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Abandonment Rights under Section 554(a) of the Bankruptcy Code: Midlantic National Bank v. New Jersey Department of Environmental Protection

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NOTES

ABANDONMENT RIGHTS UNDER SECTION 554(a) OF THE BANKRUPTCY CODE: *MIDLANTIC NATIONAL BANK V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION*

QUANTA Resources Corporation operated waste oil processing and storage facilities in Long Island City, New York, and in Edgewater, New Jersey.[1] In June 1981 Midlantic National Bank loaned Quanta $600,000 secured by Quanta's inventory, its accounts receivable, and certain equipment. That same month the New Jersey Department of Environmental Protection (NJDEP) sampled the waste oil at the Edgewater site. The samples indicated that the oil contained levels of PCBs[2] in excess of the levels permitted under Quanta's temporary operating authorization.[3] Consequently, NJDEP ordered Quanta to close the Edgewater site and began negotiating with Quanta concerning the cleanup of the site. Before NJDEP and Quanta completed the negotiations, however, Quanta filed a petition for reorganization under chapter 11 of the Bankruptcy Code.[4] The next day NJDEP issued an administrative order requiring Quanta to clean up the site. Subsequently, an investigation of the New York facility revealed that Quanta had stored over 70,000 gallons of PCB-contaminated oil in deteriorating containers there.

On November 12, 1981, Quanta moved to have its chapter 11 proceedings converted into a liquidation proceeding under chapter 7 of the Bankruptcy

1. Quanta owned the New York facility, but leased the New Jersey site.

2. PCBs, polychlorinated biphenyls, are highly toxic carcinogens.

3. NJDEP issued the temporary operating permit.

4. The Bankruptcy Code is codified as title 11 of the United States Code. Under chapter 11 a debtor can voluntarily file a plan to negotiate with creditors for an out-of-court debt restructuring. The debtor remains in possession of its property and conducts its business as a debtor in possession, unless the bankruptcy court, after notice and hearing, finds cause for the appointment of a trustee. 5 COLLIER ON BANKRUPTCY ¶ 1100.01 (L. King 15th ed. 1986) [hereinafter COLLIER]. Liquidation of assets may be accomplished under chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1123(b)(4) (1982). That chapter, however, is designed primarily for rehabilitation. D. COWANS, COWANS BANKRUPTCY LAW AND PRACTICE § 20.1, at 246 (1986).

Code.[5] The court appointed a liquidation trustee.[6] The trustee tried to sell the New York facility, but since the mortgages on the real property at the New York site exceeded the property's value, and the cost of cleaning up the toxic waste was estimated to be well over $1 million, the trustee could not find a buyer. On May 25, 1982, at the trustee's request, the clerk of the bankruptcy court issued a notice of proposed abandonment that was mailed to all Quanta's creditors. The city and state of New York opposed the abandonment on the basis that abandonment would threaten public health and safety, and would violate state environmental law.[7] The parties did not, however, dispute that the site was burdensome and of inconsequential value to the estate[8] within the meaning of the abandonment provision, section 554, of the Bankruptcy Code.[9] The Bankruptcy Court for the District of New Jersey approved the abandonment of the New York facility.[10] The District Court for the District of New Jersey affirmed,[11] and the city and state of New York appealed to the Court of Appeals for the Third Circuit.[12]

Meanwhile, the Quanta trustee petitioned to abandon the New Jersey property. NJDEP objected to the proposed abandonment[13] on the basis that the estate had sufficient funds to protect the public from the danger of the toxic waste. This argument did not persuade the bankruptcy court, which on May 20, 1983, issued an order authorizing the trustee to abandon the personal property at the Edgewater, New Jersey, site.[14] Since the issue was

5. 11 U.S.C. § 1112(a) (1982) authorizes a debtor in possession to convert a chapter 11 case to a chapter 7 case.

6. After the commencement of a voluntary case the court immediately appoints an interim trustee, and the creditors subsequently elect a trustee under § 702. *Id.* § 702. If the creditors do not elect under § 702, the interim trustee serves as trustee. *Id.* § 702(d). The trustee's duties are enumerated in § 704 of the Bankruptcy Code. The trustee must reduce the assets of the bankrupt estate to cash for distribution to the creditors as expeditiously as is prudent. *Id.* § 704. This duty to close the estate is also required by implication from the Bankruptcy Rules. *See* FED. BANKR. R. 1001. Several courts have held that the trustee's main duty consists of the liquidation of assets. *See* Pueblo Sav. & Trust Co. v. Power (*In re* Power), 115 F.2d 69, 72 (7th Cir. 1940); Bunch v. Maloney, 233 F. 967, 969 (8th Cir. 1916), *rev'd on other grounds*, 246 U.S. 658 (1917); Trice v. Coolidge Banking Co., 242 F. 175, 176 (S.D. Ga. 1917); Gardner v. Rich Mfg. Co., 68 Cal. App. 2d 725, 158 P.2d 23, 29 (1945).

7. The New York Environmental Conservation Law makes it unlawful to dispose knowingly of more than 1500 gallons of hazardous waste without authorization from state authorities. N.Y. ENVTL. CONSERV. LAW § 71-2713(7) (McKinney 1984).

8. An estate is created by commencement of a bankruptcy case and is comprised of all legal or equitable interests of the debtor in property. 11 U.S.C. § 541 (1982).

9. *Id.* § 554(a) provides that a trustee may, after notice and hearing, abandon property that is burdensome or of inconsequential value to the estate.

10. New York v. O'Neill (*In re* Quanta Resources), No. 81-05967 (Bankr. D.N.J. June 22, 1982), *reprinted in* Petition for Certiorari at 69a, Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986) (No. 84-805) (LEXIS, Genfed library, Briefs file).

11. New York v. O'Neill (*In re* Quanta Resources Corp.), 55 Bankr. 696, 697 (Bankr. D.N.J. 1983).

12. City of New York v. Quanta Resources Corp. (*In re* Quanta Resources Corp.), 739 F.2d 912 (3d Cir. 1984).

13. The New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11b(h) (West 1982), prohibits intentional or unintentional releasing, spilling, or leaking of hazardous substances that may drain into state waters.

14. Order Authorizing Abandonment of Property, *In re* Quanta Resources, No. 81-05967 (Bankr. D.N.J. May 20, 1983), *reprinted in* Petition for Certiorari at 64a, Midlantic Nat'l Bank

already pending before the Third Circuit in the context of the abandonment of the New York site, NJDEP appealed directly[15] to the Third Circuit.[16] The court of appeals did not hear any arguments in the case concerning the New Jersey property. The court reversed the decisions of the bankruptcy and district courts and held, in a split decision, that the trustee's power to abandon burdensome or inconsequential property of the estate under section 554(a) of the Bankruptcy Code did not supersede state and local laws designed to protect the public health and safety.[17] The Supreme Court granted certiorari and consolidated the two cases.[18] *Held, affirmed*: A trustee cannot abandon property under section 554(a) when doing so would contravene state or local laws designed to protect public health and safety. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986).

I. DEVELOPMENT OF THE ABANDONMENT POWER IN SECTION 554(a)

A. Effect of Abandonment

The 1978 Bankruptcy Reform Act codified the judicially created power of abandonment.[19] This legislation authorizes a trustee in bankruptcy to abandon property that is of inconsequential value to the estate.[20] Under the statutory rule control of the property reverts back to the debtor such that the debtor is treated as having owned it continuously.[21] Thus, the estate is free of expenses of burdensome property. Statutory abandonment, therefore, furthers the purpose of bankruptcy liquidation because abandonment helps the trustee expeditiously to secure funds for distribution to the general creditors of the estate.[22]

The statutory rule of abandonment stems from the common law.[23] The common law rule empowered a bankruptcy trustee to petition the court for leave to abandon an asset that, in the trustee's judgment, would burden

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v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986) (No. 84-805) (LEXIS, Genfed library, Briefs file).

15. Direct appeal is allowed under 28 U.S.C. § 1293(b) (1982).

16. *In re* Quanta Resources Corp., 739 F.2d 927 (3d Cir. 1984).

17. The court of appeals balanced the policies of the state law and federal bankruptcy law in holding that the trustee could not abandon the site. *In re* Quanta Resources Corp., 739 F.2d at 929; City of New York v. Quanta Resources Corp. (*In re* Quanta Resources Corp.), 739 F.2d at 923.

18. Consolidation was authorized by SUP. CT. R. 19-4 because the two cases involved identical questions.

19. 11 U.S.C. § 554(a) (1982).

20. *Id.*; *see supra* note 9.

21. Mason v. Commissioner, 646 F.2d 1309, 1310 (9th Cir. 1980).

22. 5 COLLIER, *supra* note 4, ¶ 554.01.

23. *See* First Nat'l Bank v. Lasater, 196 U.S. 115, 118 (1905); Dushane v. Beall, 161 U.S. 513, 515 (1896); American File Co. v. Garrett, 110 U.S. 288, 295 (1884); Cleveland Terminals Bldg., 118 F.2d 89, 94 (6th Cir. 1941); Federal Land Bank v. Nalder, 116 F.2d 1004, 1007 (10th Cir. 1941), *cert. denied*, 313 U.S. 578 (1941); Stanolind Oil & Gas Co. v. Logan, 92 F.2d 28, 31 (5th Cir. 1937), *cert. denied*, 302 U.S. 763, 303 U.S. 636 (1938); Central States Life Ins. Co. v. Koplar Co., 80 F.2d 754, 757-58 (8th Cir. 1935), *cert. denied*, 297 U.S. 687 (1936); Lincoln Nat'l Life Ins. Co. v. Scales, 62 F.2d 582, 585 (5th Cir. 1933); Quinn v. Gardner, 32 F.2d 772, 773 (8th Cir. 1929).

rather than benefit the estate.[24] The rule developed because the practice of abandoning worthless or burdensome property furthered the paramount purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money for distribution to general creditors.[25] The courts recognized that forcing a trustee to retain such property would frustrate the purpose of the liquidation.[26] Since the trustee took title to the debtor's property under the Bankruptcy Act in force at the time the abandonment concept developed,[27] common law abandonment divested the trustee of title and revested title in the debtor.[28]

B. Common Law Restrictions on Abandonment

Although prior to the current Bankruptcy Code courts normally would not deny a petition to abandon,[29] the courts did impose limitations on the power of abandonment.[30] In deciding *In re Chicago Rapid Transit Co.*[31] in 1942, the Court of Appeals for the Seventh Circuit carved out an exception to the power of abandonment for the operation of a railroad line.[32] In that case the debtor, Chicago Rapid Transit, was a public transportation utility company operating in Chicago. During the reorganization proceedings the trustee wanted to abandon a leased branch rail line. The estate was running the branch line at a deficit and was far behind in rental payments due the lessor, but the Illinois Commerce Commission forbade the abandonment of the line.[33] The court decided that bankruptcy courts could not empower a trustee to abandon property when a state utility commission and public convenience and necessity required otherwise.[34] Although the court required the estate to continue operation of the line in compliance with state law, the court did authorize the estate to reject the lease.[35] The trustee, therefore,

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24. Ottenheimer v. Whitaker, 198 F.2d 289, 290 (4th Cir. 1952). The rule developed by analogy to provisions of the former Bankruptcy Act. *See* 11 U.S.C. § 104(a)(4) (1970) (repealed 1978 and recodified as 11 U.S.C. § 505(b) (1982)), § 110(a)(2) (1970) (repealed 1978), § 110(b) (repealed 1978 and recodified as 11 U.S.C. § 365 (1982)) (contemplating abandonment of property burdened by taxes, patents and trademarks, and leases, respectively).

25. 4 COLLIER, *supra* note 4, ¶ 554.01.

26. *Id.*

27. 11 U.S.C. § 110(a) (1970) (repealed 1978).

28. 4 COLLIER, *supra* note 4, ¶ 554.02[2].

29. First Nat'l Bank v. Lasater, 196 U.S. 115, 118 (1905); Dushane v. Beall, 161 U.S. 513, 513 (1896); Ottenheimer v. Whitaker, 198 F.2d 289, 290 (4th Cir. 1952); Lincoln Nat'l Life Ins. Co. v. Scales, 62 F.2d 582, 585 (5th Cir. 1933).

30. *E.g.*, Ottenheimer v. Whitaker, 198 F.2d 289, 290 (4th Cir. 1952) (restriction on abandoning barges); *In re* Chicago Rapid Transit Co., 129 F.2d 1, 5 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942) (restriction on abandoning railroad line); *In re* Lewis Jones, Inc., [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,471 (Bankr. D. Pa. Nov. 7, 1974) (restriction on abandoning underground steam lines that pose a public hazard).

31. 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942).

32. 129 F.2d at 5.

33. The debtor was a railroad corporation engaged in transportation of passengers in intrastate commerce as a public utility in Illinois and was, therefore, subject to the regulatory jurisdiction of the Illinois Commerce Commission, which directed the trustees to continue to operate the line.

34. 129 F.2d at 5.

35. *Id.*

although required to operate the property, was free of the obligation to pay rent. The decision thus protected the estate, but ensured compliance with state law.

Chicago Rapid Transit, however, was decided in the context of a reorganization proceeding, not a liquidation proceeding. In a reorganization proceeding under the Bankruptcy Code the trustee must operate the property according to the valid laws of the state.[36] This principle does not apply to a liquidation proceeding, because during liquidation the trustee is liquidating, not operating, the estate. Furthermore, *Chicago Rapid Transit* did stress the supremacy of the federal bankruptcy law over state laws,[37] but because the case was decided prior to the codification of the abandonment power, a federal, legislative abandonment rule did not exist to override the state law.

A decade later a Fourth Circuit decision further restricted the power of abandonment. In *Ottenheimer v. Whitaker*[38] the Fourth Circuit decided that the judicially created abandonment rule would yield when it conflicted with a federal statute enacted to ensure the safety of navigation.[39] *Ottenheimer* involved a trustee who sought to abandon worthless floating barges. The harbor engineer of the city of Baltimore successfully opposed the trustee on the grounds that the proposed abandonment would obstruct navigable waters in violation of a federal statute.[40] The penalty under the statute was a fine, imprisonment, or both.[41] The court based its decision not to allow abandonment on the fact that the abandonment rule was not provided by statute, but rather was judicially created.[42] The court did not think it could extend such a judicially created rule to a situation that would cause an unjust result.[43] If the court had allowed the trustee to abandon the barges, the ownership would have revested in the debtor, who would then have been subject to the penalty under the federal statute. The court did note, however, that it would have applied the abandonment rule had it not been for the consequences to the debtor.[44]

The 1974 decision *In re Lewis Jones, Inc.*[45] is a more recent case that restricted the common law right to abandon. In an advisory opinion the Bankruptcy Court for the Eastern District of Pennsylvania concluded that a trustee must seal underground steam lines prior to abandonment so as to prevent a hazard to the public.[46] The estate had sufficient resources to fill in and seal the steam lines; therefore, the court advised the trustees to file an

36. 28 U.S.C. § 959(b) (1982).

37. 129 F.2d at 4. The court stated: "[Bankruptcy law] when given expression in legislation by Congress, is paramount and transcends and supersedes all inconsistent state laws." *Id.*

38. 198 F.2d 289 (4th Cir. 1952).

39. *Id.* at 290.

40. 33 U.S.C. § 409 (1982) provided that it was unlawful to permit or voluntarily cause vessels to sink in navigable waters.

41. *Id.* § 411.

42. 198 F.2d at 290.

43. *Id.*

44. *Id.*

45. [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,471 (Bankr. D. Pa. Nov. 7, 1974).

46. *Id.* If steam lines are left unsealed they pose a danger to public health and safety.

application seeking authorization to expend the necessary amounts to fill and seal the lines before applying for leave to abandon the property.[47] The scope of the *Lewis Jones* holding was rather narrow for two reasons. First, the decision was an advisory opinion, and second, the decision did not squarely address the issue of whether the abandonment rule should yield to state and local laws designed to protect public health and safety.

II. *MIDLANTIC NATIONAL BANK V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION*

A. Defining the Issue

When Congress enacted section 554(a) of the Bankruptcy Code it did not codify any restrictions on the power of abandonment. *Midlantic* presented the first opportunity for the Supreme Court[48] to define the parameters of the section.[49] The central issue in *Midlantic* was whether section 554(a) of the federal Bankruptcy Code preempted state laws designed to protect public health and safety. Essentially this issue was a matter of statutory construction.[50] Justice Powell based his majority opinion on three premises: (1) common law restrictions on abandonment;[51] (2) restrictions on abandonment found in other statutory provisions;[52] and (3) Congress's concern over the risks of improper storage and disposal of hazardous and toxic substances.[53] The dissenting opinion, written by Justice Rehnquist and joined

47. *Id.*

48. Lower courts had held that § 554(a) contained an explicit public policy exception. *See In re* Quanta Resources Corp., 739 F.2d 927, 929 (3d Cir. 1984) (applied balancing test comparing public risk to advantages to trustee and creditors); *In re* T.P. Long Chem., Inc., 45 Bankr. 278, 284 (Bankr. N.D. Ohio 1985). For a more extreme approach see *In re* Charles George Land Reclamation Trust, 30 Bankr. 918, 919 (Bankr. D. Mass. 1983) (bankruptcy petition dismissed for fear that owner of waste site would take shelter behind automatic stay and abandonment provisions and thereby avoid cleanup costs). *Contra In re* Stevens, 53 Bankr. 783, 787-88 (Bankr. D. Me. 1985) (trustee may abandon property containing hazardous waste; trustee not limited by 28 U.S.C. § 959(b) (1982)); *In re* A&T Trailer Park, Inc., 53 Bank. 144, 147 (Bankr. D. Wyo. 1985) (trustee may abandon property without compliance with state environmental laws); *In re* Catamount Dyers, Inc., 50 Bankr. 790, 791-94 (Bankr. D. Vt. 1985) (liquidating trustee may abandon hazardous waste material; Congress did not create hazardous waste exception to § 554(a); and because trustee is liquidating rather than managing property, 28 U.S.C. § 959(b) (1982), which requires compliance with state law, *see supra* text accompanying note 36, does not apply).

49. For background discussion see *Developments in the Law—Toxic Waste Litigation: VII Bankruptcy and Insurance Issues*, 99 HARV. L. REV. 1573, 1585-601 (1986); Note, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 879-83 (1985) [hereinafter Note, *Cleaning Up*]; Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 VAND. L. REV. 1037, 1041-63 (1985) [hereinafter Note, *Belly Up*].

50. The language of § 554(a) is unconditional. *See supra* note 9. If the abandonment power were intended to be absolute, then any implied exceptions in favor of public health and safety would be impermissible.

51. *See supra* notes 29-47 and accompanying text.

52. *See generally* 11 U.S.C. § 362(a) (1982) (automatic stay provision in Bankruptcy Code, which allows a bankruptcy petition to stay legal proceedings against a debtor, restricted to allow government to commence or continue legal proceedings to protect public health and safety); 28 U.S.C. § 959(b) (1982) (trustee must manage and operate property in his possession in compliance with state laws).

53. The legislative history of § 554(a) is brief and unhelpful. The Court, therefore, did not

by Chief Justice Burger and Justices White and O'Connor, strongly disputed each of these three premises.

B. Relevancy of Common Law Restrictions and Statutory Construction

The majority stated that together the restrictions in *Ottenheimer, Chicago Rapid Transit,* and *Lewis Jones* constituted a judicial doctrine designed to restrict the common law abandonment power when necessary to protect legitimate state or federal interests.[54] The Court reasoned that the Bankruptcy Code was meant to encompass this judicial doctrine[55] and that the doctrine would prevent abandonment of contaminated property.[56] In support of this analysis the Court stressed that accepted rules of statutory construction dictate that Congress, when it codifies a judicial doctrine such as the power of abandonment, must expressly state its intention to change the interpretation of the judicially created concept.[57] The Court argued that under this rule of construction the Bankruptcy Code abandonment power was subject to the common law doctrine derived from *Ottenheimer, Chicago Rapid Transit,* and *Lewis Jones* as the Code did not clearly indicate otherwise.[58] The majority recognized that the restrictions in *Ottenheimer, Chicago Rapid Transit,* and *Lewis Jones* did not encompass the precise factual issue involved in *Midlantic.*[59] Justice Powell emphasized, however, that the three cases represented an established doctrine that prohibited abandonment that would cause a violation of state and federal laws designed to protect legitimate interests.[60] The doctrine was not designed to prevent abandonment only in fact situations directly parallel to the facts of *Ottenheimer, Chicago Rapid Transit,* or *Lewis Jones.*[61]

As further support for its position the majority referred to another rule of statutory construction. Specifically, the Court stated that if Congress, in drafting bankruptcy laws, desires to grant the trustee exemptions from nonbankruptcy laws, it must clearly express that intent.[62] The Court con-

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rely heavily upon it. *See, e.g.*, S. REP. NO. 989, 95th Cong., 2d Sess. 92, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5878; H.R. REP. NO. 595, 95th Cong., 1st Sess. 377, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6333; 124 CONG. REC. 32,401 (1978).

54. *Midlantic,* 106 S. Ct. at 759, 88 L. Ed. 2d at 865.

55. *Id.* at 759-60, 88 L. Ed. 2d at 865-66. The Court stated that in codifying the judicially created power of abandonment, Congress also intended to include the established exception that a trustee could not abandon property in violation of certain state and federal laws. *Id.*

56. *Id.* at 762, 88 L. Ed. 2d at 869.

57. *Id.* at 759-60, 88 L. Ed. 2d at 865-66. The majority based this analysis on Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979). The Court in *Edmonds* concluded that because the legislature was silent as to the effect of prior case law, the legislation did not alter the cases' effect. *Id.*

58. 106 S. Ct. at 760, 88 L. Ed. 2d at 866.

59. *Id.*

60. *Id.*

61. *Id.* The majority stated, "[a]lthough these cases do not define for us the exact contours of the trustee's abandonment power, they do make clear that this power was subject to certain restrictions when Congress enacted § 554(a)." *Id.*

62. *Id.* (citing Palmer v. Massachusetts, 308 U.S. 79, 85 (1939); Swarts v. Hammer, 194 U.S. 441, 444 (1904)).

cluded, therefore, that since Congress did not expressly grant an exemption from state environmental laws, the trustee in *Midlantic* could not abandon contaminated property in violation of state environmental laws.[63]

C. *Analogy to Other Bankruptcy Cases and Code Sections*

The Court next turned to other sections of the Bankruptcy Code and the case law interpreting those sections to determine further the scope of the Bankruptcy Code abandonment power. Justice Powell interpreted the recent case of *Ohio v. Kovacs*[64] to require a bankruptcy trustee to comply with state environmental laws prior to abandonment.[65] After a brief discussion of *Kovacs*[66] the Court went on to examine *NLRB v. Bildisco & Bildisco*.[67] *Bildisco* interpreted the provision of the Bankruptcy Code that allows a trustee to reject an executory contract when the agreement burdens the estate.[68] The majority in *Midlantic* cited *Bildisco* for the proposition that a trustee cannot ignore nonbankruptcy law.[69]

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63. *Id.*

64. 104 S. Ct. 705, 83 L. Ed. 2d 649 (1985). In *Kovacs* the State of Ohio sought compensation for clean up of the toxic waste site of a bankrupt corporation. The *Kovacs* Court concluded that

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

Id. at 711-12, 83 L. Ed. 2d at 659. Although *Midlantic* cites *Kovacs* in support of its position, the above quoted statement from *Kovacs* could imply that a bankruptcy trustee can abandon property littered with toxic waste. *See* Comment, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199 (1984).

65. *Midlantic*, 106 S. Ct. at 760, 88 L. Ed. 2d at 866.

66. The majority's brief discussion of *Kovacs* is misleading. *Kovacs* addressed the question of whether a debtor's obligation under an environmental consent order constitutes a debt dischargeable under 11 U.S.C. § 727(b) (1982) in a personal bankruptcy proceeding. The Court held that an environmental order that is primarily a request for money is dischargeable. *Kovacs*, 105 S. Ct. at 711, 83 L. Ed. 2d at 658. *Kovacs*, however, did not address the question of whether an environmental order is subject to the automatic stay provisions of § 362(a). *See infra* notes 70-81 and accompanying text. *Kovacs*, therefore, contrary to the majority's reading, did not imply that contaminated property could not be abandoned.

67. 465 U.S. 513 (1984).

68. 11 U.S.C. § 365(a) (1982).

69. *Midlantic*, 106 S. Ct. at 760, 88 L. Ed. 2d at 866. The Court relied on a passage from *Bildisco* that read "[t]he debtor in possession is not relieved of all obligations under the [National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982)] simply by filing a petition for bankruptcy." *Bildisco*, 465 U.S. at 534. Although this excerpt seems to suggest that *Bildisco* supports *Midlantic*, the holding in *Bildisco* suggests otherwise. The holding was twofold. First, the Court held that the language "executory contract" in § 365(a) of the Bankruptcy Code includes collective bargaining agreements subject to the National Labor Relations Act and, therefore, the bankruptcy court should permit rejection of such an agreement if the agreement burdens the estate. *Bildisco*, 465 U.S. at 513. Second, the Court held that if the debtor in possession does reject such an agreement prior to court approval, he does not commit an unfair labor practice. *Id.* The decision allowed a company to terminate a union agreement and continue to operate. Although this result met with public disapproval, it is an example of correct statutory interpretation. Rather than misreading the statute, the Court left it up to Congress to deal with the public dissatisfaction. Four months later Congress enacted an express provision allowing a trustee to reject union contracts, thereby evidencing the correct response to an

The Court further stated that Congress, as well as the courts, have set forth the principle that a trustee cannot always ignore nonbankruptcy laws.[70] The Court supported this statement through a discussion of the automatic stay provision of the Bankruptcy Code, which allows a bankruptcy petition to stay legal proceedings against a debtor.[71] This provision, section 362 of the Bankruptcy Code, is very important in preserving a debtor's estate because the automatic stay prevents the assets of the estate from being used to pay fines, judgments, or settlements.[72] Congress enacted several categories of exceptions[73] to the automatic stay that allow the government to commence or continue legal proceedings to protect public health and safety.[74] The Court argued, therefore, that similar exceptions to the abandonment power existed.[75] The Court stated that although Congress codified exceptions to section 362 and did not codify exceptions in section 554, such an action did not undermine the inference that Congress intended restrictions to be read into section 554(a).[76] The Court explained that the reason the exceptions were express in section 362 and implied in section 554 was because of the differences between the predecessors of the two sections.[77] Prior

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unsavory result. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541(a), 98 Stat. 333, 390-91 (to be codified at 11 U.S.C. § 1113); *see* Note, *Rejection of Collective Bargaining Agreements in Bankruptcy:* NLRB v. Bildisco & Bildisco *and the Legislative Response*, 33 CATH. U.L. REV. 943, 949-61 (1984).

70. *Midlantic*, 106 S. Ct. at 760, 88 L. Ed. 2d at 866.

71. *Id.* at 760-61, 88 L. Ed. 2d at 866-68. 11 U.S.C. § 362(a) (1982) provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—
>
> (1) the commencement or continuation . . . of a judicial, administrative, or other proceeding against the debtor . . .
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate . . . .

In effect this provision protects the debtor from the commencement or continuation of lawsuits, including proceedings before the U.S. Tax Court, judgments, acts to obtain possession of property of the estate, and other similar actions to collect money from the debtor. *See* Lockett, *Environmental Liability Enforcement and the Bankruptcy Act of 1978: A Study of H.R. 2767, the "Superlien" Provision*, 19 REAL PROP. PROB. & TR. J. 859, 870-76 (1984).

72. S. REP. NO. 989, *supra* note 53, at 54-55, 1978 U.S. CODE CONG. & ADMIN. NEWS at 5840-41; H.R. REP. NO. 595, *supra* note 53, at 340, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6296-97.

73. For example, § 362(b)(5) permits a governmental unit to enforce nonmonetary judgments against a debtor's estate. The Third Circuit has held that an injunction to backfill a mine falls within the nonmonetary judgment exception to the automatic stay provision. Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 278-79 (3d Cir. 1984). In dictum Ohio v. Kovacs, 105 S. Ct. 705, 83 L. Ed. 2d 649 (1985), expressed support of *Penn Terra*. *Id.* at 711 n.11, 83 L. Ed. 2d at 658 n.11.

74. S. REP. NO. 989, *supra* note 53, at 52, 1978 U.S. CODE CONG. & ADMIN. NEWS at 5838; H. R. REP. NO. 595, *supra* note 53, at 343, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6299-300. Actions to prevent or stop violations of environmental laws, including actions to fix damages for those violations are specifically included. *Id.* The legislative history reveals, however, that Congress intended that courts construe express exceptions to the automatic stay narrowly. *See* Note, *Belly Up*, *supra* note 49, at 1042-51.

75. 106 S. Ct. at 761, 88 L. Ed. 2d at 867.

76. *Id.*, 88 L. Ed. 2d at 867-68.

77. *Id.*

to the enactment of the Bankruptcy Code in 1978 some courts had expanded the automatic stay permitted under the 1973 Bankruptcy Rules to preclude states from enforcing antipollution laws.[78] Although Congress further expanded the automatic stay provisions in the Bankruptcy Code,[79] it desired to limit expressly this prior judicial expansion.[80] Prior to the enactment of section 554, however, firmly established case law existed defining the power and scope of abandonment.[81]

The Court cited 28 U.S.C. section 959(b)[82] as additional evidence that Congress did not intend the Bankruptcy Code to preempt all state laws.[83] This provision requires trustees, receivers, or debtors in possession to operate the bankruptcy estate according to the valid laws of the state in which the property is situated.[84] Although admitting that section 959(b) did not directly apply to a chapter 7 liquidation proceeding, the Court analogized that section 959(b) supported its conclusion that Congress intended some state laws to continue to restrict the abandonment power.[85]

In concluding its argument the Court noted Congress's concern for protecting the environment against toxic pollution.[86] The Court found it unlikely that Congress would have implicitly overturned the common law restrictions on the abandonment power given the many environmental laws Congress has enacted.[87] The congressional emphasis on protecting the environment provided the Court with support for restricting the abandonment power to ensure compliance with state and federal laws designed to protect

78. *Id.*

79. *Id.* (citing 1 W. NORTON, BANKRUPTCY LAW AND PRACTICE § 20.03, at 5-6 (1981)).

80. *See* 106 S. Ct. at 761, 88 L. Ed. 2d at 867-68 (citing H.R. REP. NO. 595, *supra* note 53, at 174-75, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6135-36).

81. *See supra* notes 27-39 and accompanying text.

82. 28 U.S.C. § 959(b) (1982) provides:

> Except as provided in section 1166 of title 11, 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.

83. 106 S. Ct. at 761-62, 88 L. Ed. 2d at 868.

84. *See supra* note 82.

85. 106 S. Ct. at 761-62, 88 L. Ed. 2d at 868. The Court stated that although § 959(b) did not apply to an abandonment under § 554(a) and, therefore, did not delimit the precise conditions on an abandonment, the section nevertheless supported the conclusion that Congress did not intend the Bankruptcy Code to preempt all state laws that otherwise constrain the exercise of a trustee's powers. *Id.*

86. *Id.* at 762, 88 L. Ed. 2d at 868-69. The Court cited both the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982) (regulating treatment, storage, and disposal of hazardous wastes by monitoring wastes from creation until after permanent disposal and authorizing government to take judicial or administrative action to prevent substantial endangerment to health or environment), and the Superfund amendment to the Act, Act of Aug. 23, 1983, Pub. L. No. 98-80, § 2(c)(2)(B), 97 Stat. 485 (to be codified at 42 U.S.C. § 6911a) (establishing fund to finance cleanup of some sites with requirement that the fund be reimbursed by responsible parties). 106 S. Ct. at 762, 88 L. Ed. 2d at 868-69.

87. 106 S. Ct. at 762, 88 L. Ed. 2d at 869. For a discussion of federal statutes concerning toxic waste see *Developments in the Law*, *supra* note 49, at 1470-76; Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 594-98 (1983).

public health and safety.[88]

D. Analysis of Dissenting Opinion

In dissent Justice Rehnquist expressed concern that the result of the majority opinion was unclear and unfounded.[89] The dissent began its criticism with an analysis of the function of abandonment, which is to aid the trustee in its primary task of reducing the estate to money for the benefit of the creditors.[90] Under the Bankruptcy Code control of property abandoned by the trustee reverts to the debtor or goes to a person having a possessory interest in the property.[91] Abandonment of a hazardous waste site, therefore, frees the estate and passes the burden of cleanup to the owner.[92] By preventing this transfer of the burden of cleanup, the majority, according to Justice Rehnquist, contradicted the purpose of the abandonment power[93] and distorted the absolute language of section 554(a).[94]

Concerning whether Congress intended the courts to read exceptions into section 554(a),[95] the dissent reasoned that Congress knew how to make express exceptions and, thus, would have done so had that been their intent.[96] Furthermore, the dissent did not find convincing the argument that the legislative history of section 554(a) supported the majority's position, because that history did not contain any specific language to that effect.[97] Justice

88. 106 S. Ct. at 762, 88 L. Ed. 2d at 869.

89. *Id.* at 763, 88 L. Ed. 2d at 869-70.

90. *Id.*, 88 L. Ed. 2d at 870; *see* Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930); 4 COLLIER, *supra* note 4, ¶ 554.01; 2 W. NORTON, *supra* note 79, § 39.01; *supra* note 22 and accompanying text.

91. 4 COLLIER, *supra* note 4, ¶ 554.02. The trustee does not have title to the property (former Bankruptcy Act vested trustee with title); upon abandonment trustee is simply divested of control over the property. *Id.*

92. The Bankruptcy Code does not specify who takes the property, but the legislative history suggests that the prior owner would take the property. *Kovacs*, 105 S. Ct. at 711 n.12; S. REP. NO. 989, *supra* note 53, at 92, 1978 U.S. CODE CONG. & ADMIN. NEWS at 5878; *see supra* note 21 and accompanying text.

93. 106 S. Ct. at 763, 88 L. Ed. 2d at 870. The purpose of the Bankruptcy Code is to preserve assets for swift distribution to creditors. *See supra* notes 6 & 22 and accompanying text. Preventing a trustee from abandoning burdensome property will impair this purpose. In addition the majority failed to address the issue that the supremacy clause would seem to mandate that any conflict between the Bankruptcy Code and state environmental laws be resolved in favor of the Bankruptcy Code. U.S. CONST. art. VI, cl. 2.

94. 106 S. Ct. at 763-64, 88 L. Ed. 2d at 870-71. As worded, § 554(a) is limited only by consideration of the value of the property to the estate. 11 U.S.C. § 554(a) (1982).

95. *See supra* note 53.

96. 106 S. Ct. at 764, 88 L. Ed. 2d at 871. The dissent referred to the automatic stay provisions and exceptions of § 362 of the Bankruptcy Code as well as the qualified abandonment provision for railroad lines found in § 1170(a)(2). *Id.* at 764-66, 88 L. Ed. 2d at 871-73. The existence of the Interstate Commerce Commission's control over railroads required express exceptions to railroad line abandonment. *See* 5 COLLIER, *supra* note 4, ¶ 1170.01; *see also* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522-23 (1984) ("Obviously, Congress knew how to draft an exclusion . . . when it wanted to.").

97. 106 S. Ct. at 764, 88 L. Ed. 2d at 871. The dissent stated that the Court had been reluctant to imply exceptions or limitations into an unqualified statute on the basis of legislative history, unless that legislative history clearly demonstrated Congress's intent to establish limitations. *Id.* (citing Garcia v. United States, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984)). The scant legislative history on point falls short of this standard. *Id.* The legislative history of the Bankruptcy Code contains no statement to support the proposition that section 554 was in-

Rehnquist also did not believe that *Ottenheimer*, *Chicago Rapid Transit*, and *Lewis Jones* represented established exceptions to the judicially created abandonment power.[98] According to Justice Rehnquist, the majority misread those cases.[99] The dissent summarily dismissed all three cases as factually distinguishable from *Midlantic* and considered the cases rare deviations from, rather than well-recognized restrictions on, the rule of abandonment.[100] The dissenting opinion also attacked the Court's argument concerning 28 U.S.C. section 959(b), which requires a trustee to operate property in compliance with state laws.[101] Justice Rehnquist noted that a trustee's abandonment of property does not constitute managing or operating the property so as to come within the confines of section 959(b).[102] Justice Powell's reliance on the provision, therefore, was unfounded.

Justice Rehnquist stated that the dissent shared the majority's concern for protecting the public from the dangers of toxic waste, and recognized the possibility of a narrower exception to the power of abandonment.[103] He concluded, however, that the majority opinion was contrary to the purpose of the Code.[104] In addition, the majority's opinion was contrary to the public interest, because the state was in a better position to protect the public health and safety than a bankrupt company.[105]

III. CONCLUSION

As the first case to define the parameters of section 554(a) of the Bankruptcy Code, *Midlantic* concluded that the courts should read common law restrictions on the power of abandonment into section 554(a). The Court looked to the pre-Bankruptcy Code, judicially created power of abandonment to justify the holding. The majority stated that the cases of *Ottenheimer*, *Chicago Rapid Transit*, and *Lewis Jones* established clear and

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tended to codify prior case law. The legislative history does refer, however, to the common law concept of abandonment, which presumably encompasses only the idea of abandoning worthless property. *See* H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. 2, at 181, *reprinted in* 2 A. RESNICK & E. WYPYSKI, BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY, Doc. No. 22 (1979); *see also* Note, *Cleaning Up*, *supra* note 49, at 879-80.

98. 106 S. Ct. at 764-65, 88 L. Ed. 2d at 871-72; *see supra* notes 39-53 and accompanying text.

99. 106 S. Ct. at 764-65, 88 L. Ed. 2d at 871-72.

100. *Id.* (*Ottenheimer* based on conflict between Bankruptcy Code and another federal statute rather than between Bankruptcy Code and state law; *Chicago Rapid Transit* merely affirmed authorization of abandonment, but did not address legitimacy of conditions that lower court placed on abandonment; *Lewis Jones* is only a single bankruptcy court decision).

101. *See supra* notes 82-85 and accompanying text.

102. 106 S. Ct. at 766, 88 L. Ed. 2d at 873-74. Section 959(b) refers to operating the property. *Cf. In re* Adelphi Hosp. Corp., 579 F.2d 726, 729 n.6 (2d Cir. 1978) (per curiam) (trustee not manager of operations when involved in liquidation under pre-Bankruptcy Code liquidation proceedings).

103. 106 S. Ct. at 767, 88 L. Ed. 2d at 875. Such a narrow exception was suggested in the amicus curiae brief submitted by the United States: abandonment may be restricted if the property consists of a case of dynamite sitting on a furnace in a schoolhouse. Brief for the United States as Amicus Curiae Supporting Respondents at 20.

104. 106 S. Ct. at 767, 88 L. Ed. 2d at 875. Forcing the trustee to expend funds to clean up the property would in effect put the claim of the state ahead of the other creditors.

105. *Id.*

prevailing exceptions on the right to abandon. The Court also supported its position with the legislative history of the Bankruptcy Code, and other case law and statutes, such as the automatic stay provision of 11 U.S.C. section 362. The majority appears to have searched for justifications for a socially conscientious result.

The dissent saw *Ottenheimer*, *Chicago Rapid Transit*, and *Lewis Jones* as factually distinguishable from *Midlantic*. The dissent also argued that the cases did not establish well-recognized exceptions to the power to abandon as the majority claimed. The dissent also contended that the majority's reliance upon legislative history was questionable because the history was sparse and unclear. Justice Rehnquist further argued that the express exceptions in section 362, the automatic stay provision, indicated that if Congress had intended to restrict section 554(a) similarly, it could have included similar express restrictions.

An analysis of the development of the abandonment power, the Bankruptcy Code provisions, and the relevant case law indicate that the dissenting opinion is stronger than the majority opinion. The likely result of *Midlantic* will be a legislative amendment to section 554(a) expressly to allow abandonment of contaminated property and thus reconcile the section with the Court's decision. If an amendment does not follow, however, *Midlantic* will likely be construed as a narrow exception to the abandonment power since the decision stretches the language of the Bankruptcy Code.

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