

January 1991

Abandonment in the Face of Possible Toxic Contamination: What's A Lead to Do

Paula Thornton Perkins

Recommended Citation

Paula Thornton Perkins, Comment, *Abandonment in the Face of Possible Toxic Contamination: What's A Lead to Do*, 44 Sw L.J. 1563 (1991)
<https://scholar.smu.edu/smulr/vol44/iss4/15>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

COMMENT

ABANDONMENT IN THE FACE OF POSSIBLE TOXIC CONTAMINATION: WHAT'S A LENDER TO DO?

by Paula Thornton Perkins

I. INTRODUCTION

THE modern lender faces an increasingly sticky situation when a bankruptcy trustee attempts to abandon potentially contaminated real estate.¹ A trustee's abandonment of an estate property is generally irrevocable,² and the lender could be stuck with the cleanup bill.³ Unfortunately, inconsistent policies underlie state and federal environmental laws and relevant Bankruptcy Code provisions.⁴

An increasing number of bankruptcy filings,⁵ however, will involve the

1. A bankruptcy trustee can abandon property under 11 U.S.C. § 554(a) (1988). The trustee's power to abandon generally applies to any estate property that is "burdensome" or of "inconsequential value and benefit to the estate." *Id.* Neither the Bankruptcy Code nor Bankruptcy Rule 6007 places a time limitation on the trustee. Under the precode rule, however, the trustee had to abandon within a reasonable time. See *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) (trustee has reasonable amount of time in which to decide whether he will accept unprofitable estate property); *Hill v. Larcon Co.*, 131 F. Supp. 469, 474 (W.D. Ark. 1955) (trustee who failed to accept property within 60 days did not acquire title to it); *In re Malcom*, 48 F. Supp. 675, 679 (E.D. Ill. 1943) (trustee allowed reasonable time to reject burdensome property); 4 COLLIER ON BANKRUPTCY ¶ 554.02[1] (L. King 15th ed. 1990) [hereinafter COLLIER].

2. *In re Brio Refining, Inc.*, 86 Bankr. 487, 490 (N.D. Tex. 1988); *In re Polumbo*, 271 F. Supp. 640, 643 (W.D. Va. 1967).

3. See *Brio Refining*, 86 Bankr. at 488-89 (court refused to give pre-cleanup expenses arising after trustee abandoned property administrative priority because abandoned property "was not part of the debtor's estate at the time that the [creditors] expended the monies that they seek as an administrative expense"); Corash & Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor*, 43 Sw. L.J. 863, 864 (1990) (lender may be liable for debtor's cleanup costs in certain circumstances).

4. See NATIONAL CONFERENCE OF STATE LEGISLATURES, HAZARDOUS WASTE MANAGEMENT: A SURVEY OF STATE LEGISLATION (1982) for general information on state environmental laws; see also 11 U.S.C. § 554(a) (1988) ("[T]he 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.") (emphasis supplied); Comment, *Abandonment of Toxic Wastes Under Section 554 of the Bankruptcy Code*, 71 MARQ. L. REV., 353, 357 (1988) (state environmental laws usually conflict with Bankruptcy Code).

5. As of August 1985, an estimated 74 toxic waste handlers had filed for bankruptcy. Cosetti and Friedman, *Midlantic National Bank, Kovacs, and Penn Terra: The Bankruptcy*

problem of abandonment of contaminated real property.⁶ Thus, the astute lender will search for ways to avoid financing insolvent debtors' toxic cleanup costs.⁷ This Comment briefly examines the history of abandonment and environmental laws.⁸ The discussion then turns to recent case law interpreting the impact of environmental laws on bankruptcy law.⁹ Finally, this Comment discusses possible solutions to the lender's dilemma.¹⁰

II. A BRIEF HISTORY OF RELEVANT LAW

A. Abandonment

1. Abandonment at Common Law

Congress passed the first major bankruptcy legislation in the Bankruptcy Act of 1898 (1898 Act).¹¹ Although the 1898 Act provided for abandonment of certain types of property,¹² the liquidation trustee did not possess a general power of abandonment.¹³ This lack of power stood virtually unchanged until the Bankruptcy Reform Act of 1978.¹⁴ Thus, current statutory abandonment has its roots in the common law.¹⁵

Under the common law rule, the bankruptcy trustee could request permission from the court to abandon any asset that burdened the estate¹⁶ and hindered the liquidation process.¹⁷ This rule served the primary purpose of

Code and State Environmental Law—Perceived Conflicts and Options for the Trustee and State Environmental Agencies, 7 J. L. & COMM. 65, 68 (1987) (citing GENERAL ACCOUNTING OFFICE, HAZARDOUS WASTE, ENVIRONMENTAL SAFEGUARDS JEOPARDIZED WHEN FACILITIES CEASE OPERATING 18 (1986)). See also E. ALTMAN, CORPORATE FINANCIAL DISTRESS: A COMPLETE GUIDE TO PREDICTING, AVOIDING, AND DEALING WITH BANKRUPTCY 1 (1983) (from 1979 to 1980, bankruptcies increased 55%).

6. According to an EPA study, during the next 50 years 25-30% of entities owning land disposal facilities will file for bankruptcy. Cosetti and Friedman, *supra* note 5, at 68. See also R. MORRISON, BUSINESS OPPORTUNITIES FROM CORPORATE BANKRUPTCIES 24-26 (1985) (explaining why the number of bankruptcies will remain high for years to come).

7. See *infra* notes 315-21 and accompanying text.

8. See *infra* notes 11-92 and accompanying text.

9. See *infra* notes 126-310 and accompanying text.

10. See *infra* notes 315-66 and accompanying text.

11. Pub. L. No. 55-541, 30 Stat. 544 (1898).

12. See 11 U.S.C. § 104(a)(4) (1970) (repealed 1978 and recodified as 11 U.S.C. § 505(b) (1988)); 11 U.S.C. § 110(a)(2) (1970) (repealed 1978); 11 U.S.C. § 110(b) (providing for relief from burdensome taxes, patents and trademarks, and leases) (repealed 1978 and recodified as 11 U.S.C. § 365 (1988)).

13. See 4 COLLIER, *supra* note 1, at ¶ 554.01.

14. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified in 11 U.S.C. §§ 101-9032 and in various sections of 28 U.S.C. (1988)). Today, bankruptcy trustees derive their abandonment power from 11 U.S.C. § 554 (1988). See *supra* note 1.

15. 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); *Gochenour Cleveland Terminals Bldg. Co.*, 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*, 298 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).

16. *Ottenheimer v. Whitaker*, 198 F.2d 289, 290 (4th Cir. 1952).

17. *Id.* at 290.

bankruptcy litigation—to convert the debtor's estate to cash as quickly as possible for distribution to the creditors.¹⁸ Under the 1898 Act the trustee actually took title to the estate property.¹⁹ Abandonment divested this title from the trustee and revested it in the debtor.²⁰

2. Common Law Restrictions on Abandonment Under the 1898 Act

Although courts under the 1898 Act generally allowed a trustee to abandon a debtor's property,²¹ most placed some restrictions on the scope of the trustee's power.²² In the 1942 reorganization proceeding of *In re Chicago Rapid Transit Co.*²³ the trustees for the debtor, a public transportation utility, sought to abandon a leased railroad line. The line operated at a deficit and the debtor had fallen far behind in rental payments. The Seventh Circuit Court of Appeals ruled that the trustees could not abandon the line without permission from the Illinois Commerce Commission (ICC).²⁴ The court further held that Congress had not given bankruptcy courts jurisdiction to determine whether a public service should cease operations or continue out of public necessity.²⁵ Instead, such authority lay with the ICC, and Congress left the district court powerless to disturb ICC authority.²⁶

In requiring compliance with Illinois state law, the court created an exception to the trustees' abandonment power.²⁷ The court did, however, authorize the trustees to reject the lease because it was a personal contract and would not affect the state's authority to regulate its utilities.²⁸ Thus, the trustees still had the expense of operating the rail line property, but they no longer had to pay rent. This ruling accomplished the dual purposes of requiring compliance with state law while protecting the estate from undue burdens.

Importantly, *Chicago Rapid Transit* involved a reorganization, not a liquidation. A reorganization trustee must operate the estate in accordance with state law.²⁹ Courts often refuse to impose this duty on a liquidation trustee,

18. *Katchen v. Landy*, 382 U.S. 323, 328 (1966); 4 COLLIER, *supra* note 1, at ¶ 554.01.

19. 11 U.S.C. § 110(a) (1970) (repealed 1978); 4 COLLIER, *supra* note 1, at ¶ 554.02[2].

20. 4 COLLIER, *supra* note 1, at ¶ 554.02[2].

21. See *First Nat'l Bank v. Lasater*, 196 U.S. 115, 118 (1905); *Dushane v. Beall*, 161 U.S. 513, 515 (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).

22. See, e.g., *Ottenheimer*, 198 F.2d at 290 (trustee could not abandon worthless barges); *Chicago Junction R.R. Co. v. Sprague (In re Chicago Rapid Transit Co.)*, 129 F.2d 1, 5 (7th Cir. 1942), *cert. denied*, 317 U.S. 683 (1942) (trustee could not abandon railroad line which was public necessity); *In re Lewis Jones, Inc.* [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,471 (D.Pa. Nov. 7, 1974) (court required sealing of underground lines prior to abandonment).

23. 129 F.2d 1 (7th Cir. 1942), *cert. denied*, 317 U.S. 683 (1942). This case involved a reorganization under § 77B of the Bankruptcy Act of 1898, 11 U.S.C. § 207 (1940), recodified as 11 U.S.C. §§ 1101-1174 (1988).

24. *Id.* at 5. As an Illinois public utility, Chicago Rapid Transit was governed by the ICC.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. 28 U.S.C. § 959(b) (1988).

however, since the trustee only liquidates, and does not operate, the estate.³⁰ Moreover, the *Chicago Rapid Transit* court emphasized the priority federal law takes over state law.³¹ The case preceded codification of abandonment power, however, when no legislated federal abandonment rule existed to supersede state law.

Ten years later, in *Ottenheimer v. Whitaker*,³² the Fourth Circuit Court of Appeals also placed a limitation on abandonment. The Fourth Circuit held that a federal statute designed to ensure navigation safety preempted the judicially created abandonment rule.³³ In *Ottenheimer* a bankruptcy trustee attempted to abandon worthless barges by sinking them in the Baltimore harbor. City and United States officials objected because, if abandoned, the barges would obstruct navigable waters. An obstruction of this type violated a federal statute that carried a fine, imprisonment, or both.³⁴ If the trustee abandoned the property, ownership would revert in the debtor. The debtor, in turn, would face the penalties imposed by the statute.³⁵ Accordingly, the court denied the abandonment request and required the trustee to remove the barges, at considerable expense to the estate.³⁶ In so doing, the court stated that its primary reason for refusing to allow abandonment was to avoid injustice to the debtor.³⁷

In a more recent case under the 1898 Act, *In re Lewis Jones, Inc.*,³⁸ the court directed the trustee to petition for authority to fill and seal underground steam lines before abandoning them.³⁹ The estate possessed the ability to fund these precautionary measures, which would eliminate any potential for future harm to the public. Significantly, *Lewis Jones* was actu-

30. See *In re Microfab, Inc.*, 105 Bankr. 161, 169 (Bankr. D. Mass. 1989) (a chapter 7 "trustee cannot be ordered to comply with a cleanup obligation that he does not have the financial resources to satisfy"); *In re Oklahoma Ref. Co.*, 63 Bankr. 562, 565 (Bankr. W.D. Okla. 1986) (Supreme Court did not intend § 959(b) to apply directly to § 554 abandonment); *In re Commercial Oil Serv., Inc.*, 58 Bankr. 311, 317 (Bankr. N.D. Ohio 1986), *aff'd*, 88 Bankr. 126 (N.D. Ohio 1987) (court dismissed bankruptcy to relieve trustee of duty to bring polluted property into compliance with state law); *In re Charles George Land Reclamation Trust*, 30 Bankr. 918, 923 (Bankr. D. Mass. 1983) (court dismissed bankruptcy rather than require trustee to clean up contaminated property); *In re Adelphi Hosp. Corp.*, 579 F.2d 726, 729 n.6 (2d Cir. 1978) (per curiam) (liquidation trustee "is in no sense a manager of an institution's operations . . ."). See also 11 U.S.C. § 704 (1988) (outlining liquidation trustee's duties); *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 (1918); *Trice v. Coolidge Banking Co.*, 242 F. 175, 176 (S.D. Ga. 1917); *Gardner v. Rich Mfg. Co.*, 68 Cal. App. 2d 725, 731, 158 P.2d 23, 29 (1945). These cases all support the proposition that a liquidating trustee's main duty is to reduce estate assets to cash for distribution to creditors.

31. 129 F.2d at 4. "[Bankruptcy law], when given expression in legislation by Congress, is paramount and transcends and supersedes all inconsistent state laws." *Id.*

32. 198 F.2d 289 (4th Cir. 1952).

33. *Id.* at 290.

34. 33 U.S.C. § 411 (1988). See also *id.* § 409 (permitting or causing vessels to sink in navigable waters in such a way that obstructs or endangers navigation is illegal).

35. 198 F.2d at 290.

36. *Id.*

37. *Id.*

38. [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,471 (Bankr. D. Pa. Nov. 7, 1974).

39. *Id.*

ally an advisory opinion rather than a ruling. Thus, while the court may have indicated that a trustee cannot abandon property without first providing for the public safety, the opinion does not carry the weight of a court decision.⁴⁰ Furthermore, the court failed to specifically address whether the trustee's abandonment power is subject to state laws intended to protect the public welfare.⁴¹

3. *Abandonment in the Bankruptcy Reform Act of 1978*

Congress legislatively recognized the trustee's abandonment power in the Bankruptcy Reform Act of 1978 (the Code).⁴² Section 554 of the Code⁴³ allows a trustee to abandon property that is "burdensome" or of "inconsequential value" to the estate.⁴⁴ This provision facilitates distribution of estate assets to general creditors as quickly as possible.⁴⁵ Distribution to creditors is made in an orderly fashion,⁴⁶ and debt priority determines who is satisfied first.⁴⁷ Abandonment under section 554 divests the estate of control⁴⁸ of the property and usually returns it to the debtor,⁴⁹ along with all prepetition rights and obligations.⁵⁰ The debtor is then treated as having

40. See Note, *Abandonment Rights Under Section 554(a) of the Bankruptcy Code: Midlantic National Bank v. New Jersey Department of Environmental Protection*, 40 Sw. L.J. 1103, 1108 (1986).

41. *Id.*

42. 11 U.S.C. § 554 (1988).

43. Throughout this Comment the terms "1978 Act," "Bankruptcy Code," and the "Code" are used interchangeably.

44. Section 554(a) provides: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."

45. See Note, *supra* note 40, at 1106 (bankruptcy liquidation's primary purpose is to expeditiously reduce estate property to money for distribution to general creditors). See also 4 COLLIER, *supra* note 1, at § 554.01 (primary purpose of liquidation is to convert debtor's estate to cash as quickly as possible for distribution to general creditors). But see Terrell, *Caveat Lender: The Midlantic Decision and its Progeny*, 19 SETON HALL L. REV. 55, 60 (1989) ("Before the 1978 revisions to the Bankruptcy Code, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests.") (quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Prot.*, 474 U.S. 494, 500 (1986)).

46. 11 U.S.C. § 507 (1988) sets forth administrative and unsecured claim priorities.

47. *Id.* State law determines secured creditor priority. See Note, *Tort Creditor Priority in the Secured Credit System: Asbestos Times, the Worst of Times*, 36 STAN. L. REV. 1045, 1046-49 (1984).

48. Prior to 1978 the trustee took legal title to the estate property. Under 11 U.S.C. § 541 (1988) the trustee no longer takes title to the property, but only controls it. See 4 COLLIER, *supra* note 1, at § 554.02[2].

49. See *Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1984). Abandoned property reverts to the person with a possessory interest in it. *Id.* This is usually the debtor. See Drabkin, Moorman & Kirsch, *Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,168, 10,172 (1985).

50. *Riggs Nat'l Bank v. Perry (In re Perry)*, 29 Bankr. 787, 793 (D. Md. 1983), *aff'd*, 729 F.2d 982 (4th Cir. 1984); *Bennett v. Commercial Credit Plan*, 13 Bankr. 643, 645 (Bankr. W.D. Mich. 1981); *In re Cruseturner*, 8 Bankr. 581, 590 (Bankr. D. Utah 1981). Cf. *supra* notes 19, 20 and accompanying text (prior to 1978 both ownership and control vested in, and was divested from, the trustee).

owned it continuously.⁵¹

On its face, section 554 gives the trustee almost unlimited abandonment power, subject only to the requirements set forth in the section itself.⁵² Exactly how much Congress intended to restrict the trustee's abandonment power is the subject of ongoing debate in the courts.⁵³ The controversy hinges largely on what the courts interpret as Congress' intent behind statutory enactment of the abandonment rule in 1978.⁵⁴

Since the liquidating debtor rarely has any appreciable assets, abandonment of contaminated property effectively serves to separate it from its only source of cleanup funds: the estate.⁵⁵ Thus, if an environmental agency decontaminates the property, the government, and thereby the taxpayer, usually must foot the bill.⁵⁶ For this reason, the Environmental Protection Agency (EPA) and similar state environmental authorities ordinarily oppose abandonment of toxic waste facilities.⁵⁷ By the same token, if a court bars the trustee from abandoning the property, the estate, and thereby at least some of the creditors, bear the cleanup burden.

Before the Supreme Court's ruling in *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁵⁸ abandonment of burdensome hazardous waste sites was the general rule.⁵⁹ A trustee would attempt

51. See *Mason v. Commissioner*, 646 F.2d 1309, 1310 (9th Cir. 1980); 4 COLLIER, *supra* note 1, at ¶ 554.01.

52. The requirements include burdensomeness and/or inconsequential value or benefit to the estate. 11 U.S.C. § 554(a) (1988).

53. Interestingly, abandonment power is crucial only in certain instances — those in which disposal of property alienates liability. Trustees in charge of hazardous waste properties usually can abandon only in liquidations because 28 U.S.C. § 959 (1988) precludes it in reorganizations if so doing would amount to illegal waste disposal. See Note, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 880-81 & nn. 81-83 (1985); *Developments in the Law—Toxic Waste Litigation* 99 HARV. L. REV. 1458, 1592 (1986) [hereinafter *Developments in the Law*].

54. See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Prot.*, 474 U.S. 494, 501 (1986) (in codifying abandonment, Congress probably intended to include common law limitations on this power). But see Justice Rehnquist's dissent in *Midlantic*, 474 U.S. at 513 ("[Congress] knew how to draft a qualified abandonment provision" when it wished to.) See also 11 U.S.C. § 1170(a)(2) (1988) (railroad company can abandon lines only when such action is "consistent with the public interest").

55. Drabkin, Moorman & Kirsch, *supra* note 49, at 10,172, 10,180.

56. *Developments in the Law*, *supra* note 53, at 1592. Lenders are also held liable for cleanup costs in certain instances. See *infra* notes 94-124 and accompanying text.

57. Drabkin, Moorman & Kirsch, *supra* note 49, at 10,180.

58. 474 U.S. 494 (1986). For a more detailed discussion of this case, see *infra* notes 126-59 and accompanying text.

59. *In re 82 Milbar Blvd. Inc.*, 91 Bankr. 213, 218 n.16 (Bankr. E.D.N.Y. 1988). See *In re Stevens*, 53 Bankr. 783, 787 (Bankr. D. Me. 1985), *rev'd*, 68 Bankr. 774 (D. Me. 1987) (hazardous waste is not an exception to § 554 abandonment); *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 120 (6th Cir. 1987) (bankruptcy court had previously allowed trustee to convey property and responsibility for toxic waste cleanup to third parties pursuant to Bankruptcy Rule 6007); *In re Catamount Dyers, Inc.*, 50 Bankr. 790, 794 (Bankr. D. Vt. 1985) (Congress did not create hazardous waste exception to trustee's abandonment powers); *In re A & T Trailer Park, Inc.*, 53 Bankr. 144, 147 (Bankr. D. Wyo. 1985) (trustee allowed to abandon worthless mobile home park); *In re Borne Chemical Co.*, 54 Bankr. 126, 134-35 (Bankr. D.N.J. 1984) (debtor allowed to abandon burdensome property in which it had no equity). But see *City of New York v. Quanta Resources Corp. (In re Quanta Resources Corp.)*, 739 F.2d 912, 921 (3d Cir. 1984), *aff'd sub nom.*, *Midlantic Nat'l Bank v. New Jersey*

to abandon contaminated property under section 554 if the projected cleanup expense exceeded the value of the untainted asset.⁶⁰ The *Midlantic* Court, however, in a five-to-four decision, ruled that a trustee cannot abandon a hazardous waste facility "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."⁶¹ The *Midlantic* opinion created an entirely new set of problems as courts scrambled to apply the holding to the facts of their cases.⁶²

B. The Environmental Statutes

Before reaching the post-*Midlantic* decisions, a brief survey of federal environmental statutes is in order.⁶³ These statutes were enacted in response to growing concern over the impact of toxic waste on the environment,⁶⁴ and numerous states have patterned their environmental laws after the federal statutes.⁶⁵

1. RCRA

Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA) to regulate toxic waste generated in the future.⁶⁶ RCRA enables authorities to track hazardous substances throughout their entire production cycle.⁶⁷ To achieve this end, RCRA requires the EPA to keep a list of toxic wastes⁶⁸ and promulgate standards for the maintenance of storage sites.⁶⁹ Violators of RCRA incur both civil and criminal liability.⁷⁰ A number of states have also passed hazardous waste legislation similar to RCRA.⁷¹

Dep't of Env'tl. Prot., 474 U.S. 494 (1986) (public policy favoring environmental cleanup outweighs trustee's abandonment power); *New Jersey Dep't of Env'tl. Prot. v. National Smelting of N.J., Inc.* (*In re National Smelting of N.J., Inc.*) 49 Bankr. 1012, 1015 (D. Colo. 1985) (citing *In re Quanta* in reversing the bankruptcy court's abandonment authorization). The *National Smelting* court also based its decision on the fact that the trustee did not show that the requirements of § 554 had been met. "The trustee apparently assumes that the cost would be astronomical, but no evidence has been presented on this issue." *Id.* at 1015.

60. *In re 82 Milbar Blvd.*, 91 Bankr. at 218.

61. *Midlantic*, 474 U.S. at 507.

62. See *infra* notes 161-310 and accompanying text.

63. See *infra* notes 66-86 and accompanying text.

64. See *infra* note 86.

65. See *infra* notes 71, 80 and accompanying text.

66. Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6987 (1988)).

67. *Developments in the Law*, *supra* note 53, at 1471.

68. 42 U.S.C. § 6921 (1988).

69. 42 U.S.C. § 6924 (1988).

70. Under 42 U.S.C. § 6928(a) (1988), a violator under the RCRA who fails to comply with a cleanup order within the amount of time prescribed by federal authorities can be ordered to pay up to \$25,000 per day in penalties for each day of noncompliance.

71. See ALA. CODE §§ 22-30-1 to -30-24 (Michie 1990); ARIZ. REV. STAT. ANN. §§ 36-2801 to 36-2827 (West 1986 & Supp. 1989); IDAHO CODE §§ 39-4401 to -4432 (Michie 1985 & Supp. 1990); IOWA CODE §§ 455B.411 to .455 (West 1990); KAN. STAT. ANN. §§ 65-3430 to -3472 (1985). For relevant Texas legislation, see TEX. HEALTH & SAFETY CODE ANN. §§ 361.131 to .137 (Vernon 1990).

2. CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) in response to the problem of what to do with previously generated waste.⁷² CERCLA developed a system for discovering and remediating toxic waste properties.⁷³ CERCLA also provided for a "Superfund" to finance toxic waste cleanup.⁷⁴ This fund finances all CERCLA authorized remedial actions, except those at sites which have been closed due to CERCLA regulations.⁷⁵

Under CERCLA, the EPA can require property owners to do their own cleanup.⁷⁶ Alternatively, the EPA can pay for cleanup out of the Superfund and sue the property owners for reimbursement.⁷⁷ CERCLA imposes steep penalties for noncompliance.⁷⁸ CERCLA does not provide for strict liability; however, more than one court has imposed such liability on the responsible parties.⁷⁹ As with RCRA, several states have adopted hazardous waste statutes resembling CERCLA.⁸⁰

Both RCRA and CERCLA require state cooperation, particularly RCRA.⁸¹ RCRA authorizes states to enforce it⁸² and empowers the EPA to earmark federal funds⁸³ for use in state programs.⁸⁴ CERCLA does not provide for state regulation but may require states to pay for cleanup in some situations.⁸⁵ The legislative histories of both RCRA and CERCLA show that Congress intended to minimize toxic waste costs to society and to assess them against the parties responsible for them rather than leaving the expense

72. Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1988)).

73. *Developments in the Law*, *supra* note 53, at 1472.

74. At its origin "Superfund" was actually the Hazardous Substance Response Trust Fund. 42 U.S.C. § 9631 (1982). Section 9631 was repealed in 1986 by Pub. L. No. 99-499, 100 Stat. 1774 and is now part of the Hazardous Substance Response Revenue Act of 1980, Pub. L. No. 96-510, 94 Stat. 2796, 26 U.S.C. §§ 4611-4682 (1988). For excellent discussions of federal toxic waste statutes, see *Developments in the Law*, *supra* note 53, 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).

75. See *Developments in the Law*, *supra* note 53, at 1472.

76. 42 U.S.C. § 9606 (1988).

77. 42 U.S.C. § 9604(a)(1) (1988) (President can finance cleanup operations through Superfund); 42 U.S.C. §§ 9604(b), 9611(a) (1988) (President is authorized to take action necessary to recover cleanup costs).

78. 42 U.S.C. § 9607(c)(3) (1988) (allows damages up to three times cleanup costs). See Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133, 1137 (1986).

79. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 (11th Cir. 1990), *cert. denied*, 58 U.S.L.W. 2713 (U.S. Jan. 15, 1991) (No. 90-504) (hazardous waste site owner or operator strictly liable for CERCLA response costs); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985).

80. See COLO. REV. STAT. §§ 25-16-101 to -201 (West 1990 & Supp. 1990); IDAHO CODE §§ 39-4417 to -4417B (Michie 1985 & Supp. 1990); IOWA CODE ANN. §§ 455B.381 to .399, 455B.423 to .432 (West 1990); KAN. STAT. ANN. § 65-3431 (1985). For relevant Texas legislation, see TEX. HEALTH & SAFETY CODE ANN. §§ 361.181 to .203 (Vernon 1990).

81. See Comment, *supra* note 4, at 356.

82. 42 U.S.C. §§ 6904(a), 6942(b) (1988).

83. 42 U.S.C. § 6926 (1988).

84. 42 U.S.C. § 6931(a) (1988).

85. See Comment, *supra* note 4, at 357.

for the general public to bear.⁸⁶

Courts have often remarked that the section 554 abandonment provision and federal and state environmental laws cross purposes.⁸⁷ Some courts and commentators, however, assert that, under CERCLA, a bankruptcy estate may still be liable for cleanup costs, even after sale or abandonment.⁸⁸ Liability continues because CERCLA holds the "owner or operator" of a hazardous waste facility responsible for cleanup.⁸⁹ When the debtor files for bankruptcy, the estate becomes the "owner or operator" of the property; therefore, the estate becomes liable for cleanup under CERCLA.⁹⁰ One commentator has suggested that courts allow trustees to abandon contaminated property but continue to hold them responsible for cleanup costs.⁹¹ Under this theory the trustee avoids other expenses involved in administering the subject property, but remains obligated for the cleanup bill.⁹²

3. Lender Liability Under CERCLA

In certain instances the unwary lender may find itself liable under CERCLA for hazardous waste cleanup costs.⁹³ CERCLA provides that the

86. See H.R. REP. NO. 1016, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6123 ("The failure to properly dispose of hazardous waste is costing the public millions and the cost of cleanup is far more expensive than proper disposal in the first place . . ."). The RCRA's legislative history lacks specific comparisons of improper waste disposal and regulatory costs, but it is full of congressional concern over the extreme cost to society of improper waste disposal, both in health and environmental costs. See H.R. REP. NO. 1491, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6238, 6249 (discussing likelihood of harm to water and food supplies and environment in general because of improper waste disposal).

87. *Borden, Inc. v. Wells-Fargo Bus. Credit (In re Smith-Douglass, Inc.)*, 856 F.2d 12, 15-16 (4th Cir. 1988) (toxic waste abandonment question involves both federal state statutes, which conflict with one another); *In re Oklahoma Ref. Co.*, 63 Bankr. 562, 566 (W.D. Okla. 1986) (state environmental laws and Code's abandonment provisions are juxtaposed and cannot be totally reconciled); *In re Pierce Coal & Constr., Inc.*, 65 Bankr. 521, 527 (Bankr. N.D. W.Va. 1986) (discussing balancing differing policies of abandonment provision and environmental laws); *City of New York v. Quanta Resources Corp. (In re Quanta Resources Corp.)*, 739 F.2d 912, 921-22 (3d Cir. 1984), *aff'd sub nom.*, *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Prot.*, 474 U.S. 494 (1986) ("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.").

88. See *In re Wall Tube & Metal Prods. Co.*, 56 Bankr. 918, 923 (Bankr. E.D. Tenn. 1986) ("The mere transfer of property out of the estate does not also transfer any liability or potential for liability already attaching to the estate as a result of its connection with the property") (citing *In re T.P. Long Chemical, Inc.*, 45 Bankr. 278, 284-85 (Bankr. N.D. Ohio 1985)), *rev'd on other grounds*, 831 F.2d 118 (6th Cir. 1987); Drabkin, Moorman & Kirsch, *supra* note 49, at 10,181; *Developments in the Law*, *supra* note 53, at 1594.

89. 42 U.S.C. § 9601(20)(A) (1988) provides:

The term "owner or operator" means . . . (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of state or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, [sic] who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."

90. See *In re T.P. Long Chemical Co.*, 45 Bankr. 278, 284-85 (Bankr. N.D. Ohio 1985).

91. See *Developments in the Law*, *supra* note 53, at 1594.

92. *Id.*

93. See *infra* notes 102-25 and accompanying text.

lender who "holds indicia of ownership primarily to protect [its] security interest" in the property is not liable as an owner for CERCLA response costs.⁹⁴ So long as the lender maintains a passive interest in a hazardous waste site, it need not worry about CERCLA liability.⁹⁵ The difficulty arises when the lender attempts to foreclose on its mortgage after the debtor's default.⁹⁶ The lender may inadvertently take control of the property in such a way that falls outside the "indicia of ownership" exception.⁹⁷

In *United States v. Mirabile*⁹⁸ the EPA removed toxic waste from a paint manufacturing plant on which American Bank and Trust Co. (ABT) had a mortgage. The Agency then sued ABT to recover its costs. Prior to the suit ABT foreclosed on its mortgage and made the highest bid at the foreclosure sale. Four months after the sale ABT assigned its bid to the Mirabiles, who owned the property when the EPA filed suit.

ABT contended that its bid at the foreclosure sale did not serve to vest legal title in ABT.⁹⁹ Without deciding that issue, the court found ABT's actions between the time of the bid and the assignment "plainly undertaken in an effort to protect its security interest in the property."¹⁰⁰ During the four-month interim period, ABT took measures to protect the property from vandalism, looked into waste drum disposal and showed the property to prospective buyers. The court held that these actions fell within the indicia of ownership exception.¹⁰¹ The court noted, however, that if ABT had participated in the day-to-day operational aspects of the site, such conduct would have placed it outside the exception.¹⁰²

In a factually similar case, *United States v. Maryland Bank & Trust Co.*,¹⁰³ the court reached the opposite conclusion. In this case the lender purchased the contaminated property at its foreclosure sale and held it for four years.¹⁰⁴ During that time the EPA cleaned up the property and then sought to recover its costs from the lender.¹⁰⁵ When the lender attempted to escape liability under the indicia of ownership exception, the court held that the exception protected only current mortgagees, not those who acquired title to the property at foreclosure sales.¹⁰⁶ The court distinguished *Mirabile* on grounds that Maryland Bank & Trust benefitted from cleanup because it

94. 42 U.S.C. § 9601(20)(A) (1988).

95. Corash & Behrendt, *supra* note 3, at 868-69.

96. *Id.* at 869.

97. See *infra* notes 102-25 and accompanying text.

98. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985).

99. *Id.* at 20,996.

100. *Id.*

101. *Id.*

102. *Id.*

103. 632 F. Supp. 573 (D. Md. 1986).

104. The fact that the *Maryland Bank* lender held the property for years, as opposed to months, is probably irrelevant. In *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,698, 20,698-99 (D.S.C. June 15, 1984) a lender was held liable as an owner under CERCLA after holding the property for only one hour.

105. The lender's bid at the foreclosure sale was \$381,500. The cleanup cost totalled approximately \$551,713.50.

106. 632 F. Supp. at 578-79.

held title to the property throughout the process.¹⁰⁷

Significantly, the *Maryland Bank* court ruled that a lender could be liable as an owner under CERCLA without ever operating the property.¹⁰⁸ In this light, *Mirabile's* holding that a lender who does not participate in the day-to-day operations of a contaminated property is not an owner under CERCLA may no longer be applicable.¹⁰⁹ For this reason, most banks¹¹⁰ have refused to take title to contaminated property in order to avoid CERCLA liability.¹¹¹ In other words, the *Maryland Bank* ruling cautions lenders to think twice before foreclosing on property that may be subject to CERCLA cleanup.¹¹² Absent an exception from CERCLA liability,¹¹³ then, lenders will have to abandon their security interests in contaminated property.¹¹⁴

Recently, in *United States v. Fleet Factors*,¹¹⁵ the Eleventh Circuit Court of Appeals held that the lender who participates in the financial management of a toxic waste site enough to "indicat[e] a capacity to influence the corporation's treatment of hazardous wastes" is liable under CERCLA.¹¹⁶ The lender need not participate in the day-to-day management of the site,¹¹⁷ or even in decisions involving hazardous waste.¹¹⁸ If the lender's involvement in the affairs of the property sufficiently supports an inference that the lender could have influenced decisions involving hazardous waste, the lender is liable under CERCLA.¹¹⁹

The court found that its interpretation of the indicia of ownership exception was closer to the intent of Congress in enacting CERCLA than the *Mirabile* "day-to-day operations standard."¹²⁰ Agreeing with the *Maryland Bank* court, the Eleventh Circuit held that lenders have ample means to ascertain possible hazardous waste problems prior to making loans.¹²¹ The court also noted that lenders can figure their potential liability for CERCLA

107. *Id.* at 580. Conversely, ABT, in *Mirabile*, had no interest in the subject property during cleanup.

108. 632 F. Supp. at 577.

109. Corash & Behrendt, *supra* note 3, at 870.

110. *Id.*

111. See Comment, *Fear of Foreclosure: United States v. Maryland Bank & Trust Co.*, 16 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,165, 10,165 (1986) (describing this refusal as "fear of foreclosure").

112. See Corash & Behrendt, *supra* note 3, at 870. For a more in-depth discussion of the fear of foreclosure rule, see Comment, *supra* note 111, at 10,169; Seneker & Townsend, *New Liabilities for Lenders: Hazardous Waste and Toxic Building Materials*, LEGAL BULL., July 1987, at 363, 373.

113. For a discussion of the exceptions to owner and operator liability, see Corash & Behrendt, *supra* note 3, at 874-78.

114. For a much more thorough treatment of lender liability under CERCLA, see Corash & Behrendt, *supra* note 3, at 868-74.

115. 901 F.2d 1550 (11th Cir. 1990).

116. *Id.* at 1557.

117. *Id.*

118. *Id.* at 1557-58.

119. *Id.* at 1558.

120. *Id.* at 1558 n.11.

121. *Id.* at 1559 (citing *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (1986)).

response costs into the terms of their loan agreements.¹²² The court reasoned that lenders facing potential CERCLA liability will more closely monitor their debtors.¹²³ The court further reasoned that lenders will thus require compliance with state and federal environmental laws before providing ongoing financial assistance.¹²⁴ These actions by lenders would, in turn, increase compliance with CERCLA.¹²⁵

III. RECENT DEVELOPMENTS: ABANDONMENT VS. ENVIRONMENTAL CONCERNS

A. *The Effect of Midlantic on Abandonment*

1. *The Midlantic Decision*

In the landmark case of *Midlantic National Bank v. New Jersey Department of Environmental Protection*¹²⁶ the Supreme Court restricted the scope of the trustee's abandonment power pursuant to Code section 554(a).¹²⁷ The Court held that a trustee cannot abandon property containing toxic waste "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."¹²⁸ In arriving at this decision, the Court examined case law prior to codification of the trustee's abandonment power in section 554 and congressional intent behind the codification.

The Court first noted that abandonment had been judicially restricted in instances in which allowing abandonment would have jeopardized valid state or federal interests.¹²⁹ This restriction, the Court reasoned, constituted a well-established limitation on the trustee's abandonment power before the enactment of section 554.¹³⁰ The Court also found that if Congress intended to modify these judge-made restrictions on abandonment, it would have expressly said so.¹³¹ These two factors together persuaded the Court that

122. *Id.* at 1558.

123. *Id.*

124. *Id.* at 1558. See Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1294 (1987) (applying indicia of ownership exception more narrowly "conforms with CERCLA's implicit function of encouraging safer hazardous waste procedures" and provides lenders incentive to prevent misuse of hazardous waste sites); Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139, 183-85 (outlining lenders' alternatives for reducing their potential for liability under narrower construction of exception).

125. *Fleet Factors*, 901 F.2d at 1558-59.

126. 474 U.S. 494 (1986).

127. *Id.* at 507.

128. *Id.* For the facts underlying this decision, see *infra* note 169 and accompanying text.

129. *Midlantic*, 474 U.S. at 500-501. The court relied on the restrictions set forth in *Chicago Junction R.R. Co. v. Sprague* (*In re Chicago Rapid Transit Co.*), 129 F.2d 1, 5 (7th Cir. 1942), *cert. denied*, 317 U.S. 683 (1942); *Ottenheimer v. Whitaker*, 198 F.2d 289, 290 (4th Cir. 1952); and *In re Lewis Jones, Inc.*, [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,471 (Bankr. D. Pa. Nov. 7, 1974). For a discussion of these cases and the limitations they placed on common law abandonment, see *supra* notes 23-39 and accompanying text.

130. *Midlantic*, 474 U.S. at 501.

131. *Id.* "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."

neither it nor Congress had given a bankruptcy trustee the power to abandon property "in contravention of state or local laws designed to protect public health or safety."¹³²

The Court reasoned that the limitation on the trustee's abandonment power was similar to the restriction¹³³ on the automatic stay,¹³⁴ another "fundamental debtor protection[.]"¹³⁵ In addition, the Court noted that 28 U.S.C. section 959(b) requires a trustee to operate estate property in compliance with valid state laws.¹³⁶ Although section 959(b) does not apply directly to a section 554 abandonment, the Court still found it indicative of Congress' intent to limit the trustee's powers.¹³⁷

Finally, the Court found support for its position in light of Congress' recent enactment of both RCRA¹³⁸ and CERCLA.¹³⁹ These federal attempts to regulate and dispose of environmental waste provided the final impetus the Court needed to conclude that Congress intended to restrict abandonment power, if necessary, to protect the public and the environment from toxic pollution.¹⁴⁰ All these factors led the Court to hold that bankruptcy courts cannot authorize trustees to abandon toxic waste sites in violation of state laws intended to protect the public health or safety.¹⁴¹

Despite its significance, several problems cloud the *Midlantic* decision.¹⁴² First, it was endorsed by only a bare majority of justices.¹⁴³ Second, the

Id. (citing *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)). Thus, "[i]f Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy 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)).

132. *Id.* at 502. The Court also relied on its prior ruling in *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) (anyone in possession of toxic waste site, including bankruptcy trustee, must comply with state environmental laws).

133. 11 U.S.C. § 362(b)(5) (1988) allows governmental agencies to pursue nonmonetary judgments against the debtor, thus exempting them from the automatic stay. One reason for this is to protect the public from debtor created environmental danger. See S. REP. NO. 989, *infra* note 135, at 52; H.R. REP. NO. 595, *infra* note 135, at 343.: "Thus, where a governmental unit is suing a debtor to prevent or stop violation or fraud, *environmental protection*, consumer protection, *safety*, or *similar police or regulatory laws*, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." H.R. REP. NO. 595, *infra* note 135, at 343 (emphasis added).

134. 11 U.S.C. § 362(a) (1988).

135. *Midlantic*, 474 U.S. at 503, quoting S. REP. NO. 989, 95th Cong., 2d Sess. 54, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5840; H.R. REP. NO. 595, 95th Cong., 1st Sess. 340, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6296.

136. Section 959(b) 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.

137. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Prot.*, 474 U.S. at 494, 505 (1986).

138. See *supra* notes 66-71 and accompanying text.

139. See *supra* notes 72-86 and accompanying text.

140. *Midlantic*, 474 U.S. at 505-06.

141. *Id.* at 507.

142. See *infra* notes 143-59 and accompanying text.

143. The *Midlantic* opinion was a 5-4 decision.

Court expressly declined to attach a priority to claims for cleanup expenses.¹⁴⁴ Thus, while it precludes a trustee from abandoning property without first bringing it into compliance with state environmental laws, *Midlantic* gives no guidance concerning the source of the cleanup funds. Third, the limitations placed on abandonment power are uncertain;¹⁴⁵ the Court stated that the limitation is too narrow to include instances in which contamination is merely speculative or where no "imminent and identifiable" harm to the public is present.¹⁴⁶ Furthermore, the *Midlantic* rule does not apply if environmental laws are unreasonable.¹⁴⁷ Attaching definitions to "imminent" danger and unreasonable laws, however, is a difficult task.

Justice Rehnquist's stinging dissent pointed to other problems with the *Midlantic* holding.¹⁴⁸ Stressing the need in liquidation proceedings for the expeditious and equitable distribution of estate assets, the dissent assailed the Court's decision as a great hindrance to this goal.¹⁴⁹ Justice Rehnquist remained unpersuaded that Congress intended to limit a trustee's abandonment powers.¹⁵⁰ He found the language of section 554 absolute in its terms, bound only by the restrictions in the section itself.¹⁵¹ Nothing in the section's legislative history convinced him otherwise.¹⁵²

Above all, Justice Rehnquist found "particularly unpersuasive" the majority's argument that Congress merely codified into section 554 "well-recognized restrictions of a trustee's abandonment power" from prior case law.¹⁵³ The three cases¹⁵⁴ the majority relied on were, in his opinion, misinterpreted. Additionally, those cases did not merit recognition for creating widely accepted limitations on abandonment.¹⁵⁵ Finally, Justice Rehnquist agreed with the bankruptcy court¹⁵⁶ that city and state authorities are eminently more qualified to protect the public from toxic contamination than either a trustee or a debtor's creditors.¹⁵⁷ Since section 554 requires the

144. *Midlantic*, 474 U.S. at 498 n.2.

145. *Id.* at 507 n.9.

146. *Id.*

147. *Id.*

148. *Id.* at 507-17.

149. *Id.* at 508.

150. *Id.* at 509.

151. *Id.*

152. *Id.* at 509-10. Justice Rehnquist described the legislative history as "scant" and found it lacking in support for the majority's position. For this reason, he argued that it could not be used to infer congressional intent to limit § 554. "We have previously expressed our unwillingness to read into unqualified statutory language exceptions or limitations based upon legislative history unless that legislative history demonstrates with extraordinary clarity that this was indeed the intent of Congress." *Id.* at 510 (citing *Garcia v. United States*, 469 U.S. 70, 75 (1984)). Moreover, Congress knew how to create a restriction on abandonment when it wanted to. 474 U.S. at 513 (citing 11 U.S.C. § 1170(a)(2) (1988)) (restricting abandonment of railroad lines).

153. *Id.* at 507.

154. See *supra* notes 129-30 and accompanying text.

155. *Midlantic*, 474 U.S. at 507-08.

156. The bankruptcy court had originally approved the abandonment. See *Petition for Certiorari* at 69a, *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Prot.*, 474 U.S. 494 (1986), citing *New York v. O'Neill (In re Quanta Resources)*, No. 81-05967 (Bankr. D.N.J. June 22, 1982), (available on Lexis, Genfed, Briefs).

157. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Prot.*, 474 U.S. 494, 515 (1986).

trustee to give notice prior to abandonment,¹⁵⁸ these authorities have ample time to provide for any necessary precautionary measures.¹⁵⁹

2. Decisions Since *Midlantic*

a. Abandonment Allowed

Despite the Supreme Court's holding in *Midlantic*, an increasing number of courts are ruling in favor of abandonment, even where toxic waste is concededly present on the property.¹⁶⁰ Central to these decisions is the trustee's ability to fund cleanup and the possibility of harm to the public. If the estate lacks unencumbered assets and the risk of public harm is relatively low, courts will often approve abandonment.

*In re Oklahoma Refining Co.*¹⁶¹ was one of the first cases to construe *Midlantic*. The *Oklahoma Refining* court determined that *Midlantic* only required a bankruptcy court to consider state environmental laws when deciding whether to allow abandonment.¹⁶² This decision appears surprisingly far removed from both the *Midlantic* Court's rule and purpose, but a closer look reveals otherwise. The *Oklahoma Refining* trustee confronted a dilemma. He faced liquidation of an estate whose secured debts alone far exceeded the value of its assets.¹⁶³ In addition, the estate property contained hazardous substances whose estimated cleanup cost was astronomical¹⁶⁴ relative to the value of the unpolluted property. The court determined that the *Midlantic* rule barred the trustee from abandoning the property without complying with state environmental regulations.¹⁶⁵ Thus the trustee was unable either to perform his administrative duties under the Code or to reclaim the property.

The *Oklahoma Refining* court determined that *Midlantic* did not intend to saddle bankruptcy trustees with such a dilemma.¹⁶⁶ Instead, the court found that *Midlantic* merely placed an obligation on the bankruptcy court to consider state environmental laws in deciding whether to permit abandonment.¹⁶⁷ The court further buttressed its position by factually distinguishing the two cases.¹⁶⁸ In short, the *Midlantic* trustee, in contrast to the *Oklahoma Refining* trustee, acted irresponsibly with regard to the contami-

158. 11 U.S.C. § 554(a) (1988).

159. *Midlantic*, 474 U.S. at 515.

160. See *infra* notes 161-215 and accompanying text.

161. 63 Bankr. 562 (Bankr. W.D. Okla. 1986).

162. *Id.* at 565.

163. The bankrupt estate had secured claims against it in the amount of \$40 million and unsecured claims totaling approximately \$8 million. It had no unencumbered assets and no funds that were not cash collateral. The assets of the estate were valued at approximately \$4 million.

164. Uncontaminated, the property had an approximate value of \$100,000. Initial cleanup costs, however, were estimated at \$2.5 million, not including thirty years of future monitoring and cleanup expenses.

165. *Midlantic*, 474 U.S. 494, 507 (1986).

166. *Oklahoma Ref.*, 63 Bankr. at 565.

167. *Id.*

168. *Id.*

nated property.¹⁶⁹ Moreover, the site was located in New York City. The *Oklahoma Refining* property, however, was situated in rural Oklahoma, and the trustee had done what the court considered "reasonable" in light of the circumstances.¹⁷⁰ Furthermore, the *Oklahoma Refining* property presented no "immediate and menacing"¹⁷¹ threat of harm to the public.¹⁷²

The *Oklahoma Refining* court also noted that *Midlantic* addressed neither how a trustee would fund cleanup costs¹⁷³ nor a final disposition of property.¹⁷⁴ Thus, a demand of strict compliance with Oklahoma environmental laws could cause the bankruptcy to continue interminably in an unresolved state.¹⁷⁵ In addition, while not unreasonable, the Oklahoma environmental laws conflicted with the policy underlying the Code requiring efficient and timely administration of bankrupt estates.¹⁷⁶ The Court thus held that allowing state law to preempt the Code in this situation would impair administration of the bankruptcy estate.¹⁷⁷ Finally, the court decided that allowing or denying abandonment would produce the same result, since the estate lacked unencumbered funds to finance remediation.¹⁷⁸

The *In re Franklin Signal Corp.*¹⁷⁹ court held that a trustee is precluded from abandoning a hazardous waste site only if the property poses an immi-

169. The bankruptcy court did not require the *Midlantic* trustee to take any action to protect the public prior to abandonment, despite the property's condition: security fencing was not in place, deteriorating tanks were not scaled, and potentially explosive materials remained on the property. In addition, the trustee, after abandonment, released the 24-hour security service at the site and turned off the fire-suppression system. Moreover, the property was in violation of a consent order at the time of abandonment. The City of New York eventually had to decontaminate most of the property because of potential danger to the public. Remediation cost the city approximately \$2.5 million. See *Midlantic*, 474 U.S. 494, 498, 499 n.3 (1986).

170. The trustee had paid for an environmental investigation and report on the property, arranged to remove above-ground waste and clean up storage tanks and had worked cooperatively with state health and environmental agencies. He had also attempted, unsuccessfully, to sell the property.

171. One commentator has taken exception to the court's use of "immediate and menacing" as synonymous with "imminent." He contends that the variance in meaning between these terms is such that use of the former stripped the latter of some of its import and thus shifted the *Midlantic* Court's emphasis. See Casenote, *Bankruptcy Law, Environmental Law: Abandonment of Hazardous Waste Sites in Bankruptcy—In re Oklahoma Refining Company*, 63 Bankr. 562 (W.D. Okla. 1986), 13 U. DAYTON L. REV. 511, 517-19 (1988). This author finds the above argument weak and unpersuasive.

172. *Oklahoma Ref.*, 63 Bankr. at 564. All the expert witnesses called to testify said the property posed no "immediate and menacing" threat of public harm. A toxicologist did state, however, that he believed something "bad" would happen to fresh water supplies, although he could not ascertain when. *Id.* at 563-64.

173. *Id.* at 565.

174. *Id.* (citing *Midlantic*, 474 U.S. 474, 498 n.2 (1986)).

175. *Id.* at 565.

176. *Id.* at 566.

177. *Id.* at 565-66. "To pre-empt the administration of this estate would derogate the spirit and purpose of the bankruptcy laws requiring prompt and effectual administration within a limited time period." *Id.* (citing *Katchen v. Landy*, 382 U.S. 323, 328 (1966)).

178. *Id.* at 565. In other words, whether the property was abandoned or not, someone other than the estate would have to fund cleanup. Clearly, if the estate included unencumbered assets, this statement would be untrue.

179. 65 Bankr. 268 (Bankr. D. Minn. 1986).

nent danger to the public safety.¹⁸⁰ In this chapter 7 proceeding, the trustee employed a third party to investigate and report on the contents of fourteen drums of waste. The report indicated that the drums contained at least one chemical considered hazardous under Wisconsin law. Although Wisconsin authorities knew of the situation, they took no action to hold anyone responsible for the waste. From this lack of state action, the *Franklin Signal* court inferred that the drums posed no imminent threat to the public.¹⁸¹

As in *Oklahoma Refining*, the estate in this case lacked sufficient unencumbered assets to remove the hazardous waste.¹⁸² Confronted with this predicament, the court analyzed the underpinnings of the *Midlantic* decision and found that a literal interpretation of *Midlantic's* ruling prevented a trustee from abandoning property if such action violated state environmental laws.¹⁸³ The court remained unconvinced, however, that the majority in *Midlantic* intended to produce such an "undesirable" result.¹⁸⁴

Instead, the bankruptcy court deduced that *Midlantic* intended merely to impose, as a prerequisite to abandonment, the requirement that the trustee first formulate conditions which adequately protected the public.¹⁸⁵ These conditions are determined on a case-by-case basis.¹⁸⁶ The bankruptcy court must consider at least five factors: (1) the imminence of danger to the public health and safety; (2) the extent of probable harm; (3) the amount and type of hazardous waste; (4) the expense involved in bringing the property into compliance with environmental laws; and (5) the amount and type of resources available for cleanup.¹⁸⁷ Consideration of these five factors, the court concluded, effectively balanced the competing interests of the public and the administration of the bankrupt estate.¹⁸⁸ Applying this analysis, the court held that a trustee who has taken sufficient precautionary measures to ensure that no imminent danger will result to the public can abandon con-

180. *Id.* at 271-72.

181. *Id.* at 269 n.1. The Wisconsin Department of Natural Resources had been apprised of the hazardous waste in the drums. However, it expended no efforts to ensure their removal. The court inferred from the state's inaction that the drums presented no immediate public threat. *Id.* See also *Borden, Inc. v. Wells-Fargo Bus. Credit (In re Smith-Douglass, Inc.)* 856 F.2d 12, 16 (4th Cir. 1988) (state environmental agency inactivity implies lack of public threat) (citing *In re Purce, Inc.*, 76 Bankr. 523, 533 (Bankr. W.D. Pa. 1987)).

182. The unencumbered assets of the estate totalled approximately \$10,000. Projected cost to remove the toxic waste was \$20,000. In addition, the estate had incurred at least \$17,652 in administrative expenses.

183. *Franklin Signal*, 65 Bankr. at 271.

184. *Id.*

185. *Id.* According to the court, this view of *Midlantic* is in line with the Supreme Court's earlier decision in *Ohio v. Kovacs*, 469 U.S. 274, 283 (1985) (debtor's duty to comply with state court-ordered hazardous waste cleanup is dischargeable in bankruptcy). The *Kovacs* court also stated that "[i]f the property is worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with state environmental law to the extent of his or its ability." *Kovacs*, 469 U.S. at 284-85 n.12.

186. *Franklin Signal*, 65 Bankr. at 272.

187. *Id.* The preabandonment conditions the *Franklin Signal* court imposed required the trustee to (1) conduct an investigation to determine what, if any, hazardous substances were present on the property; and (2) inform state and federal agencies of any contamination and of the trustee's intent to abandon. *Id.* at 273.

188. *Id.* at 272.

taminated property.¹⁸⁹

In addition, the *Franklin Signal* court contended that a strict application of *Midlantic* to an estate that lacked sufficient funds to pay for cleanup would lead to abandonment by default under the Code.¹⁹⁰ To the court, the critical issue when the estate lacked funds to clean up property was not public safety but who must bear cleanup costs.¹⁹¹ Perhaps the state authorities' inaction led the court to conclude that the estate's hazardous substances posed no great danger to the public.¹⁹² The court held unwarranted a literal reading of *Midlantic* because such a reading only evades the cleanup funding problem.¹⁹³

The decision in *Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.)*¹⁹⁴ echoes both *Oklahoma Refining*¹⁹⁵ and *Franklin Signal*.¹⁹⁶ The Fourth Circuit Court of Appeals ruled that a trustee can unconditionally abandon contaminated property that does not greatly threaten the public health and safety if the estate lacks unencumbered assets with which to fund cleanup.¹⁹⁷ In this chapter 11 case, the former property owners¹⁹⁸ and the State of Illinois opposed abandonment. Conditions at the site undeniably violated several state environmental laws.¹⁹⁹ Although the state had monitored the site, it had failed to take action against the prepetition property owner for these violations. After the bankruptcy filing, the bankruptcy court determined that the property, despite contamination, did not present an imminent and identifiable harm to the public.²⁰⁰ The appeals court declined to disturb this decision.²⁰¹

The court of appeals found that the narrow exception created in *Midlantic* stemmed from the Supreme Court's concern for the environment and the

189. *Id.* *Midlantic* "requires something more than mere consideration of state law, but something less than complete compliance." *Id.* at 272 n.4.

190. *Id.* at 272 n. 5. The court raised the problem of funding CERCLA response costs from a chapter 7 no-asset estate and then proceeded:

The ironic quirk in a strict application of *Midlantic* is that the property would ultimately be abandoned by default pursuant to 11 U.S.C. § 554(c). That section provides: "any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for the purpose of section 350 of the title."

Id.

191. *Id.* at 274 n.9. The court apparently believed *Midlantic* was principally concerned with public safety.

192. See *supra* note 181 and accompanying text.

193. *Franklin Signal*, 65 Bankr. at 272 n.5.

194. 856 F.2d 12 (4th Cir. 1988).

195. 63 Bankr. 562, 565-66 (Bankr. W.D. Okla. 1986).

196. *Franklin Signal*, 65 Bankr. at 272.

197. *Smith-Douglass*, 856 F.2d at 17.

198. The former owners faced the possibility of incurring liability for cleanup expenses and were therefore interested parties to the suit.

199. *Smith-Douglass*, 856 F.2d at 14.

200. *Id.* at 16. The bankruptcy court must determine, with reference to state law, the nature of this risk. Moreover, not all seeming violations of laws intended to protect the public from imminent harm prevent abandonment. "Speculative and indeterminate future violations," for instance, do not. *Id.* (citing *Midlantic*, 474 U.S. 494, 507 n.9 (1986)).

201. *Smith-Douglass*, 856 F.2d at 16.

public safety, not the state treasury.²⁰² Consequently, if a trustee wishes to abandon contaminated property that presents an imminent and identifiable harm to the public, he cannot do so without first ensuring adequate protection for the public.²⁰³ *Midlantic* does not apply if the risk to the public health is speculative²⁰⁴ or "await[ing] appropriate action by an environmental agency."²⁰⁵ As in *Midlantic*, the *Smith-Douglass* court failed to decide who ultimately must fund cleanup.²⁰⁶ The court acknowledged, however, that allowing abandonment increases the states' probability of paying at least some of the cost.²⁰⁷

The 1988 case of *In re Brio Refining, Inc.*²⁰⁸ provides a look at the abandonment issue from different angle. In this case, the trustee applied for and obtained permission to abandon certain estate property. Over a year later, the EPA sought to add the abandoned property to its National Priorities List.²⁰⁹ Numerous parties potentially liable to the EPA by virtue of the abandonment moved to have the bankruptcy estate pay for investigatory, disposal, and cleanup expenses relating to the property. The bankruptcy court denied their motion, reasoning that the property was not part of the estate when the movants incurred the expenses for which they sought reimbursement.²¹⁰ The movants then appealed to the United States District Court for the Northern District of Texas, which affirmed the bankruptcy court's decision.²¹¹

The district court distinguished *Brio Refining* from *Midlantic* because, in the former, there was no evidence of contamination prior to abandonment.²¹² The court therefore held that *Midlantic* does not apply when hazardous waste contamination is discovered after abandonment and when the abandonment does not violate any environmental laws at the time of abandonment.²¹³ In addition, the court relied upon the finality of abandoning estate property in rejecting the movants' request.²¹⁴ For this reason, the *Brio Refining* estate was not liable for any expenses related to discovery or

202. *Id.* (citing *Midlantic*, 474 U.S. at 506).

203. *Id.* at 16.

204. *Id.* (citing *Midlantic*, 474 U.S. at 507).

205. *Id.*

206. *Id.* at 15 n.4.

207. *Id.*

208. 86 Bankr. 487 (Bankr. N.D. Tex. 1988).

209. This list prioritizes existing and threatened releases of toxic substances into the environment.

210. *Brio Refining*, 86 Bankr. at 488-89.

211. *Id.* at 489-90.

212. *Id.* at 489.

213. *Id.* at 489. The abandonment did not violate environmental laws because identified contamination was not in evidence when it took place. The *Midlantic* exception does not preclude abandonment which may potentially result in a future violation of environmental laws. See *Midlantic*, 474 U.S. 494, 507 n.9 (1986).

214. *Brio Refining*, 86 Bankr. at 490. Abandonment is generally final and irrevocable, except in a few, limited instances. *Id.* See *In re Polumbo*, 271 F. Supp. 640, 643 (W.D. Va. 1967). The court also acknowledged that *Midlantic* created another restriction on abandonment, but only when the property is known to be contaminated prior to abandonment, *Brio Refining*, 86 Bankr. at 490 n.3, since abandonment is generally final and irrevocable, except in a few, limited instances.

remediation of toxic contamination.²¹⁵

b. Dismissal

Many other courts have interpreted *Midlantic* as absolutely barring abandonment of contaminated property that threatens the public safety unless the trustee first brings the property into total compliance with state environmental laws.²¹⁶ At least two of these courts dismissed the bankruptcy proceeding rather than requiring the trustee to cleanup the property.²¹⁷ Shortly after the *Midlantic* decision in 1986, the trustee in *In re Commercial Oil Service, Inc.*²¹⁸ moved to dismiss the bankruptcy pursuant to section 305²¹⁹ of the Code.²²⁰ The bankruptcy court determined that dismissal would not be in the best interest of the debtor²²¹ and declined to dismiss the case under section 305.²²² The court granted dismissal for cause pursuant to Code section 707(a),²²³ however, because of the environmental threat to the public and the trustee's lack of experience in toxic cleanup operations.²²⁴

In *Commercial Oil*, the court interpreted *Midlantic* as imposing on the

215. *Id.* at 490.

216. See *In re 82 Milbar Blvd., Inc.*, 91 Bankr. 213, 218-19 (Bankr. E.D.N.Y. 1988); *In re Peerless Plating Co.*, 70 Bankr. 943, 946-47, 947 n.1 (Bankr. W.D. Mich. 1987); *In re Stevens*, 68 Bankr. 774, 780-81 (D. Me. 1987), *rev'g In re Stevens*, 53 Bankr. 783 (Bankr. D. Me. 1985); *In re Commercial Oil Serv., Inc.*, 58 Bankr. 311 (Bankr. N.D. Ohio 1986), *aff'd*, 88 Bankr. 126, (D.N.D. Ohio 1987); *In re Beker Indus. Corp.*, 64 Bankr. 900, 908 (Bankr. S.D.N.Y. 1986) (dictum).

217. *82 Milbar Blvd., Inc.*, 91 Bankr. at 222; *Commercial Oil Serv., Inc.*, 58 Bankr. at 318.

218. *Commercial Oil Serv., Inc.*, 58 Bankr. at 311.

219. Section 305(a)(1) provides:

(a) The court, after notice and a hearing, may dismiss a case under this title . . . at any time if —

(1) the interests of creditors and the debtor would be better served by such dismissal

11 U.S.C. § 305(a)(1) (1988). 11 U.S.C. § 305(c) further provides that a dismissal order is "not reviewable by appeal or otherwise."

220. The State of Ohio supported the trustee's motion, citing 11 U.S.C. §§ 305 and 707(a) (1988).

221. *Commercial Oil Serv.*, 58 Bankr. at 315.

222. *Id.*

223. Section 707(a) provides:

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause including —

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within 15 days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

11 U.S.C. § 707(a) (1988).

224. *Commercial Oil Serv.*, 58 Bankr. at 318. Although § 707(a) only gives two instances in which dismissal for cause is proper, the court found from its legislative history that Congress intended these situations merely to be "illustrative" and not "exhaustive." *Id.* at 315. In the factually similar pre-*Midlantic* case of *In re Charles George Land Reclamation Trust*, 30 Bankr. 918 (Bankr. D. Mass. 1983), the bankruptcy court also dismissed a chapter 7 proceeding for cause pursuant to § 707, stating that "it was impossible for any trustee to manage the Debtor's site in compliance with State law and thus meet the requirements of 28 U.S.C. § 959(b)." *Id.* at 923.

trustee an affirmative duty to bring the contaminated site into compliance with state environmental laws.²²⁵ Consequently, the trustee would have been liable both for failure to clean up the hazardous waste site and for any resultant injuries.²²⁶ The court deemed this liability too great a burden to place on a trustee inexperienced in waste disposal²²⁷ and ordered dismissal of the bankruptcy case.²²⁸ Noting that any distribution to creditors would have been negligible following cleanup with estate funds, the court called administration of the estate "an exercise in futility."²²⁹

More recently, in *In re 82 Milbar Boulevard, Inc.*²³⁰ the trustee moved to dismiss a chapter 7 proceeding or to approve abandonment of estate property. The court interpreted this motion as notice of the trustee's resignation²³¹ and permitted the trustee to resign²³² and appoint a successor trustee.²³³ Based on *Midlantic*, the court declined to consider abandonment as an alternative.²³⁴

The court expressed considerable concern over trustee liability in environmental bankruptcy cases.²³⁵ For this reason, the court conveyed a possessory interest in the contaminated property to the EPA²³⁶ pursuant to Code section 725.²³⁷ This action insulated the trustee from as much liability as

225. *Commercial Oil Serv.*, 58 Bankr. at 317.

226. *Id.*

227. *Id.*

228. *Id.* at 318. The court indicated it would not have dismissed the bankruptcy, however, had federal and state environmental authorities been unwilling to take action as soon as the property was free from protection under the Code. *Id.* at 316.

229. *Id.* at 318.

230. 91 Bankr. 213 (Bankr. E.D.N.Y. 1988).

231. *Id.* at 214.

232.

[T]he scope of a trustee's duties under the Bankruptcy Code is inconsistent with the potential liability of a bankruptcy trustee under CERCLA and state and local legislation. Therefore, the presence of assets within an estate which present an unreasonable risk of liability to the trustee pursuant to environmental legislation may constitute acceptable cause for resignation of a trustee.

Id. at 222.

233. *Id.* at 214. The court directed the trustee to appoint a successor under 11 U.S.C. § 703 (1988).

234. *Id.* at 219. The court found that *Midlantic* prohibited it from issuing an abandonment order because the estate lacked funds, and the trustee expertise, with which to comply with environmental laws. Thus, practical constraints disabled the court from providing for the public "health, safety and welfare." *Id.*

235. *Id.* at 218. The court observed that *Midlantic* imposed a duty on the trustee "independent of the estate's ability to fund his performance of that duty." *Id.* Placing such liability on trustees could undermine the bankruptcy system and discourage competent professionals from serving as trustees. *Id.* at 218-19. See *supra* note 232.

236. The court distinguished *In re Commercial Oil Serv.*, 58 Bankr. 311 (Bankr. D. Ohio 1986). In *Commercial Oil* environmental authorities assured the court they were ready to institute cleanup action as soon as the property was free from the automatic stay. *Id.* at 316. In the instant case, environmental authorities had given no such assurance. *In re Milbar*, 913 Bankr. at 219 n.27. See *supra* note 228.

237. *Id.* at 219. 11 U.S.C. § 725 (1988) provides:

After commencement of a case under this chapter, but before final distribution of property of the estate under section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title.

possible. Further, the conveyance permitted the EPA to exercise its responsibilities under CERCLA, allowing creditors to monitor cleanup expenses, and ensuring that the property would be sold at an optimum price.²³⁸ The conveyance was conditioned, however, on the appointment of a successor trustee.²³⁹ If no interim or successor trustee was in place within thirty days of the court's order, the court noted that such absence of the substitute trustee would be grounds for dismissal for cause under section 707(a).²⁴⁰

B. Giving Cleanup Costs Administrative Priority

Courts and commentators alike recognize that the real issue in toxic waste abandonment situations is not dispensing with the property, but who will pay for cleanup.²⁴¹ Since the *Midlantic* Court declined to address the question of who bore liability for cleanup expenses,²⁴² subsequent courts have arrived at varying results. Rights to estate assets generally arise before, and therefore outside, bankruptcy.²⁴³ For this reason, state law, such as Article 9 of the Uniform Commercial Code (UCC), primarily determines the priority various secured claims will receive,²⁴⁴ while unsecured creditor claim priority is set forth in Bankruptcy Code section 507.²⁴⁵ In general, the trustee distributes assets first to secured creditors, second to cover administrative costs, next to unsecured creditors, and finally to shareholders.²⁴⁶

The legislative history for § 725 infers that the term "interest" is limited to an ownership or security interest. See H.R. REP. NO. 595, 95th Cong., 1st Sess. 382-83 (1977); S. REP. NO. 989, 95th Cong., 2d Sess. 96 (1978); both reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5882, 6338. Too narrow an interpretation, however, goes against the purpose of § 725, which is to afford the disposition of property not already abandoned, sold, or foreclosed upon by lender. See *In re* 82 Milbar Blvd., 91 Bankr. at 220 n.29.

238. *Id.* at 220. Exactly what compliance with environmental cleanup requires, both in terms of dollars spent and actions taken, is open to dispute. See Comment, *Superfund and the National Contingency Plan: How Dirty is "Dirty"? How Clean is "Clean"?*, 12 ECOLOGY L. Q. 89, 130-46 (1984) (discussing each of adequate EPA standards for determining what constitutes remediation of contaminated property).

239. *Id.* at 220 (property cannot be conveyed without trustee).

240. *Id.* at 214. A polluted asset coupled with the "reasonable unwillingness" of a trustee to serve is cause for dismissal. *Id.* at 221. See also *In re Mattiace Indus., Inc.*, 76 Bankr. 44, 47-48 (Bankr. E.D.N.Y. 1987) (denying motion to convert chapter 11 proceeding to chapter 7 and dismissing under 11 U.S.C. § 1112(b) due to potentially unlimited trustee liability). For other cases dismissing for cause within the context of a trustee's inability to comply with environmental laws, see *In re* 30 Hill Top Street Corp., 42 Bankr. 517, 521 (D. Mass. 1984) (inability to administer bankruptcy due to lack of money and potential harm to public); *In re* Charles George Land Reclamation Trust, 30 Bankr. 918, 923-24 (D. Mass. 1983) (impossible for trustee to comply with state environmental laws because of cleanup expense and ongoing threat to public safety).

241. See *In re* Franklin Signal Corp., 65 Bankr. 268, 274 n.9 (Bankr. D. Minn. 1986); *In re* Oklahoma Ref. Co., 63 Bankr. 562, 565 (Bankr. W.D. Okla. 1986); *Developments in The Law*, *supra* note 53, at 1594.

242. *Midlantic*, 474 U.S. 494, 498 n.2 (1986).

243. *Developments in The Law*, *supra* note 53, at 1594.

244. See *Developments in The Law*, *supra* note 53, at 1594; Kennedy, *Creative Bankruptcy? Use and Abuse of the Bankruptcy Law—Reflection on Some Recent Cases*, 71 IOWA L. REV. 199, 211 (1985); Baird & Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1205, 1208-10 (1984). See also Note, *supra* note 47, at 1046-49 (Article 9, adopted in all states except Louisiana, establishes secured creditor rights in those states).

245. See 11 U.S.C. § 507 (1988).

246. *Developments in The Law*, *supra* note 53, at 1594.

1. Courts Favoring Administrative Priority

Developing a reliable test based on post-*Midlantic* decisions is nearly impossible for determining whether cleanup expenses merit administrative priority.²⁴⁷ Bankruptcy Code section 503 requires that administrative costs be "actual, necessary costs . . . of preserving the estate."²⁴⁸ Each court, however, employs a slightly different standard in deciding when removal or remediation costs meet this criteria.²⁴⁹

The court in *Juniper Development Group v. Kahn (In re Hemingway Transport, Inc.)*²⁵⁰ held that both past and future CERCLA response costs should be given administrative priority when (1) they are incurred by a purchaser who was unaware of the hazardous waste at the time he purchased the property; and (2) environmental authorities have notified the debtor of the waste and ordered clean up but the debtor has failed to comply.²⁵¹ Juniper Development Group (Juniper) purchased property from the debtor, Hemingway Transport, Inc. (Hemingway) through its trustee.²⁵² Before the sale, state environmental authorities advised Hemingway of hazards linked to chemicals contained in drums located on the subject property and ordered their removal.²⁵³ Hemingway failed to comply with the order. When the property was sold, neither Juniper, the trustee, nor the courts approving the sale were aware of the hazardous substances.

The court noted that, while the hazardous waste was on the property prior to bankruptcy, Juniper's liability actually arose postpetition²⁵⁴ because it did not own the property until then. The court assumed that the debtor attempted to pass off its liability for cleanup²⁵⁵ and therefore refused to allow this escape.²⁵⁶ Indeed, prior decisions showed that courts frown on a debtor's efforts to transfer liability under state or federal environmental laws.²⁵⁷ For this reason, the court held that any of Juniper's claims for response costs under CERCLA should be given administrative priority in Hemingway's bankruptcy.²⁵⁸

In another case, *In re Pierce Coal and Construction, Inc.*,²⁵⁹ the court held that land reclamation expenses are entitled to administrative priority under

247. See *infra* note 249 and accompanying text.

248. 11 U.S.C. § 503(b)(1)(A) grants administrative priority to "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered *after the commencement of the case*." (emphasis added).

249. See *infra* notes 254-65, 272-77, 279, 283-90, 306-10 and accompanying text.

250. 73 Bankr. 494 (D. Mass. 1987).

251. *Id.* at 505.

252. Hemingway originally filed a chapter 11 petition for reorganization. The chapter 11 proceeding was eventually converted to chapter 7. The Hemingway-Jupiter transaction, however, took place prior to the chapter 7 conversion.

253. 73 Bankr. at 501. See also *Juniper Dev. Corp. v. Kahn (In re Hemingway Transport, Inc.)*, 105 Bankr. 171, 173 (D. Mass. 1989) (state officials informed Hemingway of toxants and ordered cleanup before Hemingway filed bankruptcy.)

254. *Id.* at 503.

255. *Id.* at 505.

256. *Id.*

257. *Id.* at 505.

258. *Id.*

259. 65 Bankr. 521 (Bankr. N.D.W. Va. 1986).

section 503 when incurred postpetition by a debtor-in-possession in operating the estate.²⁶⁰ Debtor-generated prepetition expenses, however, are not.²⁶¹ The court reasoned that Congress determined which expenses deserve administrative priority, and environmental cleanup costs are not among them.²⁶² Moreover, the bankruptcy court generally lacks authority to elevate a prepetition unsecured claim to administrative priority.²⁶³ The *Pierce Coal* court believed that *Midlantic* created the only exception to this rule.²⁶⁴ *Midlantic* recognized administrative priority for cleanup costs only when environmental hazards pose an imminent and identifiable harm to the public safety.²⁶⁵

2. Courts Denying Administrative Priority

In *Burlington Northern Railroad Co. v. Dant & Russell, Inc. (In re Dant & Russell)*²⁶⁶ Burlington Northern Railroad (BN), as lessor, was jointly liable under CERCLA²⁶⁷ for expenses involved in cleaning up hazardous wastes the lessee/debtor-in-possession had deposited on BN property.²⁶⁸ BN asserted that postpetition expenditures to mitigate toxic waste hazards, which arose from the debtor-in-possession's breach of postpetition leases, deserved administrative priority.²⁶⁹ BN cited *Midlantic* as controlling.²⁷⁰ The debtor-in-possession countered that both BN's claim for reimbursement and its prospective claim for additional cleanup costs arose out of prepetition activities and were therefore general, unsecured claims. The *Dant & Russell* court declined to follow *Midlantic* and, instead, looked to the Supreme Court's decision in *Ohio v. Kovacs*,²⁷¹ in which the Court characterized simi-

260. *Id.* at 530.

261. *Id.*

262. *Id.* (although Congress expanded priorities for § 507 prepetition expenses in 1984, it made no provision for environmental damages).

263. *Id.* at 531.

264. *Id.*

265. *Id.* The *Pierce Coal* court indicated that compelling circumstances, such as imminent public harm, might even warrant elevation of cleanup costs to secured priority. *Id.* See also *In re Stevens*, 68 Bankr. 774, 783 (D. Me. 1987) (state claim for reimbursement for postpetition cleanup of toxic waste that occurred prepetition qualified as administrative expense because improper storage of hazardous waste exposes public to immediate and identifiable danger); *In re Chicago, Rock Island and Pac. R.R.*, 756 F.2d 517, 520 (7th Cir. 1985) (dictum) (expenses incurred to "avert imminent danger" can be given administrative priority because creditors benefit when estate avoids tort liability).

266. 853 F.2d 700 (9th Cir. 1988).

267. See 42 U.S.C. §§ 9601(21), 9607(a)(2) (1988).

268. 853 F.2d at 702. The debtor owned most of the land in question, but BN also owned and leased a portion of it to the debtor.

269. Oregon environmental authorities did not identify the property as a hazardous waste site until after the debtor filed bankruptcy. When the debtor-in-possession failed to comply with the Oregon authorities, BN spent over \$250,000 in an attempt to minimize harm to the public. Cleanup costs were estimated to be between \$10 and \$30 million. The debtor-in-possession's unencumbered assets totalled approximately \$3 million.

270. Apparently, BN relied on the Supreme Court's ruling that a trustee cannot abandon property in contravention of state laws intended to protect public health and safety. See *Midlantic*, 474 U.S. 494, 507 (1986).

271. 469 U.S. 274 (1985).

lar cleanup expenses as an unsecured claim.²⁷²

The court indicated that the fact that BN, and not the debtor-in-possession, owned the property in question was a primary factor in influencing its decision.²⁷³ Presumably, if the estate had owned the property, the court would have given BN's claim administrative priority.²⁷⁴ Because the Bankruptcy Code treats the breach of an ongoing lease as a prepetition event,²⁷⁵ however, the court also characterized the damages arising from such breach as prepetition and refused to give them administrative priority.²⁷⁶ If BN had not owned the property, the *Dant & Russel* court would have treated all expenditures of funds to preserve estate-owned property as administrative expenses, whether or not related to prepetition waste.²⁷⁷

In contrast, the *In re Brio Refining, Inc.*²⁷⁸ court ruled that environmental investigation and cleanup expenses did not warrant administrative priority when incurred after abandonment of the property.²⁷⁹ This holding indicates that a bankrupt estate is not liable for the costs of environmental cleanup occurring after property is no longer a part of the estate. *Brio Refining* is distinguishable from the other cases, however, because awareness of possible contamination did not arise until after abandonment. The court therefore did not have to address whether CERCLA liability passed with the property or remained with the estate. In addition, the *Brio Refining* court failed to reach the question whether the previously abandoned property violated environmental laws when the potentially responsible parties applied for administrative expense status.²⁸⁰

272. *Dant & Russell*, 853 F.2d at 708. In *Ohio v. Kovacs*, 469 U.S. at 282-83, the court ruled that an injunction requiring cleanup of contaminated property was merely a general, unsecured claim. The *Dant & Russell* court also found persuasive the reasoning of the third circuit in *Southern Ry. v. Johnson Bronze Co.*, 758 F.2d 137, 141 (3d Cir. 1985) (state administrative order requiring drainage ditch cleanup a mere unsecured claim).

273. *Dant & Russell*, 853 F.2d at 709.

274. *Id.* The court noted that both *Kovacs* and *Southern Ry.* also involved lessors seeking, unsuccessfully, administrative expense priority for cleanup costs on property the respective estates did not own. The court then stated, "quite a different result, however, is warranted when cleanup costs result from monies expended for the preservation of the bankruptcy estate." *Id.*

275. *Id.* at 709. See 11 U.S.C. § 365(g) (1988).

276. *Dant & Russell*, 853 F.2d at 709.

277. *Id.* The court based its conclusion on the following cases: *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 124 (6th Cir. 1987) (state's CERCLA response costs from debtor's estate given administrative priority); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976) (claims of third parties who supplied goods and services to debtor-in-possession which benefitted estate given administrative priority); *In re Stevens*, 68 Bankr. 774, 783 (D. Me. 1987) (state claim for property cleanup costs granted administrative status); *In re Distrigas Corp.*, 66 Bankr. 382, 386 (Bankr. D. Mass. 1986) (state entitled to administrative priority for expenses in cleaning up debtor's otherwise worthless property); *In re Vermont Real Estate Inv. Trust*, 25 Bankr. 804, 806 (Bankr. D. Vt. 1982) (claim for work which city required and performed to preserve estate entitled to administrative priority); *United States v. Price*, 577 F. Supp. 1103, 1110 (D.N.J. 1983) (claims for future expenses not awarded administrative priority).

278. 86 Bankr. 487 (N.D. Tex. 1988).

279. *Id.* at 488-90 (potentially responsible parties did not incur "actual, necessary costs and expenses of preserving the estate").

280. *Id.* at 490.

More recently, *In re Microfab, Inc.*²⁸¹ presented another situation in which a court refused to give cleanup expenses administrative priority. Massachusetts authorities sought an order requiring the trustee to clean up at the estate's expense, estate property contaminated by hazardous waste or to pay the State of Massachusetts to do the same.²⁸² The court denied the request because the state failed to show that expenditure of all the estate's funds would significantly reduce the threat to public safety.²⁸³ Moreover, the court found premature the state's request for administrative priority when it had not yet expended funds.²⁸⁴ Any ruling as to administrative priority would be merely speculative because, up to that point, the state had not incurred any expense for cleanup.²⁸⁵

The court also considered whether 28 U.S.C. section 959(b)²⁸⁶ or *Midlantic* requires a liquidation trustee to remediate site contamination. The court held that, under *Midlantic*, a chapter 7 trustee must ensure that contaminated property complies with state environmental laws.²⁸⁷ Funds expended to accomplish this are administrative expenses of the estate.²⁸⁸ The court limited *Midlantic's* effect, however, holding that the trustee is not required to undertake cleanup if the estate lacks funds to produce "appreciable" results.²⁸⁹ Moreover, since the state's actual cleanup expenses were undetermined, the court could not know whether the estate would be able to pay them.²⁹⁰

The court further held that section 959(b) does not require a chapter 7 trustee to clean up contaminated property because the trustee does not manage or operate it.²⁹¹ Instead, he merely oversees liquidation of the estate and distribution of assets.²⁹² In addition, the court found that environmental cleanup obligations should be treated as general, unsecured claims of the estate, not as personal responsibilities of the trustee.²⁹³

Finally, the *Microfab* court ruled that *Midlantic* obligates a trustee to maintain estate property in complete compliance with state environmental laws on an administrative expense basis, even when he does not seek to aban-

281. 105 Bankr. 161 (Bankr. D. Mass. 1989).

282. *Id.* at 162.

283. *Id.*

284. *Id.* at 162, 166.

285. *Id.*

286. 28 U.S.C. § 959(b) (1988) requires a trustee to manage and operate property in accordance with valid state laws.

287. 105 Bankr. at 166.

288. *Id.*

289. *Id.* The party seeking the trustee's cleanup efforts must prove both that he has the assets to achieve the results and that such expenses would have an appreciable effect on the property. Moreover, "[n]o court in equity can require a Trustee simply to throw money away, even in the name of a worthy cause." *Id.* at 169.

290. *Id.* at 166.

291. *Id.* at 168.

292. *Id.* See *Walker v. Maury County (In re Scott Housing Systems, Inc.)*, 91 Bankr. 190, 195-96 (Bankr. S.D. Ga. 1988).

293. 105 Bankr. at 167 ("As a general rule, an environmental cleanup obligation should be treated as a claim, not as a specific performance obligation that the Trustee must carry out on an administrative expense basis").

don the property.²⁹⁴ Several exceptions limit this broad obligation:²⁹⁵ (1) the environmental laws must be intended to protect the public from "imminent and identifiable harm;"²⁹⁶ (2) the violation caused by abandonment or failure to remove toxic wastes must be certain;²⁹⁷ (3) the environmental laws cannot be so onerous as to interfere with settling the bankrupt estate;²⁹⁸ and (4) the trustee must have the funds or other financial resources necessary to facilitate cleanup.²⁹⁹ The court deemed the state's failure to put on sufficient evidence to establish the last two conditions as further reason to deny its administrative expense request.³⁰⁰

3. In re Better-Brite Plating, Inc.

*In re Better-Brite Plating, Inc.*³⁰¹ sheds some light on the cleanup expense claim priority issue. The *Better-Brite* court ruled that a trustee is obligated to bring contaminated property into compliance with state environmental laws on an administrative expense basis.³⁰² This obligation, however, depends on the availability of unencumbered assets with which to pay cleanup costs.³⁰³ If the estate lacks unencumbered assets and the property poses no imminent danger to the public, the trustee may abandon the property.³⁰⁴

In this case the EPA and Wisconsin Department of Natural Resources (DNR) were in the process of investigating and remediating toxic contamination on three estate properties.³⁰⁵ They argued that pursuant to Code section 506(c)³⁰⁶ expenses they had incurred in investigating and remediating the property entitled them to future sale proceeds from these properties, ahead of the bank as the secured creditor.³⁰⁷ The court agreed and held that

294. *Id.* at 168, 169.

295. *Id.* at 169.

296. *Id.* (citing *Midlantic*, 474 U.S. 494, 507 (1986); *In re Peerless Plating Co.*, 70 Bankr. 943, 947 (Bankr. W.D. Mich. 1987)).

297. *Id.* (citing *Midlantic*, 494 U.S. at 407; *Peerless*, 70 Bankr. at 947).

298. *Id.* (citing *In re Wall Tube & Metal Co.*, 831 F.2d 118, 122 n.13 (6th Cir. 1987) and *Peerless*, 70 Bankr. at 947).

299. *Id.* (citing *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988)); *In re National Smelting of New Jersey, Inc.*, 49 Bankr. 1012, 1014-15 (Bankr. D. Colo. 1985)).

300. *Id.* at 169.

301. 105 Bankr. 912 (Bankr. E.D. Wis. 1989).

302. *Id.* at 917.

303. *Id.*

304. *Id.* See also *In re FCX, Inc.*, 96 Bankr. 49, 54-55 (Bankr. E.D.N.C. 1989) (crucial determination in authorizing abandonment is whether subject property poses immediate threat to public); *In re Purco*, 76 Bankr. 523, 533 (Bankr. W.D. Pa. 1987) (abandonment allowable when "conditions are such that abandonment will not render the public health and safety inadequately protected").

305. The DNR filed state court actions against the debtor both before and after the chapter 11 bankruptcy filing, seeking forfeitures and cease and desist orders. Cease and desist orders were issued several months after commencement of the bankruptcy. Contempt proceedings followed these orders. The EPA, however, did not initiate any of its actions until after the debtor sought protection under the Bankruptcy Code. *Better-Brite Plating*, 105 Bankr. at 915.

306. 11 U.S.C. § 506(c) (1988) provides: "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim."

307. The bank did not intend to foreclose on the property, if abandoned, because of the risk of CERCLA liability.

the EPA and DNR, in remediating the property, stood in the trustee's shoes and preserved the estate for the benefit of the bank.³⁰⁸ The court further held that because the bank did not intend to foreclose on the property, its security interest in the property should be treated as an unsecured claim.³⁰⁹ For this reason, the EPA and the DNR were entitled to recover their expenses from the property sale proceeds ahead of the secured creditors.³¹⁰

4. Automatic Stay

Environmental cleanup orders are exempt from the protective automatic stay³¹¹ and, therefore, preempt even secured creditors.³¹² Orders to expend money for cleanup, however, are not exempt.³¹³ Unfortunately, the difference between the two orders remains unclear.³¹⁴

Because this Comment deals with potential, rather than actual, toxic waste contamination, it does not dwell on the automatic stay. If toxic waste is merely suspected, or if an EPA ruling is only pending, exemption from the automatic stay is irrelevant. Only when the EPA has issued a definitive statement identifying contamination does the automatic stay come into play.

IV. OPTIONS AVAILABLE TO THE LENDER

The lender is in an unenviable position when burdened with a bankrupt debtor whose trustee wants to abandon potentially hazardous property on which the EPA has yet to make a ruling. Several options, however, are available to the lender in this situation. First, the lender can object to the abandonment.³¹⁵ If the court approves abandonment, the lender must choose between foreclosing the property, and possibly incurring CERCLA liability,³¹⁶ or releasing its collateral altogether.³¹⁷

The lender may also seek to avoid cleanup costs by asserting that abandonment will not relieve the estate of its CERCLA liability.³¹⁸ Alternatively, the lender may request that its claim for cleanup expenses receive

308. 105 Bankr. at 918.

309. *Id.* (pursuant to 11 U.S.C. § 506(a) (1988)).

310. *Id.* See also *In re Mowbray Engineering Co., Inc.*, 67 Bankr. 34, 35 (Bankr. M.D. Al. 1986) (upon property sale, EPA can recover same remediation costs trustee would, but for abandonment). Future courts will probably follow the *Better-Brite* ruling on grounds of fairness. They are likely to reason that, if the EPA or other environmental entities remediate the property to the secured creditors' benefit, fairness dictates reimbursing them for their trouble at the secured creditors' expense. Such a rule effectively side-steps the problem raised by Congress' failure to prioritize environmental cleanup claims. Unfortunately, the rule is yet another blow for lenders.

311. 11 U.S.C. § 362 (1988). The automatic stay forces all claimants against the estate to hold their claims until all claims have been made, subject to a time deadline, so that the bankruptcy court can equitably distribute the estate's limited assets. See *Developments in The Law*, *supra* note 53, at 1587.

312. See Note, *supra* note 47, at 1046.

313. *Developments in The Law*, *supra* note 53, at 1595.

314. *Id.*

315. See *infra* notes 322-25 and accompanying text.

316. See *supra* notes 96-97, 102-25 and accompanying text.

317. See Corash & Behrendt, *supra* note 3, at 870.

318. See *infra* notes 347-51 and accompanying text.

administrative priority.³¹⁹ Finally, the court may decide to dismiss the bankruptcy³²⁰ or give environmental authorities a possessory interest in the property.³²¹

To date, no court has ruled on this specific issue. Nonetheless, the cases discussed so far provide insight into the lender's options. The following discussion analyzes the various effects on the lender in exercising these options.

A. Object to Abandonment

As a first course of action, the lender should file an objection to the trustee's notice of abandonment.³²² Grounds for the objection include the fact that the property is potentially contaminated with hazardous substances.³²³ The lender should assert that the estate is potentially liable for cleanup costs under CERCLA³²⁴ and that allowing the trustee to abandon the property may endanger the public health and safety.³²⁵

In response to the trustee's objection, the court will probably apply the same analysis used in determining whether to allow abandonment of known polluted property.³²⁶ The lender's evidence of property contamination is thus critically important.³²⁷ This evidence must be more than mere speculation that the property contains hazardous substances; it must at least establish a strong inference of present contamination.³²⁸ Facing a strong inference of contamination, the court may require the trustee to forego abandonment until after the EPA has had time to make an investigation and a ruling.³²⁹

319. See *infra* notes 357-60 and accompanying text.

320. See *infra* note 318 and accompanying text.

321. See *infra* notes 361-65 and accompanying text.

322. The lender must file its objection within 15 days of the abandonment notice. BANKR. R. 6007(a). If the lender timely objects to abandonment, the court will set the matter for hearing. BANKR. R. 6007(c).

323. See *supra* notes 127-28 and accompanying text.

324. Pursuant to 42 U.S.C. § 9607 (1988), property owners are liable for CERCLA response costs. See *supra* notes 88-92 and accompanying text. 42 U.S.C. § 9601(20)(A) (1988) defines as an owner anyone owning or operating the property.

325. See *supra* notes 138-41 and accompanying text.

326. The primary objections to abandonment of contaminated property are 1) danger to the public health and safety and 2) debtor avoidance of cleanup costs. See *supra* notes 55-57, 128 and accompanying text. Arguably, these same objections also apply to potentially contaminated property. Thus, courts will probably employ the same rules in deciding whether to approve abandonment, regardless of whether the subject property is actually or only possibly contaminated.

327. If drums of chemicals from a defunct oil treatment plant are located on the property, along with pits or waste areas where toxants are known to have been dumped, the court may delay its decision pending an EPA ruling.

328. *Midlantic*, 494 U.S. 494, 507 n.9 (1986); *In re Brio Ref.*, 86 Bankr. 487, 489 (N.D. Tex. 1986).

329. To date, no case law directly addresses this issue. However, see *Midlantic*, 474 U.S. 494, 507 (1986) (bankruptcy court cannot approve abandonment without first "formulating conditions that will adequately protect the public's health and safety"); *In re Franklin Signal Corp.*, 65 Bankr. 268, 272 (Bankr. D. Minn. 1986) (outlining factors bankruptcy court must consider before authorizing abandonment). For a list of these factors, see *supra* notes 186-187 and accompanying text. See also *In re 82 Milbar Blvd., Inc.*, 91 Bankr. 213, 217 (Bankr. E.D.N.Y. 1988) ("If trustees . . . are . . . permitted to dispose of hazardous wastes under the

In this event, the question arises regarding who should fund the investigation. Possibly, the trustee will arrange to pay for it with estate assets, as in *In re Oklahoma Refining Company*.³³⁰ If the estate lacks unencumbered assets, the secured creditors will, in effect, finance the investigation, since any money spent on it will reduce the amount they would otherwise recover from the estate.

Another factor the court will consider is whether the estate possesses unencumbered assets sufficient to fund the environmental cleanup in whole or in part. The less unencumbered assets an estate possesses, the more likely a court will approve abandonment.³³¹ In addition, the court will likely place a great deal of weight on the potential for harm to the public.³³² If the property poses little present harm to the public or the threat of harm to the public is not imminent, the court may allow abandonment.³³³

The *Midlantic* decision speaks particularly to this point. In *Midlantic* the majority hastened to point out that the limitation placed on the trustee's abandonment powers was a narrow one.³³⁴ The Court expressly did not preclude abandonment in situations where the harm was merely speculative and the danger was neither imminent nor identifiable.³³⁵ A number of courts since *Midlantic* have capitalized on the narrowness of the holding.³³⁶ Courts have authorized abandonment in situations involving unquestionably contaminated property if the possibility for harm to the public was slight or unknown.³³⁷ One court determined that harm was likely to occur several years into the future instead of at the time of the objection to abandonment.³³⁸ Consequently, the court allowed abandonment on grounds that, absent the threat of immediate public danger, the *Midlantic* restriction did

cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default.") (quoting *In re Quanta Resources Corp.*, 739 F.2d 912, 921-22 (3d Cir. 1984), cert. granted sub nom., *Midlantic Nat'l Bank v. New Jersey Dept. of Env'tl. Protection*, 469 U.S. 1207 (1985), aff'd, 474 U.S. 494 (1986)).

330. 63 Bankr. 562, 563 (Bankr. W.D. Okla. 1986) (trustee obtained secured creditor consent to use cash collateral to pay for environmental report on contaminated site and to minimize immediate hazards caused by contamination).

331. *Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.)*, 856 F.2d 12, 17 (4th Cir. 1988); *In re Franklin Signal Corp.*, 65 Bankr. 268, 272 (Bankr. D. Minn. 1986); *In re Oklahoma Ref. Co.*, 63 Bankr. 562, 565 (W.D. Okla. 1986). The courts in these cases approved abandonment of contaminated properties because the estates lacked sufficient assets to enable the trustees to bring the properties into compliance with state environmental laws.

332. See, e.g., *Smith-Douglas*, 856 F.2d at 16-17 (bankruptcy court had previously determined contaminated fertilizer plant presented no immediate threat to public safety and allowed chapter 11 trustee to abandon unconditionally; the district court affirmed this reasoning.); *Franklin Signal*, 65 Bankr. at 271-72 (trustee needs only take action sufficient to ensure that abandonment won't endanger public) (noting *Ohio v. Kovacs*, 469 U.S. 274, 284-85 n.12 (1985)); *Oklahoma Ref.*, 63 Bankr. at 563-64, 566 (due to lack of immediate and menacing threat to public water supplies, chapter 7 trustee could abandon property).

333. See *supra* note 332.

334. *Midlantic*, 474 U.S. at 507 n.9.

335. *Id.*

336. See discussion *supra* notes 161-215 and accompanying text.

337. See *supra* notes 171-72, 180-81, 197-201 and accompanying text.

338. *Oklahoma Ref.*, 63 Bankr. at 563-64, 566.

not apply.³³⁹ Even when toxic contamination is already established, courts continue to allow abandonment absent imminent hazard to the public; therefore, they should approve abandonment where the presence of hazardous substances is merely a possibility. Even when evidence of contamination is clear, the trustee may abandon the property before an EPA ruling, if the court gives preeminence to the estate's financial condition and a relative lack of potential for danger.³⁴⁰

B. Foreclosure

If the court approves abandonment the trustee will, of course, abandon the property. Following the trustee's abandonment, the lender has two options. First, the lender can leave the property alone, thus losing its opportunity to recover anything from the debtor. Alternatively, the lender can foreclose on the property, sell it to the highest bidder, and apply the net proceeds of the sale to the indebtedness. The danger inherent in this latter course of action, however, results from the ever present possibility that the EPA will, subsequent to abandonment, determine that the property is contaminated and issue a cleanup order. In this event, the EPA, and subsequently a court, could also hold the lender liable as an owner or operator and impose CERCLA response costs.³⁴¹

If the lender is able to sell the property to a third party during foreclosure, it will avoid the characterization as an owner or operator.³⁴² If the lender purchases the property at the foreclosure sale, however, it must exercise extreme caution not to step outside CERCLA's "indicia of ownership" exception.³⁴³ The lender can neither participate in the day-to-day operations of the facility³⁴⁴ nor become too involved in the facility's financial affairs.³⁴⁵ Failure of a lender to meet these requirements could lead a court to recharacterize the lender's conduct as acts of ownership or operation, giving rise to CERCLA liability.³⁴⁶

C. Failure of Abandonment to Relieve Estate of CERCLA Liability

A court could determine that a trustee's abandonment of contaminated property does not relieve the estate of CERCLA liability. Indeed, several

339. *Id.* See *supra* note 172.

340. See *supra* notes 331-32.

341. See *supra* notes 93-119 and accompanying text.

342. See Corash & Behrendt, *supra* note 3, at 870 (lenders who don't take title to contaminated property are immune from CERCLA liability)

343. 42 U.S.C. § 9601(20)(A) provides that "owner or operator . . . does not include a person, [sic] who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."

344. See *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994, 20,996 (E.D. Pa. Sept. 4, 1985) (lender who participates in day-to-day operations of toxic waste site falls outside "indicia of ownership" exception). But see *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 577 (D. Md. 1986) (lender can be liable as owner under CERCLA without ever operating facility).

345. The difference between acceptable financial involvement and overreaching under CERCLA is nearly indistinguishable. See *supra* notes 115-19 and accompanying text.

346. See discussion *supra* notes 102-20 and accompanying text.

cases and commentators have adopted the position that abandoning property does not relieve the bankrupt estate of its obligation for response costs.³⁴⁷ A striking difference between those cases and the issue at hand, however, is that, in the former, the trustee abandoned properties known to be contaminated at the time of abandonment. When a trustee abandons property before an EPA ruling that it is polluted with hazardous waste, the courts may favor relief for the estate. In *Brio Refining*,³⁴⁸ for instance, since no party knew of the hazardous substances until after the property was abandoned, the estate was not held liable for cleanup costs,³⁴⁹ even though the debtor presumably caused or allowed the toxic substances to be dumped on the property before filing bankruptcy.

Brio Refining is distinguishable, however, because none of the potentially responsible parties (PRPs) contested the trustee's attempts to abandon the property, even though all received notice of his intentions. Only after the EPA put the property on its National Priority List,³⁵⁰ more than a year later, did the PRPs assert (in hindsight) that the court lacked jurisdiction to authorize the trustee to abandon the property. The PRPs argued that the estate should therefore bear the cleanup costs. Courts should treat differently estate liability under a post-abandonment EPA ruling of preabandonment contamination if the lender objected to the abandonment on toxic waste grounds. The consideration a court gives this type of objection from the lender depends on the strength of the lender's evidence of presently existing toxic contamination. Once again, the court may decline to hold the estate liable if it lacks capacity to pay CERCLA response costs.³⁵¹ If a court that embraces this view also concludes that the lender's conduct has placed it outside the indicia of ownership exemption, the lender will be forced to fund cleanup.

Conceivably, a ruling that the estate did not avoid CERCLA liability through abandonment would not automatically exonerate the lender from similar obligations. A court could hold the estate and the lender jointly and severally liable under CERCLA: the estate, if the court concludes that prepetition toxic waste existed on the property;³⁵² the lender, if the court deems its postforeclosure conduct outside the indicia of ownership exception.³⁵³ No case law exists on this point. A court holding that lenders are in the best position to monitor and prevent toxic waste contamination and to incorporate their potential for CERCLA response costs into their loan agreements, however, could reach such a decision.³⁵⁴ In addition, the strong public policy favoring compliance with environmental laws and against

347. See *supra* notes 88-92 and accompanying text.

348. *In re Brio Ref., Inc.*, 86 Bankr. 487 (Bankr. N.D. Tex. 1988).

349. *Id.* at 489-90. See *supra* notes 213-14 and accompanying text.

350. This list prioritizes existing and threatened releases of toxic substances into the environment. See *supra* note 209.

351. See discussion *supra* notes 161-215 of various courts' reasons for approving abandonment of contaminated property.

352. See *supra* notes 250-58 and accompanying text.

353. See *supra* notes 102-20 and accompanying text.

354. See *supra* notes 120-24 and accompanying text.

pushing the burden of cleanup costs onto the government and the taxpayer may cause a court to look to both the estate and the lender for at least partial financing of cleanup.³⁵⁵ If the court adopts this view, the lender will probably bear the cleanup burden alone, since the estate rarely has appreciable assets with which to fund such costs.³⁵⁶

D. Seek Administrative Priority for Response Costs

If either the EPA or the court, or both, requires the lender to pay CERCLA response costs, either solely or jointly with the debtor, the lender can petition the court to classify these expenses as administrative.³⁵⁷ Administrative priority allows the lender to recoup at least some of the money it spends on cleanup. Based on existing case law, the lender has a good chance of successfully asserting administrative status for its claim.³⁵⁸ A drawback to this alternative, however, is that the cleanup bill often greatly surpasses the value of the estate's assets.³⁵⁹ Thus, the lender who pays CERCLA response costs will probably not entirely recoup them on an administrative expense basis. Of course, the lender can sell the property and use the proceeds to help offset this expense. Undoubtedly, though, the lender will, instead, want to apply such proceeds to the debtor's loan balance. Consequently, if the sale price does not exceed response costs, the lender will be unable to recover any of its security interest in the property. Unless the lender can recover all of its response costs and at least part of the debtor's obligation, the lender should let the property go altogether.³⁶⁰

E. EPA Possessory Interest

If the lender does not sell the property between the trustee's abandonment and an EPA cleanup order, a court may convey to the EPA a possessory interest in the site, as the court did in *82 Milbar Blvd.*³⁶¹ If the EPA obtains a possessory interest, the lender should be able to monitor cleanup costs³⁶² and ensure that the decontaminated property brings the highest possible sale price.³⁶³ This route hardly offers a better alternative, however, than letting the property go, because if the EPA funds cleanup, proceeds from the sale of

355. See *supra* note 86 and accompanying text.

356. See *supra* notes 163, 182 and accompanying text.

357. 11 U.S.C. § 503(b)(1)(A) grants administrative status to "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered *after the commencement of the case*" (emphasis supplied).

358. See *supra* notes 251-60 and accompanying text. See also *supra* note 277 for a list of cases in which claims were given administrative priority.

359. See Corash and Behrendt, *supra* note 3, at 864 n.10 (on average, CERCLA cleanup costs run approximately \$26 million, but in some cases, they have exceeded \$250 million).

360. If the lender abandoned the property initially, it would not incur CERCLA liability. Thus, although the lender would lose its collateral, it would avoid cleanup expenses. Obviously, if the property is worth more than estimated response costs and the mortgage combined, the lender will choose to foreclose.

361. See *In re 82 Milbar Blvd., Inc.*, 91 Bankr. 213, 219 (Bankr. E.D.N.Y. 1988).

362. *Id.* at 220, 220 n.33.

363. *Id.* See *supra* note 238.

the property will apply first toward EPA expenses.³⁶⁴

This situation leads to a result similar to when the lender assumes responsibility and funds the cleanup itself. The difference between the EPA and the lender initially financing cleanup is that unless a court holds the lender responsible for all cleanup costs, the EPA will have access only to the proceeds from sale of the property.³⁶⁵ The EPA cannot dip into the lender's pocket for expenses exceeding the sale price. This important distinction could enable the lender to avoid potentially staggering cleanup costs. If the cost of cleanup exceeds the value of the property, however, the lender will be financially no better off than if it had entirely abandoned its claims to its collateral.

F. Dismissal

Dismissal essentially creates the same problems for lenders as abandonment. Presumably, after dismissal the debtor will default on its mortgage, if it has not previously done so. The lender will then be forced to choose between foreclosure and its attendant risk of future CERCLA liability or abandoning its collateral.³⁶⁶

V. CONCLUSION

The lender wishing to prevent abandonment of potentially contaminated property should timely file an objection with the bankruptcy court. The lender must then prepare strong evidence of contamination. Mere speculation about hazardous substances will not influence a court to deny abandonment.

If the evidence strongly infers the presence of toxic waste on the property, a court should require the trustee to use the estate's unencumbered assets to remediate the property. The realities of forcing a trustee to fund cleanup with negligible estate assets, however, have led courts to qualify *Midlantic* at almost every turn. Thus, a court will probably approve abandonment if the estate lacks sufficient unencumbered assets to fund cleanup or if the property does not pose an imminent danger to the public health and safety.

If the court allows the trustee to abandon the property, the lender should think twice before foreclosing on it. A lender may incur CERCLA liability under a subsequent EPA cleanup order if preserving its security interest takes the lender outside the indicia of ownership exemption. For this reason, many lenders have adopted a hands-off policy towards abandoned toxic waste facilities. Considering the staggering costs of cleanup, this option may be the lesser of two evils.

The lender forced to fund cleanup costs stands a good chance of recouping

364. Possibly the court will not allow the EPA to apply all sale proceeds towards cleanup costs. *But see supra* notes 301-10 and accompanying text.

365. *See In re Better-Brite Plating, Inc.*, 105 Bankr. 912, 918 (Bankr. E.D. Wis. 1989) (EPA and state environmental authorities entitled to proceeds ahead of bank, a secured creditor, because bank did not intend to foreclose on property if abandoned).

366. *See discussion supra* notes 98-125 and accompanying text.

part of its response costs from the estate as administrative expenses. This possibility is often of little solace to the lender, though. The lender stands to lose financially unless it can recover all of its response costs on an administrative expense basis. Unfortunately, cleanup costs generally far exceed the value of the unencumbered estate assets and the unpolluted property combined.

The prudent lender should take care to determine its prospective debtors' involvement with toxic waste contamination and incorporate its own potential for CERCLA liability into the terms of its loan agreements. Careful lenders should also monitor hazardous waste facilities to prevent the possibility of facing response costs. The lender whose toxic waste debtors are already in bankruptcy, however, currently has little choice but to abandon its collateral or personally face CERCLA liability.

