W.D. Okla. 1986) rejected a strict reading of *Midlantic* and professed the bankruptcy court need only "take environmental laws and regulations into consideration." *Id.* at 565.
the trustee to unconditionally abandon the plant irrespective of the fact that the facility violated state environmental laws and regulations. Moreover, several courts have recognized the futility of administering estates burdened by environmentally contaminated property, thus dismissing the bankruptcy cases due to the estate’s inability to remedy the environmental violations.

On the contrary, not every court disagrees with a strict application of Midlantic. In In re Peerless Plating Co., the bankruptcy court rejected the reasoning of the Franklin Signal decision and held that the trustee could not abandon property with less than full compliance with CERCLA. The court reasoned that a trustee may not abandon a hazardous waste site in violation of an environmental law unless: (1) the environmental law is “so onerous as to interfere with the bankruptcy adjudication itself”; (2) the environ-

148. Smith-Douglass, 856 F.2d at 17. This decision was conditioned by the EPA’s failure to pursue enforcement, indicating the plant did not present any imminent harm or danger to the public. Id. at 16. The court also held the financial condition of the debtor is relevant to the Midlantic analysis as here, the debtor had no unencumbered assets to finance a cleanup. Id. at 17. Another consideration for the Smith-Douglass court was that the polluted property did not pose a serious health risk: “We affirm the finding that unconditional abandonment was appropriate in light of the estate’s lack of unencumbered assets, coupled with the absence of serious public health risks posed by the conditions in this case.” Id. To the extent the court did not have to deal with a situation that posed a serious threat to public health and safety, its application in these types of cases is limited.

149. See In re 82 Milbar Blvd., Inc., 91 B.R. 213 (Bankr. E.D.N.Y. 1988) (denying the trustee’s abandonment request because the estate did not have sufficient funds to effect a cleanup and therefore dismissing the case); In re Commercial Oil Serv., 58 B.R. 311 (Bankr. N.D. Ohio 1986) (dismissing the debtor’s chapter 7 case pursuant to section 707(a)), aff'd 88 B.R. 126 (Bankr. N.D. Ohio 1987); In re Charles George Land Reclamation Trust, 30 B.R. 918 (Bankr. D. Mass 1983) (dismissing the chapter 7 case due to the estate’s inability to remedy ongoing violations of environmental laws.).

150. See In re Wall Tube & Metal Products Co., 831 F.2d 118, 122 (6th Cir. 1987) (holding § 959(b) applies to liquidation trustees and the trustee could not abandon hazardous property in violation of the State’s environmental laws); 82 Milbar Blvd, 91 B.R. at 213 (ordering the trustee to deed property directly to EPA in order to permit EPA to conduct cleanup operations); In re Stevens, 68 B.R. 774, 783-84 (Bankr. D. Me 1987) (flatly refusing abandonment and, in effect, devoting the entirety of bankrupt estate to funding the expense of remediation by granting the government an administration expense priority for response costs); In re Mowbray Eng’g Co., 67 B.R. 34, 35 (Bankr. M.D. Ala. 1986) (holding that the ability of the trustee to abandon property must yield to government priority to use bankrupt estate’s assets for cleanup of property to protect public health and safety).


152. See supra notes 141-46 and accompanying text.


154. Id. at 947. Although the court did not give examples of what conditions would be “so onerous as to interfere with the bankruptcy adjudication itself,” it indicated that asset depletion is not such a condition.
mental law "is not reasonably designed to protect the public health or safety from identified hazards"; or (3) "the violation caused by abandonment would merely be speculative or indeterminate." In addition, the Sixth Circuit has refused to allow abandonment when no responsible party is left to remedy the condition. In In re Wall Tube & Metal Products Co., the Sixth Circuit held that a trustee could not abandon property if abandonment violates a state environmental statute "designed to protect the public health or safety from readily identified hazards."

VI. BANKRUPTCY TRUSTEE PERSONAL LIABILITY

Although no court has held a bankruptcy trustee personally liable for the debtor's environmental cleanup costs, numerous environmental laws may impose personal liability for cleanup costs of preexisting environmental contamination merely on the grounds that the trustee acquired ownership or control of the property. This problem is compounded, from the trustee's perspective, by the Supreme Court's directive in Midlantic. Under Midlantic, a trustee is not permitted to abandon contaminated property unless the property is in compliance with state environmental laws. If the chapter 7 trustee does not have sufficient funds to effect a cleanup of the contaminated property, the trustee will be prohibited from abandoning such property and may be held personally liable for the cleanup.

The standard for liability of a bankruptcy trustee was established by the Supreme Court in Mosser v. Darrow. In Mosser, the Su-

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155. Id.
156. Id.
158. Id. at 122.
159. Although their efforts have failed, state agencies have attempted to hold trustees personally liable. See, e.g., In re Sundance Corp., 149 B.R. 641 (Bankr. E.D. Wash. 1993); In re Better-Brite Plating, 483 N.W.2d 574 (Wis. 1992).
163. 341 U.S. 267 (1951). In Mosser, a bankruptcy trustee was appointed to reorganize two bankrupt trusts consisting of two holding companies holding the securities of twenty-seven corporations. Id. at 268. The trustee employed two persons to manage the holding companies and to trade the securities of the corporations held by the trust. Id. at 269. The two employees made a substantial profit on the trusts by trading to, and for, themselves and the trusts. Id. Although the Court recognized the trustee's actions were not corrupt, it nonetheless held him personally liable for the amount of profits made by the two employees in
preme Court upheld the personal liability of a trustee who deliberately permitted his agents to profit from the trading of securities owned by the bankrupt estate. However, the *Mosser* case subsequently gave rise to a split among the circuits as to the proper standard for bankruptcy trustee liability. In *Sherr v. Winkler*, the Tenth Circuit refused to impose personal liability on a bankruptcy trustee based on negligent acts and held instead that a trustee is personally liable only for acts determined to be "willful and deliberate in violation of [the trustee's] duties." Taking a different position, the Ninth Circuit in *In re Cochise College Park, Inc.*, held that "[a]lthough a trustee is not liable in any manner for mistakes in judgement where discretion is allowed, he is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law." Despite the split among the circuits, a bankruptcy trustee can be held personally liable for intentional and negligent violations of his duties.

**A. Trustee Liability Under Chapter 7**

The potential for personal liability of a bankruptcy trustee in a case involving contaminated property can arise in a number of ways under chapter 7. Potential liability could arise where a chapter 7 trustee was operating the debtor's business, and at the same time generating toxic waste. Unless the trustee properly disposes of the waste he could face liability under CERCLA § 107(a)(3). However, their self-interested transactions. *Id.* at 275. The court stated that "[e]quity tolerates in bankruptcy trustees no interest adverse to the trust." *Id.* at 271.


165. 552 F.2d 1367 (10th Cir. 1977).

166. *Id.* at 1375.

167. 703 F.2d 1339 (9th Cir. 1983).

168. *Id.* at 1357 (citations omitted). The court added that a trustee must "exercise that measure of care and diligence that an ordinary and prudent person under similar circumstances would exercise." *Id.* at 1357. The Second Circuit has adopted the approach developed by the Ninth Circuit. See *In re Gorski*, 766 F.2d 723 (2d Cir. 1985).

169. *In re Center Teleproductions*, 112 B.R. 567, 576 (Bankr. S.D.N.Y. 1990) ("A trustee who negligently fails to discover [his] agent's negligence, negligently obtains [a] court order, or negligently or willfully carries out [a] court order he knew or should have known he wrongfully procured . . . may be held personally liable.").

170. 42 U.S.C. § 9607(a)(3) (1983 & Supp. 1994). Section 107(a)(3) imposes liability on the generators of toxic waste. *Id.* Bankruptcy trustees will not be liable under section 107(a)(1) and 107(a)(2), the "owner and operator" sections, because bankruptcy trustees are exempted from such liability under CERCLA definition of "owner and operator."
er, since the bankruptcy trustee cannot operate the debtor's business without the approval of the bankruptcy court, the extent to which the trustee may be liable will depend on the extent to which the court authorizes the trustee to generate toxic waste. By prohibiting abandonment of contaminated property unless in compliance with state environmental laws, the Supreme Court in *Midlantic* created yet another potential avenue for imposing personal liability on a bankruptcy trustee. Since bankruptcy does not provide a trustee with a safe harbor to abandon contaminated property, that trustee who is forced to continue operating a facility it sought to abandon may find itself saddled with liability. In the precarious situation in which the chapter 7 estate has no available funds to effect a cleanup of the contaminated property, the trustee may be held responsible for the cleanup of hazardous waste.

**B. Personal Liability Following *Midlantic***

Courts interpreting *Midlantic* have articulated that a bankruptcy trustee may be personally liable for the cleanup of hazardous waste.

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*supra* note 1, § 101(20)(A), 42 U.S.C. § 9601(20)(A). Section 101(20)(A) states in pertinent part: "[t]he term 'owner or operator' means . . . (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy . . . to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand." *Id.* Thus, in the case of bankruptcy, the trustee presumably is precluded from being an owner or operator under CERCLA. *Jeffery, supra* note 105, at 421 n.93. *But see In re Peerless Plating Co.*, 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (holding estate would fall within definition of "owner" under CERCLA and be liable for both pre-petition and post-petition cleanup claims); Douglas M. Garrou, *The Potentially Responsible Trustee: Probable Target for CERCLA Liability*, 77 VA. L. REV. 113, 123 (1991) (discussing the innocent landowner defense).

171. 11 U.S.C. § 721 (1993) (The trustee, with permission of the court, may operate debtor's business to the extent necessary to liquidate business.).

172. It is doubtful that a bankruptcy court would hold a trustee personally liable for generating hazardous substances when the bankruptcy court authorized the trustee to do so. *See In re Better-Brite Plating*, 105 B.R. 912 (Bankr. E.D. Wis. 1989). However, if a trustee attempted to generate waste without the permission of the bankruptcy court, personal liability under both CERCLA and common law for willful or negligent violations of his duties may be appropriate.

173. Before a bankruptcy trustee will become personally liable, the chapter 7 estate must have no available source for funds with which to effect a cleanup. This means the estate must have no unencumbered assets and no uncontaminated assets subject to a security interest. If uncontaminated secured assets exist, the trustee could potentially utilize these funds under Code § 363(e) and thus avoid personal liability. *See 11 U.S.C. § 363(e) (1993).*

In *In re 82 Milbar Boulevard, Inc.*[^175] the bankruptcy court for the Eastern District of New York recognized that as a result of the *Midlantic* decision there is the potential for personal liability of a chapter 7 trustee.[^176] The Bankruptcy Court reviewed the *Midlantic* holding and found a flaw in its decision:

> The holding in *Midlantic* implies a duty on the part of the trustee which is independent of the estate's ability to fund his performance of that duty. This decision, evaluated in conjunction with (i) the trustee's capacity to "sue and be sued," and (ii) federal, state and local environmental regulations which do not limit the liability of a trustee in bankruptcy, threatens to undermine the integrity of the system heretofore developed for the administration of bankruptcy cases.[^177]

Concerned that this potential liability would discourage people from becoming bankruptcy trustees,[^178] the court held that the existence in the bankruptcy estate of polluted assets which "present an unreasonable risk of liability to the trustee pursuant to environmental legislation may constitute acceptable cause for resignation of a trustee."[^179]

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[^175]: 91 B.R. 213 (Bankr. E.D.N.Y. 1988). The debtor in *Milbar* was a corporation whose primary asset was a piece of real estate polluted with toxic wastes. *Id.* at 214. The case came before the Bankruptcy Court on a motion by the debtor corporation's trustee to either dismiss the case pursuant to § 305 of the Code, or to authorize the abandonment of all of the debtor's assets. *Id.*

[^176]: Although *Midlantic* did not specifically address personal liability of a trustee, courts have implicitly reasoned that such liability may exist as a result of *Midlantic*. See *Better-Brite Plating*, 105 B.R. at 912; *Microfab*, 105 B.R. at 161; *82 Milbar Blvd.*, 91 B.R. at 213.

[^177]: *82 Milbar Blvd.*, 91 B.R. at 218 (citations omitted); see also *Jeffery*, *supra* note 105 (discussing bankruptcy trustee personal liability).

[^178]: *82 Milbar Blvd.*, 91 B.R. at 219. The *Milbar* court was so concerned with finding trustees would become difficult, that it held the mere presence of a polluted asset was not sufficient cause to dismiss the case under § 707 of the Code. *Id.* at 221. The inability to find a person willing to act as trustee, however, would be cause for such dismissal. *Id.* The court also held that should the trustee in the case resign, and "[i]n the event that no interim or successor trustee is in place as of 30 days from the date of this Memorandum Decision, the absence of an appointed trustee shall be cause for dismissal pursuant to 11 U.S.C. § 707 (a)." *Id.* at 214.

[^179]: *82 Milbar Blvd.*, 91 B.R. at 222. Title to the polluted property was ordered to be kept in the bankruptcy estate with the intention that after cleanup the property would be sold and the proceeds distributed to the creditors of the estate. *Id.* at 220. However, possessory interest in the polluted property was transferred to the EPA. *Id.*
Similarly, in the case of *In re Microfab, Inc.*, the bankruptcy court interpreted the *Midlantic* decision as imposing the potential for personal liability on a trustee. The *Microfab* court, however, avoided imposing liability on the trustee by reading an exception into the *Midlantic* decision. The court found that a paradox was created by the Supreme Court in *Midlantic*. *Midlantic* precludes the trustee from abandoning polluted assets of the estate without first meeting certain federal and state environmental conditions. However, the Court in *Midlantic* failed to articulate or lend any guidance as to what those conditions may be. Realizing the paradox, the Bankruptcy Court responded that a trustee is not obligated to expend assets of the estate to cleanup a site where the estate "does not have sufficient resources to achieve appreciable results." In essence, the exception delineated by the court relieved the trustee of the responsibility of blindly expending all personal and estate assets in a futile cleanup effort.

### C. Dismissal

As a result of the compromising tension between environmental law and the trustee's obligations under the Code, courts and trustees have adopted several approaches for resolving this issue. Probably the safest approach, from the trustee's perspective, would be to get the case dismissed without appointment of a trustee. In *In re Charles George Land Reclamation Trust*, the U.S. Trustee brought an emergency motion for dismissal of a waste disposal facility. The

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180. 105 B.R. 161 (Bankr. D. Mass. 1989). The State of Massachusetts sought an injunction to force the chapter 7 trustee to clean up the contaminated property of the estate. Id. at 162. However, the estate had insufficient funds to clean up the property: $750,000 of unencumbered cash, but an estimated cleanup cost between $1.6 and $1.9 million. Id. at 164.
181. Id. at 168.
182. Id.
185. *Microfab*, 105 B.R. at 166. *But see In re Peerless Plating Co.*, 70 B.R. 943, 948-49 (Bankr. W.D. Mich. 1987) ("As the estate could not avoid the consequent liability by abandonment in this case, the Trustee had a duty to expend all the unencumbered assets of the estate in remedying the situation, as required by *Midlantic*.").
188. Id. at 919.
court noted at the time of the hearing that "it became apparent that the U.S. Trustee would be called upon to serve as chapter 7 trustee of this estate as no member of the panel of private trustees was willing to assume the responsibilities of this estate." As a result, the court dismissed the case because it was impossible for any trustee to manage the debtor's site in compliance with state law and thus meet the requirements of 28 U.S.C. § 959(b).

Similarly, the Bankruptcy Court in Mattiace Industries, Inc. followed the same direction. The court reasoned that "the boundaries of the trustee's duties and scope of liability in this type of case remain potentially unlimited and untested." Relying on the Supreme Court's holding in Midlantic, the court stated that "the trustee has an affirmative duty to clean up the site and comply with State laws." As a result, the court dismissed the debtor's chapter 11 petition rather than converting the case to one under chapter 7 and appointing a trustee.

D. An Envirotek Letter

Another approach for trustees seeking a limit on personal liability is to obtain an "Envirotek" letter from the EPA. In In re Envirotek, Ltd., the U.S. Trustee was unable to find a qualified trustee to administer the debtor's estate. Consequently, the U.S. Trustee's office obtained a letter from the Department of Justice, Land and Natural Resources Division, which stated that "[the] United States will not seek to hold a chapter 7 trustee appointed [in the case] personally liable for any civil claims for hazardous waste cleanup costs so long as the trustee in administering the estate does not act in any manner that causes or contributes to environmental harm." In addition, trustees have attempted to obtain orders from the bankruptcy court relieving the trustee from personal liability. However, it is impor-
tant to recognize that an "Envirotek Letter or consent decree with the EPA does not estop state regulatory agencies which also might have jurisdiction to assert claims against the trustee."

Whatever the result, it remains apparent that courts are struggling to determine the extent of liability incurred by a trustee. What remains clear, however, is the potential for personal liability on a bankruptcy trustee, especially following the limitation on its abandonment powers by the Supreme Court.

E. Public Policy Concerns

There are important public policy concerns which stem from a Midlantic-type situation. The inability of the trustee to abandon a toxic waste site will force the trustee, who in most instances does not have the necessary expertise, to effect a cleanup or to solve complex environmental and scientific questions. Indeed, it makes more sense to impose the duty to clean up the site on the state and federal environmental agencies which have the necessary expertise. Allowing the state and federal agencies to have a "super-priority" lien on the contaminated property would give such agencies the opportunity to recover some cleanup costs before other creditors.

Abuse of the Bankruptcy Code by industrial polluters not only thwarts federal and state policies, but threatens the public welfare. A legislative solution is the proper response. Although the federal bankruptcy law may not be the proper vehicle for direct implementation of environmental protection objectives, Congress has previously been willing to amend the Code to eliminate abuse and accommodate public interests.

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198. Gardner & Sommerville, supra note 196, at 45.
199. See Cosetti & Friedman, supra note 103, at 70.
202. See, e.g., Silber, supra note 111.
203. See NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). In response to the Supreme Court's holding, Congress enacted a limited exception to § 365(a) for union contracts. In Bildisco, the Court allowed the debtor to reject its collective bargaining agreement and continue to operate its business as a debtor in possession. Consequently, congressional and
VII. CONCLUSION

The issues and equities relating to the abandonment of contaminated property have been the subject of a great deal of research and comment.204 As the estate's representative, a trustee205 must achieve an equitable distribution of the estate through liquidation (or, occasionally, a plan of reorganization). To reach this goal, the trustee strives to maximize the value of the estate. While this attempt at maximization often justifies the actual gathering and preservation of the debtor's property, under certain circumstances, the minimal or non-existent value of a particular property would not be enhanced despite the trustee's efforts and the incurrence of the costs arising from his actions. Accordingly, the Code permits the trustee to abandon property that is "burdensome" or of "inconsequential value" to the estate.206 However, a trustee's broad power to abandon property that is burdensome or worthless may be restricted if the abandonment of such property may cause harm to the public health and safety.207 Although the Court appears to have restricted the trustee's abandonment authority, many courts are still puzzled by Midlantic's holding and have been busy distinguishing it ever since.208 Midlantic failed to resolve some issues, many of which were raised by the dissent.

First, the Court acknowledged that it was not addressing the question of whether certain state laws imposing conditions on aban-

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205. See supra notes 79-83 and accompanying text.


208. See supra notes 140-58 and accompanying text.
donment may be so onerous as to interfere with the bankruptcy adjudication itself.\textsuperscript{209} According to the dissent, compliance with states' environmental laws constituted such interference.

Second, the Court failed to clarify whether abandonment itself would be barred if there was a genuine emergency or if abandonment would only "aggravat[e] already existing dangers by halting security measures that prevent public entry, vandalism, and fire."\textsuperscript{210} It is not therefore clear whether the Court intended to require total cleanup as a condition to abandonment, as suggested by the dissent, or merely to take reasonable precautions to alleviate any imminent danger.\textsuperscript{211}

Third, the Court failed "to identify those laws that it deem[ed] so reasonably calculated" to protect the public health or safety from imminent and identifiable harm.\textsuperscript{212} However, even if abandonment to the debtor is permitted, the property reverts with a debtor which lacks assets to fund a cleanup, so the public health or safety is not advanced. Conversely, if abandonment is denied many trustees are hesitant to administer contaminated property for fear of incurring personal liability for failing to comply with cleanup requirements.\textsuperscript{213}

Fourth, the Court left the pragmatic dilemma unresolved: if abandonment is prohibited, how does a trustee, with inadequate resources available in the bankrupt's estate, either bring the property in compliance with applicable environmental laws, or, at a minimum, take reasonable precautions to safeguard the public? At least one court has suggested the property be abandoned to the environmental agency, as a party with a "possessory interest" in the property.\textsuperscript{214} "Once the agency performs cleanup, the property can be sold and the agency can recoup its costs from the sales proceeds."\textsuperscript{215}

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\textsuperscript{209} Midlantic, 474 U.S. at 507.
\textsuperscript{210} Id. at 499 n.3.
\textsuperscript{211} Id. at 515-16.
\textsuperscript{212} Id. at 516.
\textsuperscript{213} See supra notes 159-86 and accompanying text.
\textsuperscript{214} In In re 82 Milbar Blvd., Inc., 91 B.R. 213 (Bankr. E.D.N.Y. 1988), the court entered an order directing conveyance of the estate's possessory interest in the property to the EPA. By conveying a possessory interest to the EPA, the "EPA could carry out its mandate under CERCLA." Id. at 220. It should be recognized that the order avoided costly and time consuming litigation to facilitate cleanup, did not favor the EPA over other creditors, and left the public safety and welfare at no greater risk upon dismissal.
Since *Midlantic*, the majority of courts that have addressed this dilemma have permitted abandonment if there is no threat of imminent and identifiable harm to the public health and safety, or if reasonable safeguards are taken to minimize imminent threat. 216 A minority of courts have interpreted *Midlantic* strictly and expansively, thus prohibiting abandonment of contaminated property if abandonment would result in a continuing violation of state environmental laws. 217 These courts have failed to analyze the degree and type of harm, or the imminence of the danger to the public. Contrary to the Fourth Circuit in *Smith-Douglass*, recent cases have held that even if there are unencumbered assets available to cleanup property, abandonment should be permitted under *Midlantic* if no imminent harm is threatened, without also requiring the expenditure of unencumbered funds to remedy the contamination. 218

Currently, courts are dealing with the problem of trustee liability in various ways. 219 While some courts have chosen to ignore the issue, 220 other courts have attempted to reconcile the competing concerns of the Code with federal and state environmental laws. 221 However, in the midst of this conflict, what remains are inconclusive and unpersuasive decisions by courts attempting to make sense of the Supreme Court’s decision in *Midlantic*. Until Congress amends § 554 of the Bankruptcy Code to expressly prohibit or somehow limit abandonment of contaminated property, the bankruptcy courts will continue to struggle with how to condition abandonment to protect the public while preventing the diminution of the estate’s assets and fostering reorganization.

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216. See supra notes 140-49 and accompanying text.
217. See supra notes 150-58 and accompanying text.
For a discussion relating to the different interpretations among the courts with respect to trustee personal liability, see supra notes 175-86 and accompanying text.
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