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Bankruptcy Law; Environmental Law: Abandonment of Hazardous Waste Sites in Bankruptcy

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CASENOTE

BANKRUPTCY LAW; ENVIRONMENTAL LAW: ABANDONMENT OF HAZARDOUS WASTE SITES IN BANKRUPTCY—*In re Oklahoma Refining Co.*, 63 Bankr. 562 (Bankr. W.D. Okla. 1986).

I. INTRODUCTION

Under section 554 of the Bankruptcy Code,[1] the bankruptcy trustee may abandon real estate or other property that is "burdensome" or "of inconsequential value and benefit" to the estate. Some businesses facing serious costs to clean up hazardous waste site have looked to this provision as an "escape route . . . to evade their public responsibilities to clean up the environment."[2] However, nothing in the abandonment statute itself permits bankruptcy courts to consider such "public responsibilities."

In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[3] the Court seemed to supplement the criteria for abandonment provided in section 554 with its own view of proper public policy, concluding that "[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety."[4] Recently, in *In re Oklahoma Refining Co.*[5] a bankruptcy court for the first time

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1. 11 U.S.C. § 554 (Supp. IV 1986). The section reads:

(a) 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.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate

2. Drabkin, Moorman & Kirsch, *Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor*, 15 ENVTL. L. REP. 10,168, 10,168 (Envtl. L. Inst. 1985).

3. 106 S. Ct. 755 (interim ed. 1986).

4. *Id.* at 762.

5. 63 Bankr. 562 (Bankr. W.D. Okla. 1986).

applied *Midlantic*, reading that case's ruling very narrowly to permit abandonment of contaminated real estate.[6]

This casenote examines the facts and holding of *Oklahoma Refining*, discusses pertinent background information and case law, and analyzes the bankruptcy court's rationale for its decision. In addition, the casenote questions the bankruptcy court's reliance on and interpretation of two phrases drawn from the *Midlantic* decision, addresses alternative approaches to the problem of abandoning hazardous waste sites in bankruptcy, and examines the issue of who is responsible for cleanup costs.

II. STATEMENT OF FACTS AND HOLDING

In *In re Oklahoma Refining Co.*,[7] abandonment was sought for a refinery which had been in operation for fifty-nine years prior to its acquisition by the debtor and for six years thereafter.[8] The trustee's reason for abandoning the property was its contamination after sixty-five years of crude oil refining without any environmental repair.[9] The consulting firm hired by the trustee to analyze the extent of the environmental problems at the site confirmed that extensive contamination had occurred over the years and detailed the environmental conditions surrounding the refinery in a document called the "Stanley Report."[10]

The report focused on potential health and safety problems attributed to the site, particularly the leaching of noxious substances into an underground aquifer which ultimately provided water for public consumption and recreation.[11] Notwithstanding the fact that no toxic substances were found in the town's water supply or private wells, a toxicologist noted "that in his opinion something 'bad' will eventually happen, the only question being whether that will occur in the near future or 25 years hence."[12]

In an effort to meet with clean-up demands made by the Oklahoma Water Resources Board, the trustee expended approximately $275,000 after obtaining the consent of the holders of secured

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6. *Id.* at 565–66.

7. 63 Bankr. 562 (Bankr. W.D. Okla. 1986).

8. *Id.*

9. *Id.* at 563.

10. *Id.* at 564.

11. *Id.* The court notes that for some twenty-five years ending in 1965, spent acid and caustic materials were discarded in pits near Gladys Creek, is a tributary of other streams which provide water for public consumption and recreation for the town of Cyril. The concern was that these discarded toxic materials would eventually leak into that water supply and require extensive cleanup. *Id.*

12. *Id.* at 564.

claims.[13] Despite further demands by the state agency, no further clean-up was conducted because the holders of secured claims refused to allow further expenditures of the cash collateral.[14]

Unable to procure additional funds, the trustee moved for an order permitting abandonment of the real estate pursuant to section 554(a) of the Bankruptcy Code.[15] Undisputed evidence demonstrated that the property was burdensome and of inconsequential or no value to the estate.[16] Thus, the motion to abandon apparently fell within the plain and ordinary meaning of section 554(a). Nonetheless, the Oklahoma Water Resources Board and the Oklahoma State Department of Health argued that abandonment would violate State health laws and would contravene the Supreme Court's decision in *Midlantic National Bank v. New Jersey Department of Environmental Protection.*[17]

In ruling on the motion, the bankruptcy court faced a dilemma: while a strict reading of *Midlantic* required the trustee to comply with state environmental laws and regulations by cleaning up the site, no property of the estate was available to fund such a clean up because all property was subject to the higher priority interest of the secured creditors.

To resolve the problem, the bankruptcy court agreed that *Midlantic* was the controlling law, but found the instant case factually distinguishable. The court stated that "*Midlantic* requires the bankruptcy court, in determining whether to permit abandonment, take [sic] state and environmental laws and regulations into consideration,"[18] but held that courts were not required to follow such laws and regulations automatically.

Holding that the pertinent state environmental laws and regulations[19] were not sufficient to outweigh the federal interest in prompt and effectual administration of the bankruptcy estate, the court found that the real estate surrounding the Oklahoma Refining plant did not present an immediate and menacing harm to public safety.[20] Nor did

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13. *Id.* at 564; *see also* 11 U.S.C. § 363(c)(2)(A) (Supp. IV 1986) (requiring consent of the holders of secured claims before the trustee can use cash collateral).

14. 11 U.S.C § 363(c)(2)(A) (1982).

15. *Id.* § 554(a) (Supp. IV 1986) (abandonment of property of the estate by trustee).

16. The testimony indicates the land sought to be abandoned would be worth approximately $100,000 if it were cleaned up and restored for farming purposes. The cleanup, however, would cost a minimum of $2,500,000 and require up to 30 years of monitoring and additional clean up operations. *Oklahoma Refining,* 63 Bankr. at 564.

17. 106 S. Ct. 755 (interim ed. 1986).

18. *Oklahoma Refining,* 63 Bankr. at 565.

19. The environmental agencies alleged that Oklahoma Refining Company violated OKLA. STAT. tit. 50, § 5 (1981)); *id.* tit. 82, § 926.4(B) (Supp. 1987); *id.* tit. 63, § 1-2009 (Supp. 1987), as well as three state agency regulations. *See Oklahoma Refining,* 63 Bankr. at 564.

20. *Oklahoma Refining,* 63 Bankr. at 565.

the condition of the real estate "aggravate the existing situation, create a genuine emergency [or] increase the likelihood of a disaster or [intensify the] polluting agents."[21] The court pointed out that strict compliance with Oklahoma environmental laws under the facts of *Oklahoma Refining* "could create a bankruptcy case in perpetuity and fetter the estate to a situation without resolve."[22] Noting that the trustee, with the consent of the secured creditors, did what was reasonable under the circumstances of the case, the court granted the trustee's motion to abandon.[23]

III. BACKGROUND

A. Quanta Resources

The Supreme Court's decision in *Midlantic National Bank v. New Jersey Department of Environmental Protection*[24] evolved from a bankruptcy proceeding involving Quanta Resources, a waste processing corporation with facilities in New York and New Jersey.[25] Faced with a both $2,500,000 cleanup charge on its New York facility[26] and a costly administrative order applying to its New Jersey site,[27] Quanta filed for reorganization under Chapter Eleven of the Bankruptcy Code, subsequently converting to liquidation proceedings under Chapter Seven.

Unable to sell the New York property, the trustee notified creditors and the bankruptcy court of his intent to abandon the property pursuant to section 554(a).[28] State and local governments objected, contending that abandonment would violate state and federal laws enacted to protect the public's health and safety.[29] Notwithstanding the objection, the bankruptcy court approved abandonment, noting that the state and local governments would be in a better position to execute the

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21. *Id.*
22. *Id.*
23. *Id.* at 566.
24. 106 S. Ct. 755 (interim ed. 1986).
25. *See* City of New York v. Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984) [hereinafter *Quanta I*], *aff'd sub nom.* O'Neill v. New York, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-805); *In re* Quanta Resources Corp., 739 F.2d 927 (3d Cir. 1984) [hereinafter *Quanta II*], *rev'd sub nom.* Midlantic Nat'l Bank v. New Jersey Dept. of Envt'l Prot., 106 S. Ct. 755 (interim ed. 1986).
26. The facility in Long Island City, New York contained "over 500,000 gallons of waste oil and other chemicals, of which at least 70,000 gallons were contaminated with polychlorinated biphenyls (PCBs), a toxic and dangerous substance." *Quanta I*, 739 F.2d at 913.
27. The Edgewater, New Jersey site was also found to contain oil contaminated with PCBs and the New Jersey Department of Environmental Protection demanded the Quanta close its New Jersey facility and clean up all hazardous materials. *See Quanta II*, 739 F.2d at 928.
28. *Quanta I*, 739 F.2d at 914 & n. 3.
29. *Id.* at 914.

clean up.[30] An affirmance by the district court was appealed to the Court of Appeals for the Third Circuit.[31]

Following the district court's approval of the New York abandonment, the trustee notified the creditors and the bankruptcy court of his intent to abandon property at the New Jersey site consisting principally of contaminated oil.[32] The New Jersey Department of Environmental Protection (NJDEP) objected, but the bankruptcy court again approved the abandonment.[33] At this point, all parties consented to a direct appeal by NJDEP from the Bankruptcy Court to the Third Circuit.[34]

Reasoning that "Congress did not intend the bankruptcy scheme generally to abrogate the enforcement of state police power regulations,"[35] the Third Circuit reversed the lower court decisions permitting abandonment. The court noted that the federal bankruptcy law is "supreme only if those principles demand that the state police powers be suspended to the extent they interfere with the liquidation of the estate."[36]

The court then balanced the state and federal policies, concluding that abandonment of Quanta's contaminated property by the trustee contravened applicable law and "did so not merely technically, but with severely deleterious implications for the public safety."[37] Attributing great weight to the state's interest in enforcing its environmental policies, the court held that federal bankruptcy interests could not override the state's interest in enhancing public health and safety and reversed the lower court decision.[38]

B. Midlantic

The United States Supreme Court granted certiorari and consolidated the two cases in *Midlantic* to determine "whether a trustee may abandon property under § 554 in contravention of local laws designed to protect the public's health and safety."[39]

In a five to four decision, the Supreme Court affirmed the appellate court decision, concluding that Congress did not intend the aban-

30. *Midlantic*, 106 S. Ct at 758.
31. *Quanta I*, 739 F.2d at 912.
32. *Quanta II*, 739 F.2d at 928.
33. *Id.*
34. The direct appeal was permitted pursuant to the Bankruptcy Act of 1978 § 405(c)(1)(B). *See Midlantic*, 106 S. Ct. at 759.
35. *Quanta I*, 739 F.2d at 918.
36. *Id.* at 921.
37. *Id.*
38. *Id.* at 921, 923.
39. *See Midlantic*, 106 S. Ct. at 758 n.2.

donment provision of the Bankruptcy Code to preempt every state and local law.[40] The Court declared that a bankruptcy court cannot authorize an abandonment without first formulating conditions that will adequately protect the public's health and safety.[41] Accordingly, the Supreme Court held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."[42]

In reaching this conclusion, the Supreme Court also relied upon 28 U.S.C. § 959(b),[43] which directs a trustee to operate property in accordance with state law. While acknowledging that section 959(b) did not correspond directly to abandonment under the Bankruptcy Code, the Court pointed out that section 959(b) was "additional evidence that Congress did not intend for the Bankruptcy Code to preempt all state laws" that otherwise limit the exercise of a trustee's power.[44]

Holding that the trustee's power to abandon property would no longer be absolute, even where the property was burdensome or of inconsequential value to the estate, the Supreme Court ruled that section 554 codified "the judicially developed rule of abandonment" and therefore "presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain federal and state laws."[45] In a footnote, the Court stated that this exception to the "rule of abandonment" is a "narrow one,"[46] only available where the laws are "reasonably designed"[47] to protect "the public health or safety from imminent and identifiable harm."[48]

IV. ANALYSIS

The decision rendered by the bankruptcy court in *In re Oklahoma Refining Co.*[49] was the first to interpret *Midlantic National Bank v. New Jersey Department of Environmental Protection.*[50] On a number of point, the *Oklahoma Refining* decision is, at best, misguided in its application of *Midlantic.*

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40. *Id* at 759–61.
41. *Id.* at 762.
42. *Id.* (footnote omitted).
43. (1982).
44. *Midlantic,* 106 S. Ct. at 761.
45. *Id.* at 759.
46. *Id.* at 762–63 n.9.
47. *Id.* at 762.
48. *Id.*
49. 63 Bankr 562 (Bankr W.D. Okla. 1986).
50. 106 S. Ct. 755, reheard en 1986.

A. *The Bankruptcy Court's Questionable Assumptions*

The bankruptcy court made two questionable assumptions in *Oklahoma Refining*. First, the bankruptcy court based its decision largely on the assumption that the United States Supreme Court used the terms "imminent and identifiable"[51] synonymously with "immediate and menacing."[52] Although the bankruptcy court's interpretation is plausible, a close reading of *Midlantic* reveals that the Supreme Court did not use the phrases interchangeably. Second, the bankruptcy court assumed it need only "consider" the applicable state and environmental laws and regulations when resolving the issue of whether or not to permit abandonment.[53] In light of the Supreme Court's definite language with regard to abandonment in contravention of statutes or regulations,[54] the bankruptcy court may have been too bold in this second assumption. In short, it appears that the bankruptcy court rested its decision upon two assumptions, each flawed.

1. The First Assumption—"Imminence"

The court's decision in *Oklahoma Refining* rests in large part on its interpretation of a footnote from the Supreme Court's holding in *Midlantic*. The note reads:

> [The] exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.[55]

Finding no definition for the phrase "imminent and identifiable harm" in the *Midlantic* opinion, the bankruptcy court suggested that "imminent and identifiable harm" *could* mean "immediate and menacing harm" in two instances.[56] First, the court noted: "[A]ll the expert witnesses testified that if imminent harm is defined as that which is immediate and menacing, harm to the public health and safety [presented by the Oklahoma Refining Company] in its present condition is not . . . imminent."[57] Then, by comparing the Quanta facilities

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51. *See id.* at 763 n.9.

52. *See infra* notes 56–58 and accompanying text.

53. *Oklahoma Refining*, 63 Bankr. at 565.

54. The Supreme Court wrote: "[A] trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic*, 106 S. Ct. at 762 (footnote omitted).

55. *Id.* at 762–63 n.9.

56. *Oklahoma Refining*, 63 Bankr. at 564.

with the one in Oklahoma, the Bankruptcy Court concluded that "the [site] does not present immediate and menacing harm to public health and safety."[58] The bankruptcy court was clearly substituting the law established in *Midlantic*, which denied abandonment where imminent environmental harm was present,[59] with its own standard of immediate and menacing harm.[60] Once this substitution was complete, the court proceeded to distinguish *Midlantic* from *Oklahoma Refining*.[61]

The court reasoned that exceptions to the power of a trustee to abandon burdensome property were "narrow" and dependent on the immediacy of threat to the environment.[62] Continuing, the court held that *Midlantic* and *Oklahoma Refining* were factually distinguishable[63] because Quanta posed a threat of imminent harm whereas the Oklahoma Refining Company did not. In rendering its decision, the bankruptcy court concluded that Quanta's situation was appreciably different from Oklahoma Refining Company's and that it was reasonable under the circumstances to permit abandonment.

The most troubling aspect of this portion of the opinion is the court's stubborn assumption that "imminent harm" is synonymous with "immediate and menacing harm."[64] The bankruptcy court never addressed the possibility that the Supreme Court meant something entirely different. In fact, the Supreme Court used the term imminent harm to identify regulations that are "reasonably designed to protect the public health or safety from identified hazards."[65] Immediacy or timing of the hazard was never an issue.

The plain meaning of the words the Supreme Court used demonstrates that the bankruptcy court's interpretation is flawed. To illustrate, imminent may be defined as:

> Near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous.[66]

> 1. ready to take place: near at hand: IMPENDING (our — departure): hanging threateningly over one's head: menacingly near.[67]

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58. *Id.* at 565.
59. *See supra* note 54 and accompanying text.
60. *See supra* notes 56–58 and accompanying text.
61. *Oklahoma Refining*, 63 Bankr. at 565.
62. *Id.* at 565.
63. *Id.*
64. *See supra* notes 54–58 and accompanying text.
65. *Midlantic*, 106 S. Ct. at 762.
66. BLACK'S LAW DICTIONARY 676 (5th ed. 1979).
67. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1120 (3th ed. 1976).

> Overhanging, about to materialize, especially something of a dangerous nature. Threatening; full of danger.[68]

Based on these definitions, it can be forcefully argued that the bankruptcy court was wrong in its assumption that "imminent" meant "immediate and menacing." For example, samples from monitoring wells around the Oklahoma Refining Company showed quantities of chromium, lead, cadmium, arsenic, and several other toxic substances exceeding acceptable levels by substantial amounts.[69] Contamination of the town's water supply was therefore "impending" or "on the point of happening."[70]

In addition, photographs introduced into evidence[71] clearly showed extensive surface contamination that was "threatening"[72] and "full of danger."[73] In short, although the facts may indicate that the Oklahoma refinery did not necessarily present "immediate and menacing" harm to public safety, the refinery clearly did present the imminent and identifiable harm that *Midlantic* held precludes abandonment.[74]

2. The Second Assumption—Mere "Consideration" of State Laws

An equally troubling aspect of the bankruptcy court's decision in *Oklahoma Refining* is an assumption concerning applicable laws and regulations. The court announced that *Midlantic* established law requiring courts to take state environmental laws and regulations "into consideration"[75] when deciding whether or not to permit abandonment. Thus, the court assumed that as long as the laws regarding environmental protection are balanced against the Bankruptcy Code, the law established in *Midlantic* is satisfied.[76] However, a careful reading of *Midlantic* suggests that this assumption is unfounded.

The majority in *Midlantic* wrote: "[W]e hold that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."[77] Although the Court qualified this language with

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68. BALLENTINE'S LAW DICTIONARY 583 (3d ed. 1969).
69. *Oklahoma Refining*, 63 Bankr. at 563.
70. *See supra* text accompanying note 66.
71. *See Oklahoma Refining*, 63 Bankr. at 563.
72. *See supra* text accompanying note 67.
73. *See supra* text accompanying note 68.
74. *Midlantic*, 106 S. Ct. at 762–63 n.9 (discussed *supra* note 55 and accompanying text).
75. *Oklahoma Refining*, 63 Bankr. at 565.
76. The court wrote: "The Oklahoma laws regarding environmental protection are not unreasonable but juxtaposed to the Bankruptcy Code cannot be reconciled to satisfy the strict compliance sought by the State agencies." *Id.* at 566.
77. *Midlantic*, 106 S. Ct. at 762 (footnote omitted).

a footnote,[78] it is obvious that the majority requires adherence to state statutes or regulations that protect the public health and safety from imminent harm.[79]

In *Oklahoma Refining*, state agencies alleged that ORC was in violation of six[80] statutes and regulations, all of which were arguably promulgated to protect the public health and safety from "imminent" harm. For instance, it was alleged that ORC was in violation of title 82, section 926.4 of Oklahoma Statutes which provides in part:

> A. It shall be unlawful for any person to cause pollution . . . of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state. Any such action is hereby declared to be a public nuisance.
> B. It shall be unlawful for any person to carry on any of the following activities without first securing such permit from the Board, as is required by it, for the discharge of all industrial wastes which are or may be discharged thereby into the waters of the state:
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> The construction, installation or operation of any industrial or commercial establishment or any extension or modification thereof or addition thereto, the operation of which would cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized.[81]

Adhering to the law established by *Midlantic*, the bankruptcy court should not have permitted abandonment while ORC was in violation of a statute so clearly designed to protect the public health and safety.

The Supreme Court's language with regard to abandonment in contravention of statutes and regulations is clear and unequivocal.[82] It requires a trustee to forego abandonment if the property is in violation of a state statute or regulation reasonably designed to protect the public health and safety.[83] The court in *Oklahoma Refining* appears to have exceeded its scope of review a second time by interpreting this language of *Midlantic* very broadly.

On the basis of the bankruptcy court's assumptions and interpretations, it may be argued that *Oklahoma Refining* is simply not in accord with *Midlantic*. But evaluating the success or failure of the bankruptcy court's decision in *Oklahoma Refining* on its literal interpretation of *Midlantic* lessens the focus of the real issue in this case. "The real

78. *Id.* at 762–63 n. 9 (quoted *supra* text accompanying note 55).
79. *Id.* at 762.
80. *Oklahoma Refining*, 63 Bankr. at 564; *see also supra* note 19.
81. OKLA. STAT. tit. 82, § 926.4 (West Supp. 1987).
82. *Midlantic*, 106 S. Ct. at 762.
83. *Id.*

issue of debate in . . . abandonment cases is who will pay for cleanup."[84]

B. Cost of Cleanup

1. General Bankruptcy Principles

In bankruptcy, the court will supervise collection and sale of the debtor's assets and distribution of the proceeds proportionally to the creditors' claims.[85] "This process is thwarted by the retention of property that has little value, or worse, negative value."[86] To enhance the value of the estate remaining for distribution to creditors, the Bankruptcy Code allows abandonment of property that is burdensome or of inconsequential value to the estate.[87] After notice and hearing, the trustee may abandon this property to the debtor or the person having the possessory interest in the property.[88] Since in most cases, the possessory interest is in the debtor, property needing clean up is often abandoned to the debtor.[89] However, there is a serious problem with abandonment of a hazardous waste site to the debtor. As one commentator has noted, "after the bankruptcy, the debtor has few, if any, assets remaining. He is not in a position to clean up the property. Thus, EPA and the states have asserted, abandonment of contaminated property should not be permitted."[90]

Opponents of abandonment argue that it is equivalent to government cleanup by default.[91] However, this image is misleading. "Companies shackled by liability for hazardous waste should not necessarily be faulted for using the protections of bankruptcy; these companies generally are reacting as would any business facing a liability it can

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84. *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1594 (1986).

85. Drabkin, Moorman, Kirsch, *supra* note 2, at 10,172.

86. *Id.*

87. 11 U.S.C. § 554(a) (Supp. IV 1986). "The standard of the statute is whether the asset is burdensome to the estate or is of inconsequential value and benefit to the estate." D. COWANS, BANKRUPTCY LAW AND PRACTICE § 9.9, at 73 (1987). The plain meaning of the Code is therefore that a trustee may reject burdensome property and retain the estates valuable assets. *See* 4 COLLIER ON BANKRUPTCY ¶ 554.02(2), at 554-6 to -7 (15th ed. 1985).

88. One commentator has characterized the abandonment process as follows:

> The general rule is that abandoned property goes back to the debtor. The matter is a bit more complex than that. A study of Section 554(c) and (d) and the legislative history supports the following reading. If abandonment occurs before a closing of the estate, it may be to anyone with a possessory interest. If the property is listed and not otherwise administered it is abandoned to the debtor unless the court orders otherwise.

D. COWANS, *supra* note 87, § 9.9, at 73–74.

89. *See id.* at 73.

90. Drabkin, Moorman, Kirsch, *supra* note 2, at 10,180.

91. *See, e.g.*, United States v. Quanta Resources Corp., 739 F.2d 912, 921 (3d Cir. 1984).

never pay."[92] Furthermore, restricting abandonment does not solve the government's problem of who will pay for cleanup. That is an issue of priority.

2. The Bankruptcy Code's Scheme of Priority

To provide an orderly distribution of the assets of an estate, which are usually inadequate to pay all claims, sections 506 and 507 of the Bankruptcy Code provide that claims be paid in a specified order of priority. Generally, "[a]ssets of a debtor in the trustee's hands are subject to all of the equities, liens and incumbrances in favor of third persons that exist at the date of bankruptcy and are not invalidated by the law."[93] In addition, according to sections 506, 507, and 726 collectively, secured debts must be satisfied before any distributions may be made to unsecured creditors.[94] Thus, only funds not subject to a perfected security interest are available to be distributed under the section 507 priority rules.

Within this scheme of priorities, environmental agencies are classified as governmental agencies and possess no more than general unsecured claims.[95] Therefore, environmental agencies should be assigned to the seventh priority category.[96] Thus, the chances of substantial repayment to an environmental agency for cleanup should be minimal, whether or not abandonment is permitted.

In response to this dilemma, some courts have endorsed the proposition that "[i]mplicit in *Midlantic* is the recognition that in some circumstances the priorities of the Bankruptcy Code must give way to laws designed to protect the public health and safety."[97] Courts that have utilized this proposition to prohibited abandonment require cleanup by the estate.[98] The theory is that *Midlantic* allows an elevation of response costs to that of administrative expenses, thereby gaining top repayment priority via Section 503(b)(1)(A).[99]

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92. Drabkin, Moorman, Kirsch, *supra* note 2, at 10,168.

93. 3 COLLIER ON BANKRUPTCY, *supra* note 87, ¶ 507.02, at 507–16.

94. "To the extent that a secured claim is perfected as required, the secured claim is satisfied in full before the bankruptcy priority system begins to operate." D. COWANS, *supra* note 87, § 12.22, at 501.

95. Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137, 141 (3d Cir. 1985); *In re* Security Gas & Oil, Inc., 70 Bankr. 786, 795 (Bankr. N.D. Cal. 1987).

96. 11 U.S.C. § 506 (1982 & Supp. IV 1987).

97. *In re* Stevens, 68 Bankr. at 774, 783 (Bankr. D. Me. 1987) (citing Pierce Coal & Const. Inc., 65 Bankr. 521, 531 (Bankr. N.D. W. Va. 1986)); *In re* Chicago R. I. & Pac. R.R., 756 F.2d 517, 520 (7th Cir. 1985).

98. *See In re* Stevens, 68 Bankr. at 783; *In re* Mowbray Eng'g, 67 Bankr. 34, 36 (Bankr. S.D. Ala. 1986).

99. Section 503(b)(1)A reads, in pertinent part:

(b) After notice and a hearing, there shall be allowed administrative expenses, other

Courts utilizing the process of gaining top repayment priority via 11 U.S.C. § 503(b)(1)(A) base their holdings on a series of assumptions and arguments. First, it is argued that creditors will benefit in some way[100] from a trustee spending funds, which secure allowed secured claims, to preserve the estate.[101] Second, it is assumed that because an environmental agency is cleaning up the estate, the agency stands in the shoes of a trustee.[102] Finally, these courts conclude that the agency paying for the clean up is entitled, as the trustee would be, to "recover costs upon sole of the property prior to satisfying any secured claims against the property."[103] Courts using this line of reasoning simply assert that the expense of cleaning up a hazard is an administrative expense.[104] All courts which have interpreted *Midlantic* and addressed the issue of who will pay for clean up do not, however, agree with the above analysis.

For instance, in *Walsh v. State of West Virginia*,[105] a bankruptcy court noted that a duty to clean up an environmental hazard, created before a petition for bankruptcy, is generally not one of the obligations entitled to a high priority under the Bankruptcy Code.[106] The court also noted that "[b]ecause in most cases unsecured creditors are not paid in full, allowing enforcement of clean-up order [sic] elevates the State above other unsecured creditors. Such a result distorts the congressionally-created priority scheme and harms other unsecured creditors."[107] In addition, it has been noted that professionals who would otherwise consider providing services to bankruptcy estates may become more reluctant to do so because there may be no funds left to pay

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than claims allowed under section 502(f) of this title, including–

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

11 U.S.C. § 503(b)(1)(A) (Supp. IV 1986).

100. Courts have found several interesting *benefits to creditors*, some of which include: protecting the public from danger. *In re* Stevens, 68 Bankr. at 783, or protecting the estate from tort liability, *In re Chicago, R.I. & Pac. R.R.*, 756 F.2d at 520, or simply the benefit of having the hazard removed, *Mowbray*, 67 Bankr. at 35.

101. The ability of a trustee to expend secured funds rests on 11 U.S.C. § 506(c) (1982) which reads:

(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.

102. *Mowbray*, 67 Bankr. at 35.

103. *Id.; see also Stevens*, 68 Bankr. at 783–84. *Mowbray* went as far as holding that "The trustee may reimburse himself for expenses incurred to date in administering the estate, in the amount of $130, and *apply the remaining assets of the estate* toward payment of the EPA claim." *Mowbray*, 67 Bankr. at 36 (emphasis added).

104. *In re* Stevens, 68 Bankr. at 783; *Pierce Coal & Constr.*, 65 Bankr. at 530.

105. 70 Bankr. 786 (Bankr. N.D. Cal. 1987).

106. *Id.* at 795.

107. *Id.*

them.[108] As a result, the economy could suffer "as debtors find themselves unable to reorganize their ailing businesses in bankruptcy proceedings."[109]

C. *The Impact of* Oklahoma Refining

The purpose of the foregoing analysis is to demonstrate that several courts have interpreted the *Midlantic* decision, as did *In re Oklahoma Refining* with varying results. The difference is, however, that many courts have gone beyond the initial question of whether or not the property will be abandoned and answered the crucial question of who will eventually pay for the cleanup.

By emphasizing the immediacy of harm to public health, the bankruptcy court in *Oklahoma Refining* avoided the critical issue of who will pay for the cleanup. The inconsistencies in the case law on abandonment must be resolved by either a Supreme Court decision which follows through by answering all pertinent questions, or an amendment to the existing Bankruptcy Code. *In re Oklahoma* appears to be a means for an end. That end was to abandon most simply burdened property. Only two cases to date have relied on its reasoning.[110]

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108. One article notes:

> If environmental obligations are paid as administrative expenses, people providing goods and services to bankruptcy estates must take extra precautions. Administrative expenses usually do not exhaust the estate's resources. Therefore, in most cases administrative claimants are paid in full. If, on the other hand, the estate does not contain sufficient assets to pay all administrative costs, the administrative claimants must accept a proportional share of the available funds. Thus, if the courts consider enormous environmental cleanup obligations to be administrative expenses, people extending credit to bankruptcy estates may need to devise new means to protect their payments. This prospect is particularly worrisome because environmental cleanup obligations may be hidden liabilities not discoverable in preliminary reviews of bankruptcy estates.

Drabkin, Moorman & Kirsch, *supra* note 2, at 10,180.

109. *Id.*

110. The first case to rely on Oklahoma refining was *In re* Franklin Signal Corp., 65 Bankr. 268 (Bankr. D. Minn. 1986). *Franklin* sidestepped the critical issue of who will pay for the cleanup as well. The court did so by noting that "[n]o party has assumed responsibility or incurred any cost in disposing of the hazardous waste. The sole issue presented in this case is whether the trustee can abandon the drums of hazardous waste." *Id.* at 274.

The second case was *White v. Coon* (*In re* Purco), 76 Bankr 523, 533 (Bankr. W.D. Pa. 1987). *Purco* relied on both *Franklin* and *Oklahoma Refining* to allow abandonment. However, *Purco* did not adopt the *Oklahoma Refining* immediate and menacing standard. The court in *Purco* wrote: "there is no showing that the public health and safety are not adequately protected, nor is there a showing of a clear and imminent danger nor does there appear to be any great risk of harm or threat to public safety, either immediate or in the foreseeable future." *Id.* at 533.

Burlington N.R.R. v. Dant & Russell, Inc. (*In re* Dant & Russell, Inc.), 67 Bankr. 360 (Bankr. D. Or. 1986), also cites *Oklahoma Refining* to support the notion that *Midlantic* is a "narrow holding." *Id.* at 364. The case, however, did not involve an abandonment issue.

V. CONCLUSION

The bankruptcy court's decision in *In re Oklahoma Refining Co.*[111] rests on the premise that the court may consider the issue of abandonment in a vacuum. With a broad interpretation of a few elusive terms, the *Oklahoma Refining* court was able to disregard the Supreme Court's clear mandate in *Midlantic National Bank v. New Jersey Department of Environmental Protection.*[112] Perhaps the case's greatest weakness, however, is its failure to address the issue of who will pay for the environmental cleanup. Subsequent decisions have tried to tackle this critical issue and therefore have not relied on *Oklahoma Refining.*

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111. 63 Bankr. 562 (Bankr. W.D. Okla. 1986).

112. 106 S. Ct. 755 (interim ed. 1986).