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Environmental Cleanup Obligations and the Bankruptcy Trustee's Abandonment Power: Dumping on the Creditor?

The federal bankruptcy code was once a tool of last resort used by ailing companies desperately seeking to avert their financial demise. Now, however, it has become a battleground between governmental regulators attempting to enforce environmental cleanups and viable corporations seeking to avoid those obligations.

With increasing frequency over the past few years, companies across the nation have been filing bankruptcy petitions to avoid costly cleanups mandated by state environmental laws. Once the bankruptcy proceedings are commenced, the trustees in bankruptcy discard contaminated property under section 554 of the Bankruptcy Code (the "Code") which permits a trustee to abandon property that is "burdensome" to the estate.[1] Environmental officials have tried to block this controversial manuever but have met with only limited success as the federal judiciary has struggled with the question of

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[1] 11 U.S.C. 554(a). This action reads as follows:

> "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." The former Bankruptcy Act did not expressly address abandonment of property by an estate. This section was added to the 1978 revisions to the Bankruptcy Code.

whether environmental laws enacted under the police power of a state may supercede the broad federal powers of the trustee in bankruptcy.

With the federal courts divided on this issue, the Supreme Court attempted to determine the proper construction of Section 554 when it agreed to decide *Midlantic National Bank v. New Jersey Department of Environmental Protection (Midlantic)*.[2] While the Court did hold that a trustee could not abandon property in contravention of state laws reasonably designed to protect the public safety, it was a very narrow and ambiguous ruling that left many crucial questions unresolved and failed to stem the tide of conflicting federal decisions.

Quanta Resources Corporation (Quanta) processed waste oil at two facilities in Edgewater, New Jersey and Long Island City, New York. Shortly after Midlantic National Bank loaned Quanta $600,000 secured by accounts receivable, inventory and certain equipment, the New Jersey Department of Environmental Protection (NJDEP) discovered Quanta had violated its operating permit by accepting 400,000 gallons of oil contaminated with polychlorinated biphenyls (PCBs). NJDEP ordered the plant closed and initiated cleanup negotiations with Quanta. When the talks stalled, Quanta filed a Chapter 11 petition for reorganization and then converted the action to a Chapter 7 liquidation proceeding after NJDEP issued an administrative order requiring Quanta to cleanup the site.

Meanwhile, a separate investigation of the Long Island City facility by the City of New York uncovered rusting storage drums containing 70,000 gallons of PCB-contaminated waste oil. After unsuccessfully attempting to sell the site, Quanta's trustee notified the Bankruptcy Court for the District of New Jersey that the property was burdensome and of inconsequential value to the estate and that he, therefore, intended to abandon it pursuant to section 554 of the Code.

The City and State of New York, claiming the abandonment would threaten public safety and would constitute an unlawful discharge of hazardous wastes, sought to bar the abandonment and asked the Bankruptcy Court to order the estate to bring the site into compliance with the applicable state environmental regulations.[3] The Court, however, granted the trustee's motion, ruling that the state was in a better position than the estate or its creditors to protect the public from the danger created by the PCBs. New York was then forced to decontaminate the property at a cost of $2.5 million.

After the District Court for the District of New Jersey affirmed, the trustee moved to abandon the personal property (consisting primarily of the contaminated oil) at the New Jersey facility.[4] NJDEP then took a direct appeal to the Court of Appeals for the Third Circuit and the case was consolidated with the New York appeal.

In a 2-1 decision,[5] the Third Circuit reversed the lower court decisions. Judge Leonard Garth, writing for the majority, found that Congress had not intended the bankruptcy code to preempt all state regulations and found that the trustee's abandonment power was subject to equitable principles that protected certain public interests.[6] He acknowledged that compliance with environmental laws might deplete the assets of the estate available for distribution to creditors and conceded that the creditors might receive less than they would otherwise be entitled to under the bankruptcy code but concluded that the state's interest in protecting the public was greater than that of the creditors.[7]

In a strongly-worded dissent, Judge John Gibbons accused the majority of allowing the trustee to "reach into the creditors' pockets for the cost of the cleanup" and that the decision unfairly transfered the burden of the cleanup onto creditors who were "in no way responsible for placing the contaminated soil on the site."[8]

By the time the Supreme Court agreed to hear *Midlantic*, five bankruptcy courts had expressly refused to follow the Third Circuit's holding[9]. Bankruptcy trustees and creditors were hopeful that a footnote appearing in *Ohio v. Kovacs*[10] which had been decided the previous term was an indication that the Court would follow this line of authority.[11] In a 5-4 decision, however, the Court affirmed the Third Circuit's holding.

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[2] ___ U.S. ___, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986).

[3] New York argued that since abandonment under section 554 would revest title in an entity without assets which could not effectuate a cleanup, the abandonment would constitute a disposal of hazardous wastes under section 71-2702 of the Envtl. Conservation Law. Furthermore, since Quanta did not have the resources to adequately secure the containers of hazardous waste, there would also be a continuing violation of the waste storage provisions of that statute as well.

[4] The trustee took no action to safeguard the public from the danger posed by the facilities. Indeed, by removing the 24-hour security and shutting down the fire suppression system, he aggravated the existing dangers to the public. This total disregard for the potential hazards posed by the sites apparently influenced the majority opinion in *Midlantic*. See 106 S.Ct. at 758 n.3.

[5] *In re Quanta Resources Corporation*, 739 F.2d 912 (1984); *In re Quanta Resources Corporation*, 739 F.2d 927 (1984).

[6] *Id.* at 915.

[7] *Id.* at 922.

[8] *Id.* at 925.

[9] *See* In re: Catamount Dyers, Inc., 50 B.R. 790 (Bkrtcy.D.Vt. 1985); In re: Union Scrap Iron & Metal Co., 49 B.R. 477 (Bkrtcy.D.Minn 1985); In re:A&T Trailer Park, Inc., 53 B.R. 144 (Bkrtcy.W.D.Mich. 1984); and In re: Charles A. Solvent, No. 184-00096, Slip. Op. (Bkrtcy.D.Maine 1985). In addition to Quanta Resources, a bankruptcy court decision permitting abandonment was reversed in In re: National Smelting of New Jersey, 13 B.C.D.(D.Col. 1985).

[10] 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649(1985).

[11] In Kovacs, the Court held that a debtor's obligation to comply with a state cleanup order was a debt subject to discharge in a bankruptcy proceeding. While elaborating on the trustee's duty, the Court noted:

Justice Lewis F. Powell, joined by Justices Blackmun, Brennan, Marshall and Stevens, rejected the trustee's argument that the unqualified language of section 554 indicated the trustee's abandonment power was only limited by the property value to the estate and the trustee's obligation to preserve as much of the debtor's estate as possible. He said a judicially-created, pre-Code exception to the abandonment power limited the trustee's power to discard property and relied on three pre-Code cases to support this proposition.[12]

In *Ottenheimer v. Whitaker*,[13] Powell observed that the Fourth Circuit held that a bankruptcy trustee could not abandon four worthless barges that were obstructing navigation in a harbor in violation of federal law even though the cost of complying with the law exceeded the value of the barges. In *In Re Chicago Rapid Transit Co.*,[14] he noted that the Seventh Circuit approved the imposition of conditions authorized by a district court on an abandonment of a railway line by the trustee of a debtor transit company because the conditions ensured compliance with the state law. Finally, in *In re Lewis, Inc.*,[15] a bankruptcy court required a trustee of a debtor utility to seal vents and manholes before it would authorize abandoning an underground network of steampipes. Although no local law was involved, Powell found this case demonstrated that a trustee's power could be subject to the equitable power of a court to protect the public interest.

Powell concluded that these restrictions on the trustee's power were well established when Congress enacted section 554 and that Congress therefore did not intend to grant a bankruptcy trustee unlimited abandonment power.[16]

He also found support for the majority's holding in the automatic stay provision of the Bankruptcy Code.[17] The trustee had argued that if Congress had intended to restrict the scope of the abandonment power it would have enacted express restrictions similiar to those in the automatic stay provision. In dismissing this contention, Powell noted that the two sections had different legislative histories. When section 554 was enacted, he explained, the judge-made exception to the abandonment power was already recognized. In contrast, the automatic stay had been expanded by the courts following its original codification and, Powell explained, Congress inserted express restrictions on that power to expressly override those decisions that had permitted that section to be used to prevent enforcement of antipollution laws.[18]

The majority also asserted that Title 28 U.S.C. 959(b) which requires the trustee to manage property in his possession in accordance with valid state laws buttressed the conclusion that Congress had not intended the Code to pre-empt all state laws that place constraints on the trustee's power.[19] Finally, Powell also found support for his position by the repeated passage of environmental laws. In the face of this uncontroverted congressional concern over improper disposal of hazardous wastes, Powell did not want to presume that Congress implicitly intended to override these long-standing restrictions on the abandonment power.[20]

After setting the stage for a sweeping environmental decision, though, the majority issued a surprisingly limited ruling, holding 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"[21]. The majority further ruled that a bankruptcy court did not have the power to authorize an abandonment without "formulating conditions that will adequately protect the public health and safety."[22] Powell emphasized that the ruling was a narrow one that did not encompass speculative or indeterminate future violations of such laws.[23] He further qualified the holding by suggesting that the exception might not apply to state laws that were "so onerous as to interfere with the bankruptcy adjudication itself" and that the abandonment power was "not to be fettered by laws or regulations not reasonable calculated to protect the public health or safety from imminent and identifiable harm."[24]

In a stinging dissent, Associate Justice William Rehnquist, joined by Chief Justice Burger and Justices White and O'Connor, criticized the majority for imposing conditions on the abandonment power that Congress never contemplated.[25] He pointed out that language of section 554 was clear and absolute and that the Court had been unwilling to read limitations into such un-

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> . . . If the property was worth more than the cost of bringing it into compliance with state [environmental] law, the trustee would undoubtably sell it for its net value, and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of the 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. 105 S.Ct. at 711 n.12.

[12] 106 S.Ct. 755,759.

[13] 198 F.2d 289 (4th Cir. 1952)

[14] 129 F.2d 1 (7th Cir. 1942), cert. denied, 317 U.S. 683 (1942).

[15] 1 B.C.D. 277 (Bkrtcy E.Pa. 1974).

[16] 106 S.Ct. at 759.

[17] 11 U.S.C. 362.

[18] 106 S.Ct. at 761.

[19] *Id.* The petitioner argued that this section was only relevant when the trustee was actually operating the business as opposed to liquidating the estate and while the majority conceded this section did not directly apply to the abandonment power it was nevertheless further evidence that Congress did not intend the Bankruptcy Code to pre-empt all state laws.

[20] *Id.* at 762.

[21] *Id.*

[22] *Id.*

[23] *Id.* at n. 9

[24] *Id.*

[25] *Id.* at 763.

qualified language without a clear expression of congressional intent.[26] He concluded that when Congress was concerned about enforcement of environmental laws, it clearly expressed itself as it had done with the express restrictions of the automatic stay. Therefore, he reasoned, the absence of such provisions in the section 554 indicated Congress had no intention to so restrict the trustee's power.

The dissent also argued that the effect of the decision was to give priority to state cleanup costs over those of creditors and that Congress had not intended that section 554 be used to establish the priority of particular bankruptcy claims.[27] While the dissent conceded that there might be some circumstances when abandonment itself might create a genuine emergency that only the trustee would be uniquely suited to guard against, it concluded that in most cases, all the trustees should be required to do was to give adequate notice to the appropriate government officials before abandoning the property so that the authorities would have sufficient time to protect the public from the harm posed by the property.[28]

The *Midlantic* decision left unresolved for the lower courts to decide several key issues that would further define the contours of the abandonment power and the obligations of the creditors of the estate.

Under the ruling, a debtor may not hide behind the shield of a bankruptcy proceeding to avoid environmental cleanup costs even if that would require the debtor to devote substantial portions of its assets towards the cleanup. It is unclear, however, if the debtor would be required to perform a total cleanup or if it could satisfy its obligations by removing only those hazards that pose immediate harm to the public. Different environmental agencies have developed different cleanup standards for different substances and these guidelines are influenced by the geology and hydrology of the site. The respondents had argued that abandonment could be conditioned on a total cleanup and by affirming a decision that seemed to adopt the respondents position, the majority seemed to indicate that a total cleanup requirement would fall within the narrow exception to the abandonment power. Yet, by limiting its ruling to those laws reasonably calculated to protect the public from imminent harm and by cautioning that those laws could not be so onerous as to interfere with the adjudication of the bankruptcy proceeding, the Court also seemed to suggest that if a partial decontamination could eliminate the risk of an imminent discharge or release of hazardous substances, the trustee might only be required to perform the partial cleanup even though the regulation mandated that the site be restored to a pristine condition. Indeed, the dissent argued that requiring the trustee to perform a total cleanup when a partial decontamination would eliminate the "imminent harm" would constitute an "onerous" condition that interfered with the bankruptcy adjudication.[29]

Another issue the Court did not address which is of paramount importance to creditors is the priority of governmental cleanup costs - in other words - who is to pay for the cleanup if the unencumbered assets of the estate are insufficient to satisfy the cleanup costs? While not directing ruling on the issue, however, the *Midlantic* case seems to have shifted the trend towards affording priority status to cleanup costs under sections 503(b), 506(c) and 507(a) of the Code.

Prior to the *Midlantic* decision, it was unclear if the postpetition cleanup costs incurred by governmental agencies were general unsecured claims that would be subordinate to the claims of secured creditors or whether such government expenses were superior to previously perfected liens on the property of the party responsible for the contamination. To protect their claims, a handful of states had enacted so-called "Superlien" laws that elevate governmental cleanup claims above the pre-existing claims of secured and unsecured creditors.[30] Several other states and the United States Environmental Protection Agency (EPA), though, had sought with mixed success to have their cleanup costs accorded priority status as an administrative expense under the Code which would allow the cleanup costs to be satisfied out of the proceeds of the collateral of secured creditors.

For example, in *In re T.P. Long Chemical, Inc.*,[31] the EPA initiated cleanup activities and removed approximately 90 buried drums containing various hazardous substances after the trustee had refused to take remedial action and the agency then sought to have its cleanup costs entitled to administrative expense priority under section 506(c).[32] The Ohio bankruptcy court found that the estate of the debtor had a duty to

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[26] *Id.* at 764.

[27] *Id.* at 767. The dissent did acknowledge that the states had considerable latitude to enact "Superlien" laws to ensure the priority of their claims.

[28] *Id.*

[29] *Id.* at 767.

[30] As of this writing, Arkansas, Connecticut, Massachusetts, New Hampshire, New Jersey, Oregon and Tennessee have adopted Superlien laws but they vary in scope. The New Jersey, Connecticut and Massachusetts superpriority lien only applies to the affected real property while a nonpriority lien attaches other personal and real property. The New Hampshire law creates a superpriority lien against all real and personal property of the responsible party as well as on its business revenues. In Tennessee, however, the lien is on the increase in property value resulting from the cleanup and is subordinate to any lien for real estate taxes. The Arkansas lien is similar to Tennessee since it is subordinate to real estate tax liens but is also limited to the real property that is subject to the cleanup.

[31] 45 B.R. 278 (Bkrtcy.N.D.Ohio 1985)

[32] The 506(c) provides that a 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.

cleanup the property under the Comprehensive Environmental, Response, Compensation and Liability Act of 1980 (CERCLA or Superfund)[33] and that the cost incurred by the EPA in discharging this liability was an actual necessary expense for preserving the estate that was entitled to administrative expense priority[34]. The court acknowledged that this would deplete the assets of the estate available for distribution to general creditors but declared that this was a "risk which the creditors must bear."[35]

Since the unencumbered assets were insufficient to satisfy the EPA's claim, the agency sought to invade the proceeds from the collateral of the secured lender, BancOhio which had a security interest in the personal property of the debtor. EPA argued that if it had not remove the hazardous waste drums, BancOhio would have been obligated to do so and thus the bank received a benefit from the EPA cleanup. The court ruled that the drums had no value as collateral to BancOhio so no benefit was conferred to the bank. Furthermore, the bank was merely a secured party who did not incur any obligations under the federal Superfund that had been discharged by the cleanup.[36] The court did note, however, that if the EPA expenditure did discharge the BancOhio of a cleanup obligation, that discharge would qualify as a necessary "benefit" under section 506(c).[37]

In *In re Wall Tube and Metal Products Co.*,[38] however, the bankruptcy court declined to allow priority status to the cleanup costs incurred by the Tennessee Department of Health and Environment (TDHE) because the trustee had conveyed the real property and fixtures and the costs were, thus, not connected to preserving property of the debtor's estate.[39] The court also ruled that the sampling costs associated with 80 drums of hazardous substances that were not conveyed by the trustee were not the sort of expenses contemplated by section 503(b).

Expenses incurred by a Debtor-in-Possession were also given administrative expense priority in *In re Laurinburg Oil Company, Inc.*[40] The Bankruptcy Court for North Carolina found that since 28 U.S.C. 959(b) required a debtor in possession to operate the property in accordance with state laws, the expenses of abating violations of North Carolina environmental laws would be administrative expenses necessary for the preservation of the estate.

Cases decided subsequent to *Midlantic* have held that since the trustee cannot abandon contaminated property, the estate is liable for the cleanup of hazardous wastes and, therefore, the costs incurred by the government are a necessary expense of preserving the estate. In *In re Stevens*,[41] the United States District Court for the District of Maine reversed a bankruptcy court ruling that postpetition cleanup costs for a prepetition environmental hazard were an unsecured claim not entitled to first priority administrative expense. In that case, the Maine Department of Environmental Protection discovered 29 drums of waste oil contaminated with PCB's on the debtor's property and informed the debtor that the drums would have to be placed in an adequate storage area and arrangements would have to be made for their disposal. The debtor did not comply with the agency's storage directives and, instead, placed the drums in a tractor-trailer box. Following the filing of a chapter 7 petition, the trustee notified the agency it would not arrange for the removal of the drums and while it did not object to the agency removing the waste oil, the estate would not pay for the costs of such removal. The agency then removed the waste oil and sought to recover the costs as an administrative expense.

Relying on *Midlantic*, the court found that the improper storage of waste oil containing PCB's constituted an imminent and identifiable danger to the public and held that the trustee could not abandon the waste oil. Since the trustee refused to comply with state environmental laws by removing the contaminated oil, the agency was obligated to conduct the cleanup itself. The court reasoned that since the agency fulfilled the legal obligation of the trustee as possessor of the hazardous waste to cleanup the property, the cleanup conferred a benefit on the estate by bringing it into compliance with environmental laws. Therefore, the court ruled, the cleanup costs should be allowed as administrative expenses.

Equally significant was the ruling in *In Re Pierce Coal and Construction, Inc.*[42] that prepetition costs could be elevated to administrative expense priority if such costs were necessary to protect the public from imminent and identifiable harm. In *Pierce*, reclamation costs attributed to the mining operations of the debtor-in-possession

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[33] 42 U.S.C. 9601 et seq.

[34] 45 B.R. at 286.

[35] *Id.* at 287.

[36] *Id.* at 288.

[37] *Id.* One wonders how the court would have ruled if BancOhio had been a mortgagee whose mortgaged premises were enhanced in value by the removal of the toxic wastes?

[38] 56 B.R. 918 (Bankr. E.D. Tenn. 1986).

[39] *Id.* at 924. The court reasoned that a conveyance of property to a solvent entity who had the financial capacity to perform the cleanup and who had contractually agreed to conduct the cleanup did not raise same the public policy concerns raised in the Third Circuit's decision in *Quanta* since in the latter case, abandonment would have revested title in the debtor who had no assets with which to perform a cleanup. Furthermore, the court noted, the conveyance did not constitute an impermissible transfer of liability under CERCLA since the mere transfer of property out of the estate does not relieve the estate from CERCLA liability.

[40] 49 B.R. 652 (Bnkr. M.D.N.C. 1984)

[41] Civ. No. 85-0418-B, January 9, 1987.

[42] 65 B.R. 521 (Bnkr. N.D.W.Va. 1986)

were afforded administrative expense priority but the prepetition expenses not incurred by the debtor-in-possession were held to be merely general unsecured claims. However, the court went on to say that the rule that a bankruptcy court could not elevate a prepetition unsecured claim to an administrative priority had been altered by *Midlantic* so that "where imminent and identifiable harm is present, the priorities of the bankruptcy code may be subservient to the environmental laws designed to protect the public safety.[43] Under such the proper set of circumstances, the court continued, the necessary costs of protecting the public health or safety from imminent and identifiable could be elevated to administrative priority and "even to a type of secured priority."[44]

The *Midlantic* decision may also have implications under CERCLA. Under Superfund, past and current owners and operators of facilities are strictly liable for cleanup costs.[45] The current owners/operators are responsible for cleanups even if they did not contribute to the unlawful release or discharge.[46] While secured creditors are generally exempt from Superfund liability, they may lose their immunity if they foreclose on contaminated property or become so entangled in the day-to-day management of their debtor's operation that they are deemed to be an owner/operator under Superfund.[47] Since bankruptcy does not provide a trustee with a safe harbor to abandon contaminated property, that trustee who is forced to continue operating a facility it sought to abandon may also find itself saddled with Superfund liability as an owner or operator.[47a] This liability could also be extended to Debtor-in-Possession financiers and even creditors' committees.

The murky decision in *Midlantic* complicates the task of counsel for lenders and bankruptcy trustees but several bankruptcy cases which were decided after *Midlantic* and permitted abandonment of contaminated property do provide some guidance on the boundaries of the abandonment power and the obligations of the trustee. These cases seem to stand for the proposition that if the contaminated property does not pose an "imminent harm" to the public and where the trustee has notified the environmental officials or otherwise acted reasonably, the trustee may exercise its power of abandonment to discard the property.

In *In Re Oklahoma Refining Co.*,[48] the trustee proposed abandoning a closed oil refinery after unsuccessfully attempting to sell the property. Toxic substances were leaching from the site into a creek and an underground acquifer but did not pose imminent harm to the public. The trustee took steps to minimize the harm and had proposed a closure plan in accordance with state law to ensure that the contaminants would not migrate from the site. The total value of the estate was estimated to be $4 million against $40 million in secured claims, $8 million in unsecured claims and an estimated $2.5 million cleanup. The trustee did not have any non-cash collateral and the creditors would not consent to applying any further cash towards the cleanup.

In approving the abandonment, the bankruptcy court held that *Midlantic* did not require strict compliance with state environmental laws but only that a court take such laws and regulations into consideration when determining whether to permit abandonment.[49] The court noted that unlike the trustee in *Midlantic*, the trustee had taken steps to mitigate the hazard and the pollution did not pose "immediat and menacing harm" to the public. Furthermore, the estate was in con pliance with all state directives e cept for the closure plan which w rejected for technical reasons. T court concluded that the truste with the consent of its lenders, ha acted reasonably under the circumstances and to require strict compliance with the state environmental laws would create a bankruptcy case in perpetuity that would "derogate the spirit and purpose of the bankruptcy laws requiring prompt and effectual administration within a limited time."[51]

In *In re Franklin Signal Corp.*,[52] the trustee sought to abandon 14 deteriorating barrels of hazardous wastes because the removal cost exceeded the value of the estate's unencumbered assets. In a well-reasoned opinion, the bankruptcy court for the District of Minnesota approved the abandonment and in the process proposed a balancing test to weigh the competing interests of environmental protection and the bankruptcy code.

The court held that the *Midlantic* decision did not bar a trustee from abandoning property if that abandonment would violate state laws designed to protect the public but simply required that the trustee take adequate precautionary measures to ensure that there is no imminent harm to the public as a result of the abandonment and that

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[43] *Id.* at 531.

[44] *Id. See also* In re Distrigas, 66 B.R. 382 (Bkrtcy. D. Mass. 1986); In re Mowbray Engineering Company, Inc., 67 B. R. 34 (Bkrtcy. M. D. Ala. 1986) and In re Hemingway Transport, Inc., 73 B. R. 494 (Bkrtcy. D. Mass. 1987)(holding that environmental cleanup costs were entitled to a first priority and administrative expense that could come ahead of the claims of secured creditors).

[45] New York v. Shore Realty Corp., 759 F.2d 1032 (2d cir. 1985).

[46] *Id.*

[47] U.S. v. Mirabile, No. 84-2280 (E.D.Pa. Sept. 6, 1985).

[47a] *See* In re Peerless Plating Co., 70 B. R. 943 (Bkrtcy. W.D. Mich. 1987)(holding that the estate itself would fall within the definition of "owner" under CERCLA and be liable for both pre-petition and post-petition cleanup claims.

[48] 63 B.R. 562 (Bkrtcy. W.D.Okl. 1986).

[49] *Id.* at 565.

[50] *Id.*

[51] *Id.* at 566.

[52] 65 B.R.268 (Bkrtcy.D.Minn. 1986).

bankruptcy courts could not authorize abandonment without formulating conditions that will adequately protect the public.[53] The court said in developing these conditions, a court must take into account the following factors: (1) the imminence of danger to the public health and safety, (2) the extent of probable harm, (3) the amount and type of hazards, (4) the cost of bringing the property into compliance and (5) the amount and type of funds available for cleanup.[54] The court suggested that under *Midlantic*, a trustee had a duty to take minimal steps to protect the public until abandonment was authorized. While these measures would depend on the facts of each case, the court believed that, at a minimum, the trustee would have to conduct an environmental inspection to identify the hazards and to inform the appropriate governmental agencies.[55]

In this case, the trustee had already conducted an investigation and reported the findings to the Wisconsin Department of Natural Resources. Since the agency had not acted after the trustee notified it about the presence of the barrels and since there was no evidence that the drums posed an immediate threat to public safety, the court concluded that no further conditions on the abandonment were necessary.[56] The matter was, in the opinion of the court, "not one of public safety but one of money; who must bear the cost of cleanup."[57]

While the scope of the abandonment power was not before the *Stevens*[58] court, its analysis of the trustees actions is instructive. In *Stevens*, the debtor was informed by the Maine Department of Environmental Protection (MDEP) that the drums containing contaminated oil that were improperly stored in a tractor-trailer box. After the trustee refused the MDEP's request to remove the waste oil, the trustee held a sale of the debtor's personal property in which the tractor-trailer box was roped-off with warning signs at the request of the MDEP. In arguing that the decision of the bankruptcy court that cleanup costs were not an administrative expense should be affirmed despite *Midlantic*, the trustee insisted it had reasonably protected the public health by posting warning signs and roping-off the tractor-trailor box. He contrasted this to the actions of the *Midlantic* trustee where even the most minimal safety precautions were not taken. The trustee argued that *Midlantic* only required a bankruptcy court to formulate conditions that will adequately protect the public before authorizing abandonment and that he had complied with the conditions requested by the MDEP. However, the court ruled that the only conditions that would adequately protect the public were those that complied with the Maine waste disposal laws and that trustee had declined to comply with those requirements.

Under the post-*Midlantic* line of cases, it would appear then that so long as the contamination does not pose an "imminent" threat to the public and the trustee promptly notifies the local authorities and takes reasonable steps to ensure that the hazardous substances will not discharge into the environment (including conducting a preliminary environmental audit), that a bankruptcy court may permit abandonment.

Midlantic and its progeny will have a profound effect on the administration of bankruptcy cases and on lenders' business practices. Not only may a lender find its collateral greatly impaired and perhaps subordinated or consumed by a state cleanup claim but it may find itself directly liable for cleanup costs that far exceed the value of its collateral. Until the issues surrounding abandonment of contaminated property are further refined, lenders will have to include potential environmental liability as another factor to consider when evaluating a client's creditworthiness and should implement an environmental risk management policy containing the following elements:

1. Prior to booking a loan, conduct a preliminary environmental audit consisting of a site inspection of the prospective client's facility and an examination of plant records and permits to determine past compliance and violations of environmental laws.

2. Contact the state and local environmental authorities to determine if there have been any environmental violations or incidents at the facility.

3. Loan documents should contain representations about past environmental practices and covenants regarding environmental activities during the life of the loan.

4. Lenders should not become involved in the day-to-day operation or management of the client's facility.

5. Under no circumstances should a lender foreclose on a mortgage until an environmental audit has been performed to determine the environmental liabilities and whether the cleanup costs will exceed the value of the collateral.

6. DIP lenders should require a court order granting superiority to its DIP liens.

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[53] *Id.* at 271.

[54] *Id.* at 272.

[55] *Id.* at 273. The court suggested that this did not obligate the trustee to investigate all the property but just that it reasonably believed would violate the state environmental laws if abandoned. *Id.*

[56] The court expressed doubt that the Wisconsin environmental laws regulating generators of hazardous waste applied to a bankruptcy trustee who was not generating any waste or operating a treatment facility. *Id.* at 272. In determining that there was no imminent harm to the public, the court was also strongly influenced by the failure of the Wisconsin Department of Natural Resources to respond to the notice from the trustee. Id. at 274.

[57] *Id.* The court explained that unlike in *Midlantic*, the wastes at this site did not present risks of explosion, fire and death. Id. at n.9.

[58] See Note 41, *supra*