



1988

Casenotes: Bankruptcy — Trustee May Not Abandon Property in Contravention of a State Statute or Regulation That Is Designed to Protect the Public from Identified Hazards. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986)

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Recommended Citation

Margulies, Laura Jacobs (1988) "Casenotes: Bankruptcy — Trustee May Not Abandon Property in Contravention of a State Statute or Regulation That Is Designed to Protect the Public from Identified Hazards. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986)," *University of Baltimore Law Review*: Vol. 17: Iss. 3, Article 7.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol17/iss3/7>

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CASENOTES

BANKRUPTCY — TRUSTEE MAY NOT ABANDON PROPERTY IN CONTRAVENTION OF A STATE STATUTE OR REGULATION THAT IS DESIGNED TO PROTECT THE PUBLIC FROM IDENTIFIED HAZARDS. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

A waste oil processing company¹ accepted oil contaminated with toxic carcinogens² in violation of New Jersey's environmental laws.³ The company filed for bankruptcy under a chapter 11 reorganization proceeding, and subsequently converted the reorganization to a chapter 7 liquidation proceeding under the Federal Bankruptcy Code.⁴ The trustee, utilizing the abandonment powers of section 554(a), gave notice of his intention to abandon the contaminated oil.⁵ The state objected, contending that the abandonment would violate state and federal environmental laws, and would pose a threat to public health and safety be-

1. The name of the company is Quanta Resources Corporation ("Quanta"). Quanta was incorporated in Delaware in March 1980. In July of 1980, Quanta entered into an agreement to acquire Edgewater Terminals, Inc., which operated a facility for processing waste oil and oil sludge. Quanta also operated a waste oil processing facility in Long Island City, New York. Brief for Petitioner at 5-6, *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986) (No. 84-801).
2. Quanta was operating the facility under a "Temporary Operating Authorization" ("TOA") issued by the New Jersey Department of Environmental Protection ("NJDEP"). In August of 1980, Quanta received an administrative order from the NJDEP to repair serious maintenance problems. In May of 1981, the NJDEP ordered Quanta to remove all sludge from the site, improve maintenance procedures, and rectify the chronic spills and leaks at the facility. An injunction was also ordered, expressly prohibiting the facility from accepting oil contaminated with polychlorinated biphenyls (PCBs), a toxic carcinogen. A month later, on June 23, 1981, NJDEP investigators tested Quanta's tanks and discovered unlawful concentrations of PCBs. Brief for Respondent at 3-4, *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986) (No. 84-801).
3. The illegal concentration of PCBs in Quanta's tanks was in contravention of the Spill Compensation and Control Act, codified at sections 58:10-23.11 to -23.11z of the New Jersey Statutes Annotated (West 1982 & Supp. 1988) and the Solid Waste Management Act, found at sections 13:1E-1 to -116 of the New Jersey Statutes Annotated (West 1979 & Supp. 1988).

Environmental investigators also found illegal concentrations of toxic waste at the company's Long Island City facility in violation of New York law. This case-note, however, deals primarily with the violations of the New Jersey statutes.

4. On October 6, 1981, Quanta filed a voluntary petition for reorganization under chapter 11 of the Bankruptcy Code. The next day, the NJDEP directed the company to remove all hazardous waste, including all material contaminated with PCBs, and to prepare and execute a closure plan for the facility. One month later, the company converted the reorganization petition to a liquidation proceeding under chapter 7. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 497 (1986).
5. On October 8, 1982, the trustee filed the first of a series of notices proposing the abandonment of the PCB-laden waste oil at the New Jersey facility. Brief for Petitioner, *supra* note 1, at 8. The trustee claimed that the contaminated property was burdensome and of inconsequential value to the estate, and therefore may be abandoned pursuant to section 554(a) of the Bankruptcy Code. *Midlantic*, 474 U.S. at 497; see also 11 U.S.C. § 554(a) (1982).

cause of the uncontrolled toxic chemical discharge leaking out of the tanks.⁶ The bankruptcy court permitted the abandonment and the federal district court affirmed.⁷ The Court of Appeals for the Third Circuit reversed the district court's ruling.⁸ On certiorari, the Supreme Court affirmed the Third Circuit's ruling and held that a trustee in a chapter 7 liquidation proceeding may not abandon hazardous waste if doing so violates a state environmental law.⁹

Proper disposal of hazardous waste is a relatively recent concern.¹⁰ Chemical and waste industries produce an overwhelming quantity of toxic waste each year.¹¹ There are approximately 28,000 abandoned toxic waste sites in the United States¹² that present a variety of hazards,¹³ and are very expensive to clean up.¹⁴ To combat this crisis, the states and the federal government have enacted legislation to control the dump-

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6. *In re Quanta Resources Corp.*, 739 F.2d 912, 924 (1984); see *infra* notes 14-15 (federal statutes regarding hazardous waste).
 7. *In re Quanta Resources Corp.*, 55 Bankr. 696 (Bankr. D.N.J. 1983), *aff'd*, 739 F.2d 912 (3d Cir. 1984).
 8. *In re Quanta*, 739 F.2d at 921-22. Midlantic National Bank ("Midlantic"), Quanta's largest creditor, appealed the decision of the court of appeals to the Supreme Court. On June 3, 1981, five days after receiving its TOA from the NJDEP, Quanta borrowed \$600,000 from Midlantic for working capital. Quanta executed and perfected a note and a security agreement with Midlantic granting them a security interest in Quanta's inventory, accounts receivable and several items of equipment. Brief for Petitioner, *supra* note 1, at 6. Midlantic argued that implementation of the Third Circuit's decision would force the trustee to use all of the company's assets to clean up the hazardous waste site, leaving nothing for its secured creditors. *Id.* at 15.
 9. *Midlantic*, 474 U.S. at 507.
 10. See Davis, *Discouraging Dumping: The California Example*, in BEYOND DUMPING: NEW STRATEGIES FOR CONTROLLING TOXIC CONTAMINATION 71 (B. Piasecki ed. 1984). In the past, American industry has put their lead, mercury, chlorinated hydrocarbons, PCBs and other poisons into the ground without consideration of its future impact. See Piasecki, *Beyond Dumping: An Overview and Introduction*, in BEYOND DUMPING, *supra*, at xiii.
 11. Two hundred and seventy-five million metric tons of toxic waste are produced annually. Telephone interview with Robin Woods, Spokeswoman of the Environmental Protection Agency Press Office (Feb. 3, 1988).
 12. *Id.*; see also U.S. GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE, ENVIRONMENTAL SAFEGUARDS JEOPARDIZED WHEN FACILITIES CEASE OPERATING 18 (1986) [hereinafter "U.S. GENERAL ACCOUNTING OFFICE"].
 13. S. EPSTEIN, L. BROWN & C. POPE, HAZARDOUS WASTE IN AMERICA 26-27 (1984). Hazards presented by these toxic wastes include contamination of soil and ground water, destruction of indigenous plant and animal habitats, air-pollution, fires, and a variety of human health problems, such as kidney and respiratory diseases.
 14. *Midlantic*, 474 U.S. at 498. New York State spent approximately 2.5 million dollars to clean up and restore Quanta's site located in Long Island City, New York. The Environmental Protection Agency ("EPA") estimates that cleanup costs will range between 2 million and 4 million dollars per land disposal facility under the Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1982)), amended by The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified at 42 U.S.C. §§ 6901-6991i (Supp. IV 1986)). See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 12; Cosetti & Friedman, *Midlantic National Bank, Kovacs, and Penn Terra: The Bankruptcy Code and State Environmental Law—Perceived Conflicts and*

ing of hazardous waste.¹⁵ The common purpose of these laws and regulations is to place the liability for cleaning up the hazardous waste on the party responsible for creating or contributing to the hazard.¹⁶ Some companies, however, have attempted to escape their financial responsibility for hazardous waste clean up by taking advantage of bankruptcy laws which allow a trustee to abandon property of inconsequential value.¹⁷

The law of bankruptcy consists primarily of federal bankruptcy acts and statutes.¹⁸ Prior to 1978,¹⁹ the main source of bankruptcy law was the Bankruptcy Act of 1898 (the "Act").²⁰ The Act provided several methods for relieving a debtor of his financial liability. The debtor could liquidate his remaining assets and distribute them on an equitable basis to his creditors, thereby relieving himself of further liability, or he had the option of extending these debts over a period of time.²¹ If the debtor chose a liquidation proceeding, a trustee was appointed to administer his

Options for the Trustee and State Environmental Agencies, 7 J.L. & COM. 65, 68 (1987).

15. The public outcry over these toxic waste disposal hazards has spurred governmental action. The states, in exercising their broad police powers, enacted the first statutes dealing with hazardous waste. The states applied their police power to prevent the serious threat to the public health posed by environmental poisons, such as toxic waste. *See, e.g.*, CAL. HEALTH AND SAFETY CODE §§ 25100-25249 (West 1984); MD. NAT. RES. CODE ANN. §§ 1-301 to -305 (1983 & Supp. 1988); N.J. STAT. ANN. 13:1E-1 to -116 (West 1979 & Supp. 1988); *Id.* §§ 58:10-23.11 to -23.11z (West 1982 & Supp. 1988); N.Y. ENVTL. CONSERV. LAW §§ 27-900 to -923 (McKinney 1984).
- The devastating ramifications of the toxic waste problem also compelled the federal government to act. Congress, under its commerce clause powers in the United States Constitution art. I, § 8, cl. 3, enacted legislation concerning hazardous waste pollution, its regulation, cleanup and cost. *See, e.g.*, RCRA, *supra* note 14; Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2629 (1982)). Congress has allocated 8.5 billion dollars to clean up all these hazardous waste sites. *See* The Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986)).
16. *See supra* notes 14-15.
17. *See* Klein, *Hazardous Waste Liability and the Bankruptcy Code*, 10 HARV. ENVTL. L. REV. 533 (1986); Note, *Creditors' Rights When Federal Bankruptcy Laws Conflict with State Environmental Agency Enforcement Powers After Midlantic National Bank*, 48 U. PITT. L. REV. 879 (1987). As of August 1985, it was estimated that 74 hazardous waste facilities had filed for bankruptcy. *See Midlantic*, 474 U.S. at 498; U.S. GENERAL ACCOUNTING OFFICE, *supra* note 12; 4 L. KING, COLLIER ON BANKRUPTCY ¶ 554.01 (15th ed. 1984); *see also* *Mason v. Comm'r*, 646 F.2d 1309, 1310 (9th Cir. 1980).
18. 1 W. NORTON, NORTON BANKRUPTCY LAW AND PRACTICE § 1.02, at 1-3 to 1-6 (Supp. 1982).
19. In 1978, Congress enacted a new Bankruptcy Code. *See* The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1986)).
20. Act of July 1, 1898, ch. 541, 30 Stat. 544 (*repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1986))); *see also* 1 W. NORTON, *supra* note 18, § 2.01, at 2-1. The purpose of the Bankruptcy Act of 1898 was to relieve the honest debtor from the weight of oppressive indebtedness and permit him a fresh start. *Id.* at 2-2.
21. 1 W. NORTON, *supra* note 18, § 1.03, at 11-7 to -8.

estate.²² The trustee would then convert the debtor's assets to money as expeditiously as possible in order to secure funds for distribution to the debtor's creditors.²³

The 1898 Act contained no specific provision governing the abandonment of property from the debtor's estate.²⁴ Nevertheless, the courts did permit a trustee to abandon property because the courts found the abandonment of property by the trustee analogous to the trustee's power to reject executory contracts under section 70b of the Act.²⁵ This common law rule allowed the bankruptcy court, when satisfied that certain property in the estate would not yield any benefit to the general estate because it was either worthless or overburdened, to permit the trustee to abandon the property.²⁶

The trustee's ability to abandon worthless or overburdened property, however, was not unlimited. The courts would not allow a trustee to abandon property when the abandonment would violate state or federal regulations.²⁷ For example, in *In re Chicago Rapid Transit Co.*,²⁸ the Court of Appeals for the Seventh Circuit decided that the trustee in bankruptcy could not abandon a leased branch rail line operating at a substantial loss because a state law required operations to continue.²⁹ Similarly, in *Ottenheimer v. Whitaker*,³⁰ the Court of Appeals for the Fourth Circuit denied a trustee permission to abandon worthless floating

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22. Act of July 1, 1898, ch. 541, § 44, 30 Stat. 544, 557 (*repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1986))); *see* H. BLACK, BLACK ON BANKRUPTCY, §§ 91, 98 (1924).
 23. Act of July 1, 1898, ch. 541, § 47, 30 Stat. 544, 557 (*repealed by* Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1986))); *see* H. BLACK, *supra* note 22, § 180; 4 L. KING, *supra* note 17, ¶ 554.01, at 554-3. Initially, all property of the debtor became property of the estate, but the Act provided that the debtor could apply state law to exempt certain property. Therefore, such property reverted back to the debtor. *See* *Brown v. O'Keefe*, 300 U.S. 598 (1937); *Rosenblum v. Dinfelder*, 111 F.2d 406 (2d Cir. 1940); 1 W. NORTON, *supra* note 18, § 1.03, at 1-7.
 24. Abandonment is defined as the exclusion of property previously included in the debtor's estate. 2 W. NORTON, *supra* note 18, § 39.01, at 39-1 (citing *Brown v. O'Keefe*, 300 U.S. 598 (1937)).
 25. 4 L. KING, *supra* note 17, ¶ 554.01, at 554-2; H. BLACK, *supra* note 22, §§ 189-90.
 26. *See, e.g.*, *Brown v. O'Keefe*, 300 U.S. 598, 602 (1937); *First Nat'l Bank v. Lasater*, 196 U.S. 115, 118 (1905); *Stanolind Oil & Gas Co. v. Logan*, 92 F.2d 28 (5th Cir. 1937), *cert. denied*, 302 U.S. 763, 303 U.S. 636 (1938); *Lincoln Nat'l Life Ins. Co. v. Scales*, 62 F.2d 582, 585 (5th Cir. 1933); *In re Yalden*, 109 F. Supp. 603, 604 (D. Mass. 1953).
 27. *See, e.g.*, *Midlantic*, 474 U.S. at 500; *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952); *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942); *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. (CRR) 277 (Bankr. E.D. Pa. 1974); 4A L. KING, COLLIER ON BANKRUPTCY ¶ 70.42[2] (14th ed. 1978); *see supra* note 15 (state and federal regulations).
 28. 129 F.2d 1, 6 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942).
 29. *Id.* at 5. Nevertheless, the court did authorize the estate to reject the lease. *Id.* at 9. Thus, although the trustee was required to continue operations, insuring compliance with state law, he was free from the obligation to pay rent. *Id.*
 30. 198 F.2d 289 (4th Cir. 1952).

barges because the proposed abandonment would violate the federal law that made the obstruction of navigable waters illegal.³¹ The court held that federal law preempted the judicially created abandonment rule.³² Finally, in *In re Lewis Jones, Inc.*,³³ a bankruptcy court issued an advisory opinion that permitted the trustees to abandon certain property only on the condition that the trustees first use the assets of the estate to repair the potentially hazardous condition in order to protect the public.³⁴

In 1978, Congress repealed the Bankruptcy Act of 1898 and enacted the Bankruptcy Reform Act of 1978 (the "Code"),³⁵ which included a provision allowing a trustee to abandon property.³⁶ Under section 554(a) of the Code, a trustee, with court approval, may abandon any property found to be burdensome or of inconsequential value to the estate.³⁷ This new statute contains no qualifications or limitations on the trustee's abandonment power, and thus fails to address environmental concerns. As a result, in a majority of decisions following the enactment of this section, the trustees were permitted to abandon any burdensome property of the estate, including property containing hazardous waste.³⁸

31. *Id.* at 290; see also 33 U.S.C. §§ 409, 411 (1982).

32. *Ottenheimer*, 198 F.2d at 290. The court agreed with the debtor that the cost of removing the barges would exceed the barges' value. Nevertheless, the court denied the trustee permission to abandon them and directed him to remove them.

33. 1 Bankr. Ct. Dec. (CRR) 277 (Bankr. E.D. Pa. 1974). In this case the trustee of a bankrupt utility company sought instruction from the court concerning the possibility of abandoning certain underground manholes, vents and steam pipes that could become hazardous if they remained in their worn-out condition. *Id.* at 278. These structures could be made safe by repairing, filling and sealing, but only at a very substantial cost. *Id.*

34. *Id.* at 280.

35. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1982 & Supp. IV 1988)), repealing Act of July 1, 1898, ch. 541, 30 Stat. 544; see also S. REP. NO. 989, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787; 1 W. NORTON, *supra* note 18, § 3.01, at 3-1. Congress considered this legislation essential due to the vast changes in modern society since 1898, including changes in consumer credit and commercial financing. *Id.* at § 2.01.

36. Section 554(a) of the Bankruptcy Code provides: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a) (1982).

37. *Id.*

38. See, e.g., *In re A & T Trailer Park, Inc.*, 53 Bankr. 144 (Bankr. D. Wyo. 1985) (trustee permitted to abandon waste water treatment facility in contravention of Wyoming state order to repair facility); *In re Catamount Dyers, Inc.*, 50 Bankr. 790, 794-95 (Bankr. D. Vt. 1985) (trustee permitted to abandon various barrels of hazardous waste chemicals in contravention of an order by the Utah EPA to remove them); *In re Stevens*, 53 Bankr. 783 (Bankr. D. Me. 1985) (trustee permitted to abandon 29 barrels of oil contaminated with PCB in contravention of state order to remove them properly); *In re Union Scrap Iron & Metal Co.*, 49 Bankr. 477 (Bankr. D. Minn. 1985) (court approved abandonment of scrap piles over objection of Minnesota Pollution Control Agency because abandoned property was burdensome to the estate). *But cf. In re T.P. Long Chemicals Inc.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985) (trustee could not abandon drums leaking sulfur monochloride, a hazardous substance, since abandonment would violate federal environmental law, the

The Code, however, is not devoid of all references to state or federal environmental laws. For example, the automatic stay provision of the Code³⁹ provides an exception for the enforcement of certain judgments obtained in a governmental agency action or proceeding.⁴⁰ Similarly, government actions to compel compliance with toxic pollution control are not subject to the stay,⁴¹ thus demonstrating that the Bankruptcy Code can be preempted by other laws.⁴²

Another federal law addressing bankruptcy actions, 28 U.S.C. § 959(b), also requires trustees to comply with state environmental laws by requiring a trustee to manage and operate the property in his possession according to state law.⁴³ Traditionally, section 959(b) applied only to chapter 11 reorganization proceedings⁴⁴ and not to chapter 7 liquidation proceedings.⁴⁵ Compliance with state law was required under a

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(a)(2) (1982 & Supp. IV 1986)).

39. 11 U.S.C. § 362 (1982). The automatic stay provision in section 362 grants the debtor immediate temporary relief from his creditors and prevents the dissipation of the estate's assets before an orderly distribution can be made to his creditors. *See, e.g., Penn Terra Ltd. v. Dep't of Envtl. Resources*, 733 F.2d 267, 271 (3d Cir. 1984).

40. Section 362(b)(5) of the Code provides:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78 eee (a)(3)), does not operate as a stay—

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

11 U.S.C. § 362(b)(5) (1982).

41. The legislative history of the Bankruptcy Reform Act of 1978 indicates that Congress did not intend that the automatic stay provision apply when a governmental unit is suing a debtor to halt violation of environmental protection laws. *See S. REP. NO. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5878; H.R. REP. NO. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6299; see also Penn Terra Ltd. v. Dep't of Envtl. Resources*, 733 F.2d 267 (3d Cir. 1984); *Illinois v. Electrical Util.*, 41 Bankr. 874 (N.D. Ill. 1984).

42. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (a debtor may not avoid the provisions of the National Labor Relations Act by filing a petition for bankruptcy).

43. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2667 (codified at 28 U.S.C. § 959(b) (1982)). Section 959(b) provides that a trustee shall "manage and operate the property in his possession . . . according to the requirements of the valid laws of the state." *Id.*

44. *See, e.g., Gillis v. California*, 293 U.S. 62 (1934) (bankruptcy court was powerless to authorize receiver's noncompliance with state licensing statute regardless of consequences for the business); *Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 768-78 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982) (trustee in reorganization who was selling off grain was required to adhere to local licensing regulations).

45. In a chapter 7 liquidation proceeding, the debtor surrenders all non-exempt assets to creditors. The debtor hopes to have the relief of a discharge. The trustee collects the assets, sells them off and distributes the proceeds on a pro rata basis to the creditors. In a chapter 11 reorganization proceeding the debtor does not surrender his assets but attempts to work out an agreement with creditors and interest holders

chapter 11 reorganization proceeding because the business was still functioning in the state and deriving benefits from state laws. Conversely, compliance with state law was not required for a chapter 7 liquidation proceeding because the company had severed its connection with the state, and was no longer operating; it was being dissolved with its assets distributed to its creditors.⁴⁶

The conflict between the judicially created abandonment doctrine and federal laws prescribing the limits of a trustee's power to abandon property has become particularly acute in the area of hazardous waste control. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁴⁷ the Supreme Court attempted to clarify the powers of a trustee to abandon hazardous waste in contravention of state law. In *Midlantic*, the Court held that a trustee in a chapter 7 liquidation proceeding may not abandon hazardous waste material if doing so violates a state environmental law.⁴⁸ Relying on principles of statutory construction, the Court construed section 554(a) of the Bankruptcy Code as incorporating pre-Code case law.⁴⁹ The Court reasoned that when Congress enacted section 554(a), the pre-Code exception was incorporated by implication because the common law provided a restriction on a trustee's power to abandon property in contravention of federal or state law.⁵⁰ Furthermore, the Court concluded that cases decided after the enactment of the Code proved that Congress did not intend to preempt every state law which limited a trustee's powers when it enacted the Code.⁵¹

The Court examined other federal statutes involving bankruptcy,

to remain in business. Either an extension of time to pay in full, an agreement for part payment, termed a composition, or a combination of both is contemplated. 1 D. COWANS, COWANS BANKRUPTCY LAW AND PRACTICE ¶ 3.4 (1987).

46. 7 Pt. 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 66.04(4) (2d ed. 1982); see also *Austrian v. Williams*, 216 F.2d 278, 285 (2d Cir.), cert. denied, 348 U.S. 953 (1954) (the mere collection and liquidation of assets did not constitute the carrying on of a debtor's business); *Missouri*, 647 F.2d at 768-78 (trustee in a chapter 11 proceeding must operate the debtor's grain business in accord with state law as mandated by Code section 959(b)). The court in *Missouri* doubted the applicability of this section to a chapter 7 proceeding. *Id.* at 778 n.18.
47. 474 U.S. 494 (1986).
48. *Id.* at 502.
49. *Id.* at 501. The Court noted that the usual rule of statutory construction requires that Congress, when enacting new legislation, expressly state that the new legislation changes a previously judicially created rule or doctrine. *Id.* (citing *Edmonds v. Campagnie Gen. Transatlantique*, 433 U.S. 256, 266-67 (1979)). The Court cited three cases, *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952), *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), cert. denied, 317 U.S. 683 (1942), and *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. (CRR) 277 (Bankr. E.D. Pa. 1974) as establishing a pre-Code limitation on a trustee's abandonment power. See *supra* notes 27-34 and accompanying text.
50. *Midlantic*, 474 U.S. at 501. The Court reasoned that if Congress intended to alter the common law doctrine and allow a trustee to be exempt from compliance with federal or state law it would have done so explicitly. *Id.* (citing *Palmer v. Massachusetts*, 308 U.S. 79, 85 (1939) and *Swarts v. Hammer*, 194 U.S. 441, 444 (1904)).
51. *Midlantic*, 474 U.S. at 502 (citing *Ohio v. Kovacs*, 469 U.S. 274 (1985) for the principle that a trustee in bankruptcy is required to comply with state environmen-

and concluded that the abandonment provision of the Code was not intended to preempt state and local laws. The Court noted that the automatic stay provision in Code section 362(b)(5) affords state environmental laws great deference by allowing the government to proceed immediately in actions regarding its environmental protection laws.⁵² The Court reasoned that Congress provided a specific exception for abandonments in section 362, but not in section 554, because the two concepts were treated differently in pre-Code judicial rulings.⁵³ The Court explained that section 362 was enacted in response to court decisions which "had stretched the expanded automatic stay to foreclose [s]tates' efforts to enforce their antipollution laws."⁵⁴ Conversely, the Court implied that a similar provision in section 554(a) was unnecessary because courts already required the trustee to comply with state law.⁵⁵

The Court relied on 28 U.S.C. § 959(b) to support its holding.⁵⁶ This statute governs the management of the bankrupt's estate in a reorganization proceeding by requiring a trustee to manage and operate the property in his possession according to the requirements of state law.⁵⁷ The *Midlantic* Court, however, found an implied willingness of Congress to extend the principles found in section 959(b) to liquidation proceedings.⁵⁸

Finally, the Court also found that Congress has repeatedly pro-

tal laws prior to abandonment). The Court in *Midlantic* quoted the following passage from *Kovacs* in support of their reasoning:

Finally, we do not question that anyone in possession of the site - whether it is [the debtor] or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee - must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the state, or refuse to remove the source of such conditions.

Midlantic, 474 U.S. at 502 (quoting *Kovacs*, 469 U.S. at 285) (emphasis added by the *Midlantic* Court). The Court also cited *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), as further proof that a trustee cannot ignore nonbankruptcy law. The *Midlantic* Court relied on a section of *Bildisco* which provided that "[t]he debtor-in-possession is not relieved of all obligations under the [Act] simply by filing a petition for bankruptcy." *Bildisco*, 465 U.S. at 534.

52. *Midlantic*, 474 U.S. at 503-04; see also *supra* notes 40-41.

53. *Midlantic*, 474 U.S. at 504.

54. *Id.*

55. *Id.*

56. *Id.* at 505. For a discussion of section 959(b), see *supra* notes 43-46 and accompanying text.

57. 28 U.S.C. § 959(b) (1982).

58. See *Midlantic*, 474 U.S. at 502 (citing *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985)). In *Kovacs*, the Court held that a state court injunction requiring a debtor to clean up a hazardous waste site was a "debt" subject to discharge under the Bankruptcy Code. After reaching this conclusion, the Court stated that "anyone in possession of the site . . . in the event the receivership is liquidated and the trustee abandons the property . . . the bankruptcy trustee—must comply with environmental laws of the [s]tate of Ohio." *Kovacs*, 469 U.S. at 285.

moted the abatement of toxic pollution in recent legislation.⁵⁹ These acts served as evidence that Congress had not meant, by the unqualified language of section 554(a), to overturn a well established common-law restriction on the abandonment power.⁶⁰ Combining these diverse sources of authority, the Court determined that the trustee could not abandon the company's toxic waste material because it would be a violation of the state's environmental laws designed to protect the public health and safety.⁶¹

Justice Rehnquist strongly dissented.⁶² He criticized the majority's interpretation of the statutes,⁶³ as well as the case law,⁶⁴ and attacked the majority's reliance on 11 U.S.C. § 362 and 28 U.S.C. § 959(b).⁶⁵ Finally, he found the majority's opinion incongruous to the purpose of the Code.⁶⁶

In reaching its decision in *Midlantic*, the Supreme Court sought to uphold the state law protecting public health and safety from "imminent and identifiable hazards,"⁶⁷ because permitting a trustee to abandon such property tends to discourage rather than encourage proper handling of toxic waste.⁶⁸ This holding is policy oriented, and although the policy

59. *Midlantic*, 474 U.S. at 505-06 (citing the following Congressional acts: Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1982)), amended by The Hazardous and Solid Waste Amendment of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified at 42 U.S.C. §§ 6901-6991i (Supp. IV 1986)) and The Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982))).

60. *Midlantic*, 474 U.S. at 506.

61. *Id.*

62. *Id.* at 507-17 (Rehnquist, J., dissenting, joined by Justices White, O'Connor, and Chief Justice Burger).

63. *Id.* at 507-10.

64. *Id.* at 510-13.

65. *Id.* at 513-15.

66. *Id.* at 514-17. Forcing the trustee to expend funds to clean up the property would in effect put the state's claim ahead of other creditors' claims. Justice Rehnquist asserted that Congress did not intend that section 554(a) hearings be used to establish priorities among creditors. *Id.* at 517.

67. *Midlantic*, 474 U.S. at 507 n.9. In footnote 3 the Court noted the serious threat to the public health resulting from the abandonment of the hazardous waste facility. *Id.* at 499 n.3. Specifically, the Court noted that because the trustee was permitted to abandon the property, relatively minor steps were not taken to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents. The trustee further aggravated already existing dangers by halting security measures that had prevented public entry, vandalism, and fire. "The 470,000 gallons of highly toxic and carcinogenic waste oil in unguarded, deteriorating containers 'present[ed] risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact.'" *Id.* (quoting Brief for United States as *Amicus Curiae* at 4, 23, *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986) (No. 84-801)).

68. See Note, *Bankruptcy Trustee's Abandonment of Burdensome Estate Property and State Environmental Protection Laws: Midlantic National Bank v. New Jersey Department of Environmental Protection*, 55 U. CIN. L. REV. 853, 870 (1987).

behind this decision is laudable, it is not one soundly based on either precedent or statutory interpretation.

Midlantic involved a conflict between federal and state law.⁶⁹ The federal law in question permits a trustee in bankruptcy to abandon any type of property that is burdensome or of inconsequential value to the estate, while the applicable state law forbids the abandonment of toxic waste material.⁷⁰ The Court attempted to resolve this apparent conflict between the Code and environmental laws by interpreting section 554(a) as including an exception to abandonment when state law applies.⁷¹ To support this position, the Court cited three cases as establishing a pre-Code judicial doctrine limiting a trustee's abandonment powers.⁷² An analysis of these cases, however, reveals that they do not stand for the Court's proposition. The first case, *Ottenheimer v. Whitaker*,⁷³ involved a conflict between a federal statute and a judge-made rule, whereas *Midlantic* involved a conflict between a federal statute and a state law.⁷⁴ In the next case, *In re Chicago Rapid Transit Co.*,⁷⁵ the court permitted the trustee to abandon property, however, the terms cited by the majority in placing conditions on abandonment are only dicta.⁷⁶ Finally, in *In re Lewis Jones, Inc.*,⁷⁷ a bankruptcy court required the trustee to repair a hazardous condition before abandoning it only because of the judicial nature of the abandonment rule.⁷⁸ In short, these cases do not support the majority's position that an established judicial exception to pre-Code abandonment law exists.⁷⁹ Even assuming they stand for this proposition, three isolated cases do not constitute the sort of settled law that fairly implies Congress intended to adopt the pre-Code judicial rule by a

69. The supremacy clause of the United States Constitution article VI, clause 2 mandates that conflicts between federal and state law be resolved in favor of federal law. It specifically provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

70. See Solid Waste Management Act, N.J. STAT. ANN. §§ 13:1E-1 to -116 (West 1979 & Supp. 1988); Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11 to -23.11z (West 1982 & Supp. 1988); Brief for Respondent at 17-18, *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986) (No. 84-801).

71. *Midlantic*, 474 U.S. at 506-07.

72. *Id.* at 500-01.

73. 198 F.2d 289 (4th Cir. 1952); see *supra* notes 30-32 and accompanying text.

74. *Midlantic*, 474 U.S. at 511 (Rehnquist, J., dissenting).

75. 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942).

76. *Id.* at 5. "Congress has not seen fit to empower bankruptcy courts with jurisdiction to determine the questions which confront state utility commissions in regulating of interstate utilities, such as whether a service should be abandoned or whether public convenience and necessity require continuation." *Id.*

77. 1 Bankr. Ct. Dec. (CRR) 277 (E.D. Pa. 1974).

78. *Id.* at 279-80.

79. *Midlantic*, 474 U.S. at 510 (Rehnquist, J., dissenting).

failure to codify a rule to the contrary.⁸⁰

A second criticism of the Court's analysis relates to its use of statutory construction. The Court reasoned that Congress had incorporated, by implication, the prior case law restricting abandonment when they enacted section 554(a).⁸¹ The plain language of this section, however, is unqualified, indicating that Congress did not contemplate making exceptions to the trustee's rights to abandon burdensome property.⁸² The language of the section clearly states that after notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.⁸³ The purpose of the notice and hearing is to determine whether the property is burdensome or of inconsequential value to the estate.⁸⁴ Therefore, once the notice and hearing requirements are satisfied, the statute provides the trustee the express power to abandon the property without regard to compliance with state or federal environmental laws.⁸⁵

An additional concern involving the Court's interpretation of Code section 554(a) is that the legislative history of this statute does not reveal a congressional intent to incorporate judge-made exceptions to abandonment.⁸⁶ Had Congress intended to restrict a trustee's abandonment power in section 554(a), it could have provided for express exceptions.⁸⁷ For example, unlike section 554, the automatic stay section contains specific exceptions which limit its applicability.⁸⁸ Similarly, section 1170(a)(2) of the Code provides an express exception which limits abandonment.⁸⁹ The lack of such exceptions in section 554(a) implies that Congress did not intend to limit the section's operation.⁹⁰

80. *Id.* at 511-12.

81. *Id.* at 501.

82. *See supra* note 36.

83. *Id.*

84. 11 U.S.C. app. § 6007 (Supp. IV 1986). The Advisory Committee Notes to this rule state that, "pursuant to § 554, the trustee may abandon property but only after notice and hearing." *Id.*

85. These requirements are not difficult to meet, and if the trustee's decision to abandon clearly appears correct, the court may dispense altogether with the notice to creditors. *See* 4 L. KING, *supra* note 17, ¶ 554.02[4]; *see also supra* notes 36-38 and accompanying text. When the language of a statute is clear, its plain meaning should control. *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917).

86. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 377, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6333; S. REP. NO. 989, 95th Cong., 2d Sess. 92, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5878.

87. *Cf. NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Congress knows how to draft an exclusion when it so desires, and its failure to do so indicates that Congress did not intend to provide for one. *Id.* at 522-23; *see also* Paige, *In Re Quanta Resources Corp.: Bankruptcy Policy v. Environmental Interests; A Polluted Judicial Theory*, 59 AM. BANKR. L.J. 357, 365 (1985).

88. *Compare* 11 U.S.C. § 554(a) (1982) *with* 11 U.S.C. § 362(b)(5) (1982).

89. Section 1170 of the Bankruptcy 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).

90. *Midlantic*, 474 U.S. at 510 (Rehnquist, J., dissenting).

The Court found further support for the conclusion that not all state laws are preempted by relying on Bankruptcy Code section 959(b).⁹¹ This section provides that a trustee-in-possession must manage and operate the property according to state law, thereby implying that state law takes precedence over federal law.⁹² Reliance on this section, however, is misplaced. All cases prior to *Midlantic* applied section 959(b) exclusively to chapter 11 reorganization proceedings.⁹³ The duty in section 959(b) applies only to the management and operation of a business in compliance with state law when the trustee is, in fact, managing or operating a business.⁹⁴ In *Midlantic*, the waste processing facility was no longer in operation.⁹⁵ The trustee was not operating or managing the company, but was merely in the process of liquidating and distributing its proceeds.⁹⁶ The Court, while conceding that section 959(b) does not directly apply to abandonment,⁹⁷ nevertheless inferred that section 959(b) may include liquidation proceedings because the court concluded that "Congress did not intend for the Bankruptcy Code to preempt all state laws that otherwise contain the exercise of a trustee's powers."⁹⁸ In effect, however, the Court created an exception to the abandonment rule without evidence that Congress intended there be one.⁹⁹

The practical effect of *Midlantic* will require an insolvent company to expend all its assets to clean up its hazardous waste. A better approach would be to distribute the burden of cleanup equitably between the debtor and the government. Although not specifically provided for in Code section 554(a), a balancing approach in a chapter 7 liquidation proceeding is appropriate because the substantial interests of an estate to excise burdensome property could be weighed against any competing public health and safety interests. This would allow a court to determine the most fair and reasonable result.¹⁰⁰ This approach would require a court to weigh the following considerations: The imminence of danger to public health and safety; the extent of the possible harm to soil and water contamination; the amount and type of hazardous waste; the cost of

91. *Id.* at 505.

92. *See supra* note 43. A trustee-in-possession is one who is in control of the debtor's estate.

93. *See supra* notes 44-46 and accompanying text.

94. In *In re Charles George Land Reclamation Trust*, the bankruptcy court wanted the trustee to comply with state cleanup efforts, pursuant to Code section 959(b), and therefore refused to allow the waste disposal company to convert its chapter 11 proceeding to a chapter 7 proceeding. 30 Bankr. 918, 923 (Bankr. D. Mass. 1983).

95. *Midlantic*, 474 U.S. at 497.

96. *Id.*

97. *Id.* at 505.

98. *Id.*

99. *Id.* at 510 (Rehnquist, J., dissenting).

100. *Id.* Under section 105 of the Bankruptcy Code, 11 U.S.C. § 105 (Supp. IV 1986), a bankruptcy court has broad equitable powers to issue any appropriate order or judgment. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *see also SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940) (applying provisions of 1898 Act).

bringing the property into compliance with environmental laws; and finally, the amount and type of funds available for clean up.¹⁰¹ If a balancing approach is adopted by the court, the trustee could abandon the property on condition he take certain steps to clean up the site. For example, some of the assets of the estate could be directed to this purpose. Accordingly, this approach would promote the environmental interests of the states as well as preserve some assets of the estate for distribution to deserving creditors.

The potential impact of *Midlantic*, requiring a bankrupt estate to expend its remaining assets cleaning up its hazardous waste, has been diminished by subsequent cases that have permitted abandonment of hazardous waste by construing the *Midlantic* holding narrowly and distinguishing its facts.¹⁰² The result in *Midlantic*, however, may still have an impact on the business community.¹⁰³ Companies handling toxic waste may have difficulty in obtaining credit from banking institutions,¹⁰⁴ or they may have to pay higher rates of interest to compensate the creditor for its increased risk.¹⁰⁵ The issue then becomes whether the cost of doing business for these types of companies will exceed the returns, which may result in a greater number of these companies going bankrupt.¹⁰⁶ Furthermore, prior to *Midlantic*, secured creditors' claims were protected because they were the first in line to collect their debts.¹⁰⁷ Now, because *Midlantic* limits a trustee's abandonment power, the estate may have to use its assets to clean up property laden with hazardous waste prior to abandonment, thereby reducing the value of the secured creditors' interests.¹⁰⁸ This result may leave an unsuspecting creditor

101. See, e.g., *In re Purco, Inc.*, 76 Bankr. 523, 533 (Bankr. W.D. Pa. 1987); *In re Franklin Signal Corp.*, 65 Bankr. 268, 272 (Bankr. D. Minn. 1986); see also Buschman & Joyce, *The Impact of the Bankruptcy Code on Environmental Disputes*, A.L.I.-A.B.A. COURSE MATERIALS 105 (1987).

102. See, e.g., *In re Smith-Douglass, Inc.*, 75 Bankr. 994 (Bankr. E.D.N.C. 1987) (trustee permitted to abandon property with environmental problems because it did not present any imminent identifiable harm to the public health and safety); *In re Oklahoma Refining Co.*, 63 Bankr. 562 (Bankr. W.D. Okla. 1986) (trustee permitted to abandon hazardous waste property because the trustee had taken substantial steps to alleviate additional environmental hazards and was in compliance with the state cleanup orders, and there was no immediate harm to the public health); *In re Franklin Signal Corp.*, 65 Bankr. 268 (Bankr. D. Minn. 1986) (trustee was permitted to abandon 14 drums of hazardous waste because there was no imminent danger to public health and the amount of hazardous material was relatively small compared with the high cost of compliance with environmental law).

103. See *supra* note 102.

104. Shanker, *Bankruptcy Superfund For Some Super Creditors From Ohio to Midlantic and Beyond*, 61 AM. BANKR. L.J. 185, 186 (1987).

105. *Id.*

106. A recent EPA study concluded that over the next 50 years, 25% to 30% of the firms owning disposal facilities will petition for bankruptcy. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 12.

107. See 11 U.S.C. § 506 (1982) (secured interests under state law); 11 U.S.C. § 507 (1982) (list of priorities).

108. The trustee who now has responsibility for attempting to cleanup the site will be forced to use the company's funds to accomplish this task. As the company is insol-

with the real burden of paying for the hazardous waste clean up.¹⁰⁹

The recent Supreme Court decision in *Midlantic National Bank v. New Jersey Department of Environmental Protection* qualified section 554(a) of the Bankruptcy Code by refusing to allow a trustee in bankruptcy to abandon certain hazardous waste material because such abandonment would violate state environmental laws. Although the environmental concerns in denying abandonment were compelling, the language of the abandonment statute does not support this result. The optimal solution to this conflict is an equitable test that balances the interests of the creditors of the estate against the environmental concerns resulting from a proposed abandonment.

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vent, the only available funds will be those held by the secured and unsecured creditors. See Buschman & Joyce, *supra* note 101, at 103.

109. The extent to which a trustee may recover cleanup costs from secured creditors holding a security interest in hazardous property is found in section 506(c) of the Bankruptcy Code, which provides:

(c) the trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 U.S.C. § 506(c) (1982).