TRUSTEE'S POWER TO ABANDON: THE IMPACT OF *MIDLANTIC*

INTRODUCTION

Federal and state legislatures have enacted environmental legislation to implement the cleanup of hazardous waste sites.[1] The legislation generally provides two alternative procedures to achieve this goal.[2] The government may issue an administrative order requiring the party responsible[3] to remedy the hazardous site.[4] Alternatively, the govern-

1. Reports indicate that industry in the United States generates over 250 million tons of hazardous waste per year. St. Louis Globe-Democrat, Jan. 20, 1985, at 28, col. 1. There are approximately 50,000 mishandled waste facilities in the United States. *See* United States v. Chem-Dyne, 572 F. Supp. 802, 804 (S.D. Ohio 1983).

2. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter CERCLA), 42 U.S.C. §§ 9601-9657 (1983), to remedy past improper disposal of hazardous waste. This article addresses specific provisions of CERCLA to illustrate the environmental legislation discussed generally throughout the article. CERCLA is an appropriate focus for the discussion because most state legislation closely mirrors CERCLA. The reader, however, should consult the statutes of the particular state in interest.

Congress also enacted the Resource Conservation and Recovery Act in 1976 to regulate all facilities that transport, generate, or dispose of a certain amount of hazardous waste. 42 U.S.C. §§ 6901-6987 (1982).

3. CERCLA imposes strict liability on four categories of persons: (1) the owner or operator of a facility, (2) the owner or operator of the facility at the time of the hazardous substance's disposal, (3) any person who arranged for disposal, treatment, or transport of the hazardous substance at the facility, and (4) any person who accepted the hazardous substance for transport to the facility selected by such person. 42 U.S.C. § 9607(a)(1)-(4). *See* State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (holding the current owner of a waste facility strictly liable under CERCLA).

The definition of "owner and operator" exempts persons who, without participating in the management of a facility, have the indicia of ownership primarily to protect their security interest in the property. 42 U.S.C. § 9601(20)(A) (1983). *See infra* note 28 and accompanying text.

CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State,

ment may clean up hazardous sites[5] and seek recovery from the responsible parties for government costs incurred.[6] The legislation contemplates that persons responsible for a hazardous site will pay for its cleanup.[7] The costs of such a cleanup are substantial[8] and sometimes result in responsible parties seeking refuge from liability in bankruptcy.[9] When this occurs, the environmental statutes directly conflict with the federal Bankruptcy Code.[10] In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[11] the Supreme

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municipality, commission, political subdivision of a state, or any interstate body." 42 U.S.C. § 9601(21) (1983).

4. 42 U.S.C. § 9606 (1983).

5. CERCLA creates a $1.6 billion superfund to finance emergency assistance and containment actions. 42 U.S.C. §§ 9631-9633 (1983). CERCLA section 9604 authorized the Environmental Protection Agency (hereinafter EPA) to remove and remedy any release or threatened release of any hazardous substance into the environment which may present an imminent and substantial danger to the public health or welfare. 42 U.S.C. § 9604 (1983). To authorize the use of the Superfund, response action must be in accord with the National Contingency Plan (hereinafter NCP). *Id.* The EPA promulgated the NCP to effectuate the response powers and responsibilities created by CERCLA. 400 C.F.R. 300 (1985). States acting in accordance with the NCP may also clean up a hazardous waste site and seek reimbursement from CERCLA's Superfund. 42 U.S.C. § 9607 (1983). President Reagan recently signed a bill appropriating $9 billion to continue Superfund for the next five years. St. Louis Post-Dispatch, Oct. 19, 1986, at 7A, col. 3.

6. *See supra* note 3. Responsible parties are also liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan" and "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from [a hazardous substance] release." 42 U.S.C. § 9607(a)(4)(B)(C) (1983).

7. *See supra* notes 3-6 and accompanying text.

8. The average expenditure per Superfund site nears $12 million. 49 Fed. Reg. 40,320, 40,325 (1984).

9. One writer suggests that environmental cleanup obligations make bankruptcy a "virtual necessity." 15 ENVTL. L. REP. 10168, 10169 (1985). "When a company faces environmental liabilities that are grossly out of proportion to the size of the business or unanticipated given the nature of the business, it has little choice but to seek shelter in bankruptcy." *Id.*

10. 11 U.S.C. §§ 101-1330 (1982). The Bankruptcy Code (hereinafter Code) is partly designed to provide individual debtors in bankruptcy a fresh start by discharging all debts arising before bankruptcy. The Code also provides for the equitable distribution of the bankrupt's assets among creditors. On the other hand, legislatures designed environmental legislation to protect the public health and environment by requiring responsible parties to clean up hazardous waste sites. Additionally, the legislation seeks rapid recovery of response costs that the government incurs so as to finance the cleanup of other hazardous dumpsites.

11. 106 S. Ct. 755 (1986).

Court held that bankruptcy trustees cannot abandon property in contravention of state environmental statutes.[12] A bankruptcy court may authorize abandonment only after the court formulates conditions that adequately protect the public health and safety.[13]

This article first discusses the abandonment power and how its exercise may circumvent environmental legislation.[14] Next, the article critically reviews the *Midlantic* decision.[15] Finally, the article discusses the practical impact of *Midlantic* on the abandonment power where environmental liability exists.[16]

I. TRUSTEE ABANDONMENT POWERS

Courts recognized a trustees' ability to abandon property[17] prior to congressional codification of the abandonment power in the 1978 Bankruptcy Code.[18] This judicially created power permits trustees to abandon any property of the bankrupt's estate deemed harmful to the estate.[19] This property may be so heavily encumbered or extremely costly to preserve that the property is valueless to the estate.[20] Allowing trustees to abandon burdensome property benefits the estate's creditors and furthers the primary purpose of a bankruptcy liquidation.[21] Funds that a trustee would otherwise use to administer value-

12. 106 S. Ct. at 762.

13. *Id. See infra* notes 65 and 66 and accompanying text.

14. *See infra* Section I. This article is limited to Chapter 7 liquidation proceedings. Section 959(b) of the Code requires trustees to act in accordance with state environmental laws during a Chapter 11 reorganization. *See infra* notes 59, 60 and accompanying text.

15. *See infra* Section II.

16. *See infra* Section III.

17. *See, e.g.*, Brown v. O'Keefe, 300 U.S. 598, 602-03 (1937) (abandonment is the release from the debtor's estate of property previously included in that estate).

18. 11 U.S.C. § 554 (1982 & Supp. 1986).

19. *See* 4A W. COLLIER, COLLIER ON BANKRUPTCY para. 70.42 at 502-04 & n.4 (14th ed. 1978) (citing cases) [hereinafter COLLIER].

20. *See id.*

21. The overriding purpose of bankruptcy liquidation is the expeditious reduction of the debtor's property to money for an equitable distribution to creditors. *See* Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930); COLLIER, *supra*, note 18, para. 70.42 at 502. "Forcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets." Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755, 763 (1986) (Rehnquist, J., dissenting).

less property are instead distributed to creditors.[22]

The trustee may abandon the property to any party with a possessory interest, such as a debtor or a lien creditor entitled to possession.[23] After abandonment, the property no longer belongs to the estate.[24] When an environmental cleanup order confronts the estate, the trustee may seek to abandon the property to avoid the cleanup obligation and expense.[25] If abandonment occurs,[26] the government is left with either a responsible debtor financially incapable of cleaning up the hazardous

22. Administrative expenses include "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). Administrative expenses include, for example, the cost of liquidating property of the estate for distribution to the creditors. Administrative expenses have priority over general unsecured claims in the distribution of the estate's assets. *See* 11 U.S.C. § 726 (1982 & Supp. 1986).

23. Section 554 does not itself specify to whom title to the abandoned property passes. The legislative history states that abandonment may be to any party with a possessory interest in the abandoned property. S. REP. No. 95-989, 95th Cong., 2d Sess., 92 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5878.

24. *See supra* note 17.

25. *See In re* T.P. Long Chemical, Inc., 45 Bankr. 278, 284 (Bankr. Ohio 1985) (prohibiting abandonment of contaminated drums as a means to escape CERCLA liability).

26. Arguably, abandonment of contaminated property does not sever liability for the hazardous waste from the estate, at least not under CERCLA. Although the property is the source of the estate's liability, the estate's liability cannot be transferred with title to the property. The estate, once an owner or operator of a facility, is liable under CERCLA § 9607(a). *See supra* note 3. Subsequent abandonment of the source of liability cannot transfer the estate's liability. CERCLA § 9607(e)(1) (1983) renders ineffective any ostensible transfers of liability. *See T.P. Long Chemical*, 45 Bankr. at 284-85; *see* 15 ENVTL. L. REP., *supra* note 9, at 10181 (stating that abandonment does not necessarily transfer liability). *See infra* notes 73 to 79 and accompanying text.

The analysis may be different, however, with state environmental statutes that lack the extensive scope of liability sanctioned by CERCLA. The Supreme Court's earlier brief discussion of abandoning hazardous waste indicated that a trustee could abandon property to avoid the estate's environmental obligations. The Court stated:

> 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 to the estate. Such abandonment is to the person having the possessory interest in the property.... If the site at issue were [the debtor's] property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation [the debtor] might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

Ohio v. Kovacs, 105 S. Ct. 705, 711 n.12 (1985) (citations omitted).

property[27] or a party without legal responsibility for the cleanup.[28]

27. If the trustee abandons the property to an individual debtor, the debtor will receive the property discharged from pre-petition environmental debts. Bankruptcy discharges all individual debts or liabilities on a claim that arose before bankruptcy. *See* 11 U.S.C. § 727(b) (1979). Thus, if the government cleans up a hazardous site before the debtor petitions for liquidation, the debtor's subsequent petition discharges the debt to the government. Similarly, a recent Supreme Court decision held that a cleanup order may be an obligation to pay money which therefore constitutes an obligation dischargeable in bankruptcy. *See* Ohio v. Kovacs, 105 S. Ct. 705 (1985) (holding a cleanup order reduced to a monetary obligation where appointment of a receiver before bankruptcy divested the debtor of any assets available to clean up the site); United States v. Robinson, 46 Bankr. 136 (Bankr. M.D. Fla. 1985) (holding compliance with a court order that costs money a debt dischargeable in bankruptcy). *But see* United States v. ILCO, Inc., 48 Bankr. 1016 (Bankr. N.D. Ala. 1985) (rejecting the argument that an order requiring the expenditure of money is a money judgment prohibited by the automatic stay).

A claim that arises after the debtor petitions for bankruptcy liquidation is a post-petition debt. A post-petition debt is not dischargeable in bankruptcy. Similarly, an order requiring cleanup may survive bankruptcy. *Id.* Under these circumstances, the government may proceed against the individual debtor after bankruptcy. Most individuals, however, are unlikely to possess sufficient funds to make a significant contribution to a cleanup. *See supra* note 8.

A discussion of the issues concerning when a claim arises is beyond the scope of this article. For a further discussion of these issues as they relate to environmental liability, *see* 15 ENVTL. L. REP., *supra* note 9, at 10175-77.

Non-individual debts are not dischargeable in bankruptcy. The 1978 Bankruptcy Code eliminated the provision for discharge of non-individual debts. 11 U.S.C. § 727(a)(1) (1979); *see* S. REP. No. 989, 95th Cong., 2d Sess. 98 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5884. Thus, although a government claim for reimbursement and an order requiring cleanup will survive a corporate bankruptcy, the liquidated corporation claim will not.

28. If the trustee abandons the property to a lien creditor, in most instances, the lien creditor will not qualify as a responsible party liable for cleanup. *See supra* note 2. This result is certain to occur where the government already cleaned up the hazardous site and the lien creditor received the property free from contamination. The government can only seek recovery from the lien creditor if the lien creditor previously participated in operating the hazardous site. *See* United States v. Mirabile, No. 84-2280, slip op. (E.D. Pa. Sept. 6, 1985) (participation in the daily operations of a waste site is a prerequisite to a secured creditor's liability under CERCLA). A lien creditor may also incur liability for cleanup if the government removes hazardous waste from the property after the lien creditor becomes the owner of the property. *See* United States v. Maryland Bank & Trust, 632 F. Supp. 573 (D. Md. 1986) (holding mortgagee-turned-owner who possessed title to property for one year before discovery of hazardous waste liable for cleanup costs); *but see Mirabile*, No. 84-2280, slip op. (holding mortgagee-turned-owner who promptly resells contaminated property exempt from liability under CERCLA); *T.P. Long*, 45 Bankr. 278 (bank repossessing contaminated drums pursuant to its security agreement would be exempt from liability under CERCLA); 42 U.S.C. § 9601(20)(A) (1983) (definition of "owner and operator" exempts persons who, without participating in the management of a facility, hold indicia of ownership primarily to protect their security interest in the facility). A prudent creditor, however, will aban-

Thus, abandonment is an effective means for the estate to avoid environmental cleanup expenses, rendering hazardous waste cleanup both a government responsibility and expense.

Only three pre-Code decisions limit the trustee's common law abandonment power when it conflicts with legitimate federal or state interests.[29] Congress codified the abandonment power in section 554 of the 1978 Code, but failed to limit the trustee's power to abandon.[30] Sec-

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don a lien on contaminated property to avoid the possibility of environmental liability. For a discussion of lender liability and how lenders can protect against risks of environmental liability, *see* Cohen, *Hazardous Waste: A Threat to the Lender's Environment*, 19 U.C.C.L.J. 99 (1986); Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and other Deep Pockets*, 103 BANKING L.J. 509 (1986).

29. In Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952), the Fourth Circuit held that the bankruptcy trustee could not abandon several barges anchored in Baltimore's harbor. *Id.* at 289-90. If the court permitted abandonment, the barges would obstruct navigable waters in violation of federal law. *Id.* at 290. The court explained that the judge-made rule must succumb to a federal statute enacted to protect the safety of navigation. *Id.* The court required the trustee to remove the barges at the estate's expense. *Id.*

In Chicago Rapid Transit Co. v. Sprague, 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942), the Seventh Circuit conditioned the trustee's abandonment power on compliance with state law. *Id.* at 6. The debtor railroad was a public utility subject to state regulations. *Id.* at 3. The regulations limited the railway's power to abandon service without state approval. *Id.* The court held that the trustee of the debtor transit company could not abandon the services of the railway line because local law required its continued operation. *Id.* at 6. Although the court ordered continued operation of the services, it permitted abandonment of the burdensome lease of the line from the interstate authority. *Id.*

In re Lewis Jones, Inc., 1 B.C.D. 277 (Bankr. E.D. Pa. 1974), found no federal or state laws which prohibited abandonment of the manholes, vents, and steampipes the trustee sought to abandon. *Id.* at 279-80. The court held, however, that abandonment would pose a continued danger to the public health and safety. *Id.* at 280. The court required the trustee to seal the manholes, vents, and pipes before abandoning them. *Id.* The trustee charged the costs of securing the property to the debtor's estate. *Id.*

See also In re Adelphi Hospital Corp., 579 F.2d 726 (2d Cir. 1978) (holding that a trustee could abandon medical records regardless of a state law requiring insolvent hospitals to retain them).

30. Congress limited the abandonment power only to the property's value to the estate. 11 U.S.C. § 554 (1982 & Supp. 1986). Justice Rehnquist explained that the absolute language of section 554 "suggests that a trustee's power to abandon is limited only by considerations 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." Midlantic National Bank v. New Jersey Dept. of Envtl. Protection, 106 S. Ct. 755, 763-64 (1986) (Rehnquist, J., dissenting). *See also In re* T.P. Long Chemical Inc., 45 Bankr. 278, 284 (Bankr. Ohio 1985) (except for procedural requirements, nothing in the text of section 554 appears to prohibit abandonment); Note, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 883 (1985).

tion 554 simply 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."[31]

II. THE *MIDLANTIC* DECISION

In *Midlantic* the Supreme Court decided whether a bankruptcy trustee may abandon property and avoid responsibility for cleanup under state environmental laws.[32] The bankruptcy trustee in a liquidation proceeding sought to abandon waste oil facilities in New York[33] and New Jersey.[34] Both facilities were contaminated[35] and required a cleanup to comply with state law.[36] All parties to the liquidation pro-

31. 11 U.S.C. § 554(a) (1982 & Supp. 1986). Section 554 requires notice and a hearing before the bankruptcy court may authorize abandonment. *Id.* This procedure provides the debtor and creditors of the estate an opportunity to be heard on the question of abandonment. *See generally In re* Williamson, 13 Bankr. 139 (Bankr. Ga. 1981); *In re* Robinson, 12 Bankr. 591 (Bankr. Ga. 1981); *In re* Hawkins, 8 Bankr. 637 (Bankr. Ga. 1981); *In re* Malcolm, 48 F. Supp. 675 (E.D. Ill. 1943); Felty v. Olwan, 284 Ky. 762, 145 S.W.2d 1059 (1940). Section 554(b) also authorizes a "party in interest" to petition the bankruptcy court to compel the trustee to abandon the property. 11 U.S.C. § 554(b) (1982 & Supp. 1986).

32. 106 S. Ct. 755, 757 (1986).

33. The debtor, Quanta Resources Corporation (Quanta), owned and operated the waste oil storage and processing facility in Long Island City, New York. The site contained fuel storage tanks holding more than 500,000 gallons of waste oil and other chemicals. At least 70,000 gallons were contaminated with polychlorinated biphenyls (PCBs), which are extremely hazardous chemicals. *In re* Quanta Resources Corp., 739 F.2d 912, 913 (3d Cir. 1984).

34. Quanta leased and operated the facility in Edgewater, New Jersey where it processed and resold waste oil and oil sludge. Quanta operated the site under temporary operating authorities that the New Jersey Department of Environmental Protection issued Quanta. The temporary operating authorities prohibited Quanta from accepting PCB-contaminated oil. *Id.* at 928.

35. Quanta accepted large quantities of highly contaminated oil at the New Jersey facility. The New Jersey Department of Environmental Protection (NJDEP) found PCB-contaminated oil at the New Jersey site in violation of the temporary operating authority.

36. After discovering Quanta's violation, NJDEP ordered cessation of Quanta's New Jersey operations and the two parties commenced negotiations regarding cleanup. 106 S. Ct. at 757. Before the negotiations concluded, however, Quanta petitioned for reorganization under Chapter 11 of the Bankruptcy Code. *Id.* NJDEP immediately issued an administrative order requiring Quanta to cease operations, close the facility within one year, and clean up all hazardous materials. *Quanta Resources*, 739 F.2d at 928. Quanta then converted the reorganization proceeding to a liquidation proceeding under Chapter 7 of the Code. *Id.* After Quanta filed for bankruptcy, an inspection of the New York facility also revealed the necessity of a cleanup at the New York site. 106 S. Ct. at 758.

ceeding agreed that the sites were "burdensome" and of "inconsequential value to the estate."[37]

The bankruptcy and district courts approved abandonment of the sites.[38] The United States Court of Appeals for the Third Circuit reversed,[39] holding that section 554 fails to supersede enforcement of state public health and safety laws.[40]

The Court's five to four decision,[41] authored by Justice Powell, held

37. 106 S. Ct. at 758. The trustee's notice of intent to abandon the New York faclity asserted that the expenditures needed to bring the facility into compliance with state law would render the property burdensome to the estate. *Quanta Resources*, 739 F.2d at 914. The City and State of New York opposed abandonment, claiming that abandonment constitutes disposal of hazardous wastes in violation of state law. *See* N.Y. ENVTL. CONSERV. LAW § 71-2702 (McKinney Supp. 1982). New York also claimed that abandonment would create a continuing violation of the state's hazardous waste storage laws. *Quanta Resources*, 739 F.2d at 914.

NJDEP also objected to the proposed abandonment because it would violate state law and threaten public health and safety. *Id.* at 928. The oil at the New Jersey site remained in leaking and insecure tanks that created a danger of spillage into the Hudson River. *Id.* New York law prohibits intentional or unintentional releasing, spilling, or leaking of hazardous substances that may drain into state waters. N.J. STAT. ANN. § 58:10-23.11b(h) and § 58:10-23.11c (West 1982). Moreover, NJDEP argued that the estate possessed sufficient funds to remedy the hazards. *Quanta Resources*, 739 F.2d at 928.

38. After the trustee abandoned the New York site, New York cleaned up the facility with the exception of the contaminated subsoil. 106 S. Ct. at 758. The cleanup cost New York approximately $2.5 million. *Id.* The bankruptcy court did not require the trustee to secure the abandoned property in New York or New Jersey. Minor measures such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removal of explosive agents, could have minimized the imminent danger of the sites. Instead, the trustee's abandonment at both the facilities aggravated the existing dangers by discontinuing security measures to prevent public entry, vandalism, and fire. *Id.* at 758, n.3.

39. *In re* Quanta Resources Corp., 739 F.2d 927 (3d Cir. 1984) (appeal of the NJDEP), *cert. granted sub nom.*, Midlantic National Bank v. New Jersey Dept. of Envtl. Protection, 469 U.S. 1207 (1985); *In re* Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984) (appeal of the State and City of New York), *cert. granted sub nom.*, O'Neill v. City of New York, 469 U.S. 1207 (1985).

40. 739 F.2d at 921. The Third Circuit agreed with New York's argument that abandonment constitutes disposal of hazardous waste:

> If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation. . . .

739 F.2d at 921. *See supra* note 37.

41. The Supreme Court granted certiorari and consolidated the cases. Midlantic National Bank v. New Jersey Dept. of Envtl. Protection, 469 U.S. 1207 (1985); O'Neill v. City of New York, 469 U.S. 1207 (1985).

that trustees may not abandon property in contravention of state laws reasonably designed to protect the public health or safety from identified hazards.[42] A bankruptcy court may authorize abandonment only after formulating conditions to adequately protect the public from imminent and identifiable harm.[43]

The Court first addressed the unrestricted language of section 554 and its scant legislative history.[44] The majority primarily relied on the three pre-Code decisions that restrict the trustee's common law abandonment power.[45] Powell characterized these opinions as "well-recognized restrictions" on the abandonment power.[46] Consistent with this characterization, he assumed that congressional codification of the abandonment power includes prohibiting abandonment in contravention of specific state and federal laws.[47] The opinion reasoned that a congressional change in the common law restriction would have been explicitly stated.[48]

Three aspects of Justice Powell's statutory interpretation are questionable. First, the three earlier decisions are not "well-recognized restrictions."[49] Second, the conclusion that Congress knew about the decisions is doubtful. Third, assuming congressional awareness of the pre-Code decisions, the more appropriate construction is that Congress

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42. 106 S. Ct. 755, 762 (1986).

43. *Id.* at 762, 763 & n.9.

44. The legislative history of section 554 is *de minimus. See* S. REP. No. 95-989, 95th Cong., 2d Sess., 93 (1978) *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5879.

45. *See supra* note 29 and accompanying text.

46. 106 S. Ct. at 759.

47. *Id.* at 759. *Compare* Girouard v. United States, 328 U.S. 61, 69 (1946) (overruling three prior judicial interpretations of congressional statutes, notwithstanding Congress' intervening re-enactment of the statutes without any changes rejecting the earlier interpretations).

48. Justice Powell explained that:

> [t]he Court has followed this rule with particular care in construing the scope of bankruptcy codifications. If Congress wishes to grant the trustee an extraordinary exemption 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."

Id. (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)).

49. Justice Rehnquist responded to Powell's characterization of the three decisions, stating: "[The characterization] 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)." *Id.* at 763 (Rehnquist, J., dissenting).

intentionally omitted the judicial limitation. Since the Code is a comprehensive statute, it is unlikely that Congress would omit a simple sentence incorporating "well-recognized restrictions" and leave further interpretation to the Supreme Court.[50]

The Court also relied on other bankruptcy provisions that Congress expressly limited, concluding that section 554 does not pre-empt all state laws. Particularly, Justice Powell focused on an explicit statutory exception to the automatic stay[51] that permits the government to enforce nonmonetary judgments against the debtor's estate.[52] The legislative history specifically exempts from the stay any government action relating to environmental protection.[53] In light of such express limitations on other bankruptcy provisions, Justice Powell assumed that

50. According to Powell's construction, Congress must assume the role of a court watcher and promulgate statutes that include instructions specifying what Congress does not intend to legislate. *See* Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L. REV. 515, 517 (1982) ("the *words* of a statute—and *not* the legislators' intent as such—must be the crucial elements both in the statute's legal force and in its proper interpretation") (emphasis in original).

51. The Bankruptcy Code provides that the filing of a petition in bankruptcy operates as a stay of:

(1) the commencement or continuation, including the issuance or employment of process, or a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before commencement of the case under this title.

11 U.S.C. § 362(a)(1), (2) (1982 & Supp. 1986). The automatic stay relieves debtors from the claims of their creditors and prevents depletion of the bankrupt's assets before an equitable distribution among the creditors.

52. The exceptions to the automatic stay include: (1) the commencement or continuation of actions or proceedings by governmental units to enforce the regulatory or police powers and (2) the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce the regulatory or police power. 11 U.S.C. § 362(b)(4), (5) (1982). *See* United States v. ILCO, Inc., 48 Bankr. 1016 (Bankr. N.D. Ala. 1985) (holding a cleanup order is not subject to the automatic stay).

53. The legislative history provides:

Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety, or similar policy or regulatory laws, or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.

S. REP. NO. 95-989 at 52, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5838; H. REP. NO. 95-595 at 343, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6299. (emphasis added).

Congress intended to include the common law restriction on the abandonment power.[54] He dismissed the argument that Congress could limit the abandonment power if it desired,[55] as it did with respect to other bankruptcy provisions.[56] Instead, Justice Powell used the judiciary as a legislative body, explaining that it was unnecessary for Congress to expressly limit section 554 because the judiciary already did so.[57]

Finally, the majority posited that section 959(b) of the Bankruptcy Code supports the conclusion that section 554 fails to pre-empt state law.[58] Section 959(b) directs trustees to manage and operate the estate's property in accordance with state law.[59] Abandonment, however, does not constitute management or operation, and the majority opinion failed to clarify what application, if any, section 959(b) has to section 554.[60]

Midlantic restricts the abandonment power and compromises a bankruptcy liquidation policy to accommodate state environmental

54. 106 S. Ct. at 760.

55. *Id.* at 761.

56. *See, e.g.*, section 1170(a)(2) of the Code governing abandonment of railroad lines. 11 U.S.C. § 1170(a)(2) (1982). Section 1170 permits abandonment of a railroad line if the abandonment is "*consistent with the public interest.*" *Id.* (emphasis added).

57. Justice Powell explained that it was unnecessary for Congress to expressly limit the abandonment power because the judiciary already "firmly established" the exceptions. *Id.* In contrast to existing judicial limts on the abandonment power, Congress intended to overrule pre-Code judicial decisions that broadened the automatic stay to foreclose enforcement of state anti-pollution laws. *Id. But see supra* note 54 and accompanying text.

58. 106 S. Ct. at 761.

59. Section 959(b) provides in relevant part:

> . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, 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, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

60. In some liquidation proceedings, section 959(b) applies if the court authorizes the trustee to operate the debtor's business. *See* 11 U.S.C. § 1108 (1982).

Justice Powell's own uncertainty as to the application of section 959(b) to section 554 is evident from his following statement:

> Even though § 959(b) does not directly apply to an abandonment under § 554(a) of the Bankruptcy Code—and therefore does not delimit the precise conditions on an abandonment—the section nevertheless supports our conclusion that Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers.

106 S. Ct. at 762.

laws.[61] Although a safe environment is unquestionably an important public policy, the Supreme Court's resolution of how to attain a safe environment is suspect.

III. LIMITATIONS ON *MIDLANTIC*

The *Midlantic* decision is a disappointing answer to the complex issues raised when a responsible party faced with cleanup obligations petitions for liquidation under Chapter 7. Although the decision limits a trustee's power to abandon hazardous property, the opinion fails to delineate exactly what a trustee must do before a bankruptcy court may authorize abandonment. The Court left open questions such as: what state laws or regulations a trustee must comply with before a bankruptcy court may authorize abandonment; whether a complete cleanup of contaminated property is a prerequisite to abandonment; if the government cleans up contaminated property and then seeks reimbursement from the estate, whether the *Midlantic* decision prohibits abandonment as a means to avoid liability; whether the estate's funds will finance required remedial measures. These issues are the focus of the following sections.

A. *Adequate Measures to Protect Public Health and Safety*

Midlantic requires bankruptcy courts to formulate conditions that adequately protect the public health and safety.[62] This command will cause controversy regarding what measures adequately protect the public welfare. In *Midlantic*, abandonment of two facilities aggravated already existing dangers. The trustee removed guard service from the facilities, thus creating the additional danger of public entry and injury.[63] At a minimum, courts may interpret *Midlantic* to prohibit

61. Justice Powell found Congress' interest in protecting the environment manifest in the two congressional statutes regulating hazardous substances. *See supra* note 2. Relying on Congress' expressed concern over hazardous waste, Justice Powell refused to presume that Congress implicitly overruled "longstanding restrictions" on the abandonment power. 106 S. Ct. at 762. The dissenting opinion countered that "[i]f these statutes operated to bar abandonment here—something neither respondents nor the Court suggests—then this might be a different case. . . . But the statutes do not bar abandonment, and the majority's reference to their obvious concern over the risks of storing hazardous substances is little more than make-weight." *Id.* at 764-65, n.3. (citation omitted).

62. *See supra* notes 41-43 and accompanying text.

63. *See supra* note 38. In addition to removing 24-hour guard service, the trustee shut down a fire-suppression system at the New York facility. 106 S. Ct. at 758.

abandonment when it creates additional danger to the public.[64] Beyond this threshold, the command of *Midlantic* is ambiguous.

The decision holds that abandonment may not contravene state laws reasonably designed to protect the public from identified hazards.[65] A footnote adds the limitation that the abandonment power may be limited only by laws or regulations reasonably designed to protect the public health or safety from "*imminent and identifiable harm.*"[66] When a hazardous site presents an imminent and identifiable harm, the bankruptcy judge must determine which state laws or regulations a trustee must comply with before court authorization of abandonment.[67] Remedial measures short of a total cleanup which eliminate imminent and

64. Justice Rehnquist, writing for the dissent, would accept a narrow condition on the abandonment power "where abandonment by the trustee itself might create a genuine emergency that the trustee would be uniquely able to guard against." In any other situation, Justice Rehnquist would require only that the trustee notify the appropriate authorities to allow those authorities to take remedial measures. He reasoned that this procedure is consistent with the Code and also furthers the state's interest. He stated, "[i]t advances the States' interest in protecting the public health and safety, and, unlike the rather uncertain exception to the abandonment power propounded by the Court, at the same time allows for the orderly liquidation and distribution of the estate's assets." *Id.* at 767 (Rehnquist, J., dissenting).

65. *Id.* at 762.

66. *Id.* at 762, n.9. (emphasis added). The majority's holding, in full context, also reveals uncertainty as to the scope of the *Midlantic* holding:

> Accordingly, without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we 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.

Id. at 762. The footnote to this holding reads in full:

> This 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.

Id. at n.9.

67. In *Midlantic*, hundreds of thousands of gallons of highly toxic waste oil remained in deteriorating containers causing imminent risks of explosion, fire, water contamination, natural resource destruction, injury, genetic damages, and death through personal contact. The bankruptcy court failed to require the trustee to abate these imminent dangers. After abandonment, both facilities remained a high risk to public health and safety. *Id.* at 758, n.3, (quoting Brief for the United States as Amicus Curiae 4, 23).

In his dissent, Justice Rehnquist argued that the majority failed to identify those state laws "reasonably calculated to protect the public health or safety from imminent and identifiable harm," thus, a trustee must speculate as to which state laws he or she must follow. 106 S. Ct. at 767 (Rehnquist, J., dissenting).

identifiable harm and adequately protect the public comply with the *Midlantic* requirement.[68] If measures short of a total cleanup adequately protect the public, the trustee can abandon the property without the greater financial burden of a complete cleanup. Bankruptcy courts should adopt this approach to achieve a more equitable resolution of the conflict between the abandonment power and environmental laws. Such an approach protects the public from imminent harm and allows the trustee to administer the bankrupt's estate with less delay and to distribute more of the estate's assets to the debtor's creditors.[69]

If a court requires a complete cleanup of a contaminated site, state environmental laws will completely obviate the abandonment power and cripple the Chapter 7 liquidation proceeding. This result is unwarranted in light of the language of section 554[70] and the Bankruptcy Code's supremacy over state law.[71] Although the *Midlantic* majority found that section 554 fails to pre-empt all state laws, the holding does not sanction state environmental laws completely negating the trustee's abandonment power.[72] In the absence of express congressional intent, courts should reconcile the operation of the Bankruptcy Code with environmental statutes, rather than subordinate the Code's provisions to environmental legislation. A flexible analysis of which remedial measures adequately protect the public from imminent and identifiable harm accommodates the policies underlying both the Bankruptcy Code and environmental legislation.[73]

B. *Midlantic's Impact on Cleanup and Cost Recovery Actions*

When the government cleans up a hazardous site while it is in the estate's possession, the trustee may subsequently seek to abandon the property to escape the estate's reimbursement obligation.[74] The *Midlantic* decision fails to prohibit abandonment in this situation. The

68. Remedial measures, such as fencing, removal of explosive agents, and sealing deteriorated tanks, could adequately protect the public health and safety from imminent dangers. *Id.*

69. *See supra* note 21.

70. *See supra* notes 29-31 and accompanying text.

71. U.S. CONST. art. VI, § 2.

72. *See supra* note 66.

73. *See supra* note 10.

74. *See In re* T.P. Long Chemical, Inc., 45 Bankr. 278, 284 (Bankr. N.D. Ohio 1985) (trustee sought to abandon contaminated drums that were property of the estate when the estate took remedial action to avoid its obligation to the EPA under CERCLA).

Court in *Midlantic* refused to extend its rationale to government cleanup and cost recovery actions. If the government remedies the hazardous site, subsequent abandonment will not threaten the public with an imminent and identifiable harm.[75] Statutory or regulatory provisions requiring reimbursement protect the public purse instead of protecting the public from imminent and identifiable harm.

The government may argue, however, that speedy cost recovery is necessary to finance future cleanups of harmful sites. The majority opinion foreclosed this argument.[76] The Court stated that the limit on abandonment "does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment."[77]

Permitting abandonment in a government cleanup and cost recovery action, however, will not necessarily prevent the government from obtaining reimbursement from the estate.[78] Some of the expenses incurred by the government are costs the estate would bear following a government cleanup order.[79] If abandonment totally relieves the estate of its reimbursement obligation, determining who pays for environmental cleanup depends on which procedure the government employs. To prevent this anomalous result, courts must render ineffective a trustee's attempt to avoid or transfer the estate's liability.[80]

C. *Utilizing Estate Funds to Remedy Imminent Dangers*

Prohibiting abandonment will remedy a hazardous site and ensure compliance with environmental laws only if sufficient estate funds are available to remedy the danger. The Court in *Midlantic* failed to discuss what part of the estate's funds will finance the remedial measures required by the bankruptcy courts.[81] Cleanup obligations must obtain

75. *See supra* notes 65-66 and accompanying text.

76. The Court prohibits abandonment to protect the public health and safety from "identified" hazards only. *See supra* note 65 and accompanying text.

77. *See supra* note 66 and accompanying text.

78. *See T.P. Long*, 45 Bankr. at 284 (holding that abandonment does not affect the estate's liability under CERCLA). *See also supra* note 26 and accompanying text.

79. *See T.P. Long*, 45 Bankr. at 287 (holding government removal of hazardous wastes an obligation of the estate under CERCLA because the EPA discharged a "duty of the trustee").

80. Applicable environmental statutes may already foreclose abandonment as a means for the estate to avoid reimbursement obligations. *See supra* note 26 and accompanying text.

81. In *Midlantic*, New York sought reimbursement from the estate as an administrative expense. 106 S. Ct. at 758, n.2. New Jersey also sought to force the trustee to remedy the New Jersey hazard with estate funds. 739 F.2d at 928. The majority re-

priority over other claims against the estate to ensure that prohibiting abandonment will remedy hazardous property. Otherwise, the property will remain in the estate's possession as an imminent danger to the public health and safety.[82]

Thus, since the Court in *Midlantic* failed to address the issue of cleanup cost priority, the decision leaves bankruptcy courts with few choices to effectuate the command of the *Midlantic* majority. Courts will undoubtedly follow earlier decisions that allow cleanup costs as an administrative expense.[83] The trustee pays administrative expenses before the claims of unsecured creditors, but after those of the secured creditors.[84] This approach will result in cleanup by the estate, to the detriment of unsecured creditors, rather than by the government.[85]

A greater problem arises when the funds available for administrative expenses are insufficient to cover remedial cleanup costs.[86] To date, bankruptcy courts have refused to subordinate secured creditors' claims to an estate's cleanup obligation.[87] Some states, however, do so

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fused to address this issue, responding that the question was not before the Court. *Id.* That question, however, is inseparable from the question the Court decided. The Court's holding necessarily requires the trustee to spend estate funds. *See* 15 ENVTL. L. REP., *supra* note 9, at 10181 (the Third Circuit assumes "that denying abandonment would prevent or minimize the environmental hazard"). In sum, the Court prohibits abandonment on the preliminary assumption that the estate must remedy the hazardous site. Otherwise, there is no reason to prohibit abandonment.

82. *See supra* note 81.

83. *See In re* T.P. Long Chemical, Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985) (holding that cleanup costs incurred by the EPA after the debtor files for bankruptcy are recoverable from the bankrupt's estate as an administrative expense). *See In re* Laurinburg Oil Co., No. B-84-0011, slip op., (M.D.N.C. Sept. 14, 1984). *But see In re* Stevens, 53 Bankr. 783 (Bankr. Maine 1985) (cleanup cost inherited by trustee is not an administrative expense).

84. The Bankruptcy Code allows as an administrative expense "the actual necessary costs and expenses of preserving the estate. . . ." 11 U.S.C. § 503(b)(1)(A) (1982). Administrative expenses received the first priority of payment out of the estate's unencumbered assets. 11 U.S.C. § 507(a)(1) (1982).

85. The court in *T.P. Long*, 45 Bankr. at 287, stated that it could:

> sympathize with the creditors but finds that this is a risk which the creditors must bear. Creditors must bear the risk of any enterprise. Congress has decided that administrative expenses should be paid prior to other claims against the estate. The estate cannot avoid its legal obligations merely by invoking concern for the general creditors.

86. In *T.P. Long*, the unencumbered assets of the estate were insufficient to cover the cleanup costs and the EPA sought payment out of a bank's security interest on the contaminated property. *Id.*

87. Section 506(c) of the Code allows recovery of administrative expenses from secured creditors. The section represents an exception to the traditional rule that admin-

through express superlien provisions creating statutory liens in favor of the states for environmental cleanup costs.[88] Absent such legislation, secured creditors are presently immune from government attempts to recover cleanup costs. Unsecured creditors, however, remain unprotected from this attack.

CONCLUSION

As a matter of policy, *Midlantic* represents the view that unsecured creditors, rather than the government, must bear the risk of cleanup when the responsible debtor petitions for bankruptcy. The Court effectively places the financial burden of environmental cleanup on an unsuspecting few when the responsible debtor liquidates in Chapter 7 and escapes liability. For this reason, bankruptcy courts should interpret *Midlantic* narrowly and require that the trustee expend only the funds necessary to protect the public health and safety from imminent and identifiable harm. Until Congress produces a legislative plan to resolve the conflicts between the Bankruptcy Code and environmental legislation, courts must strive to reach an equitable result that accommodates both legislative schemes.

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istrative expenses are not charged against secured creditors. The traditional rule exists because trustees usually act for the benefit of general creditors. If the trustee acts for the benefit of the secured creditors, however, the estate is not expected to bear the cost. Thus, § 506(c) provides that "[t]he trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expense 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) (emphasis added). In *T.P. Long*, the court rejected the EPA's claim that the expense fell within the § 506(c) exception because the bank would not benefit as holder of the secured claim. *See supra* note 86. *But see In re* Berg Chemical Co., No. 82-B 12052 (HB) (Bankr. S.D.N.Y. July 9, 1984) (New York obtained a first lien and superpriority over all debts, including existing liens, in the Berg bankruptcy pursuant to an agreement in which it agreed to fund a hazardous cleanup at a Berg site).

88. These states include New Jersey, New Hampshire, and Massachusetts. For a discussion of these provisions and related issues, *see* Note, *Priority Lien Statutes: The State's Answer to Bankrupt Hazardous Waste Generators*, 31 WASH. U. J. URB. & CONTEMP. L. 373 (1987).

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