Abandonment of Toxic Wastes Under Section 554 of the Bankruptcy Code

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COMMENTS

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I. INTRODUCTION

The burgeoning areas of bankruptcy law and environmental law intersect when a trustee in bankruptcy attempts to abandon real estate on which toxic wastes are located and thereby escape liability for any attendant clean up costs. In this situation, courts are confronted with the competing policies underlying state and federal environmental regulations and the statutory scheme of the Bankruptcy Code. As deindustrialization continues and increasing numbers of companies are the subject of bankruptcy proceedings, the problem is likely to become even more pronounced.

The first part of this Comment will give a brief overview of these two different areas of law and the objectives that each attempts to achieve. The article will next examine the relevant case law and will then consider some constraints which prevent abuse by debtors. Finally, the article will conclude with a discussion of several alternatives.

II. THE RELEVANT AREAS OF LAW

A. The Bankruptcy Code

The Constitution grants Congress the power to establish "uniform Laws on the subject of bankruptcies throughout the

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3. The number of bankruptcies from 1979 to 1980 increased by 55%. E. ALTMAN, CORPORATE FINANCIAL DISTRESS: A COMPLETE GUIDE TO PREDICTING, AVOIDING, AND DEALING WITH BANKRUPTCY 1 (1983). In addition, "[c]orporate failure is no longer the exclusive province of the small, undercapitalized business but occurs increasingly among the large industrial and financial corporations." Id. See also R. MORRISON, BUSINESS OPPORTUNITIES FROM CORPORATE BANKRUPTCIES 24-26 (1985) (discussing why the high number of bankruptcies will continue for many years).
United States." The first comprehensive bankruptcy legislation enacted by Congress was the Bankruptcy Act of 1898. A major overhaul of the Act, undertaken by Congress during the 1970's, culminated in the Bankruptcy Reform Act of 1978. Bankruptcy law preempts conflicting state law.

Bankruptcy has been referred to as a "law for the benefit and relief of creditors and their debtors...." A fundamental purpose of the Bankruptcy Code (Code) is to enable the debtor to be relieved of obligations and start anew. At the same time, the Code contemplates that the debtor's assets will be conserved until distribution can be made to creditors in an orderly manner or until the debtor proposes a confirmable plan of reorganization, depending under which chapter of Title XI the debtor is proceeding. The statutory design of the Code further benefits creditors by ensuring that creditors within the same class will be treated equally in recovering claims from the debtor. Thus, distribution of the debtor's assets under the Code is not premised on which creditor seeks protection first.

A voluntary bankruptcy case begins when the debtor files a petition with the bankruptcy court. Once the debtor files,
an entity separate from the debtor, the bankrupt estate, is created. The estate consists of the debtor's property at the time the petition is filed. Generally, a trustee in bankruptcy will be appointed to serve as the "representative of the estate."

Once adjudicated bankrupt, the debtor may either liquidate or reorganize. In a Chapter 7 liquidation, the nonexempt assets of the debtor are converted to cash and then distributed to creditors. In a Chapter 11 reorganization, the debtor hopes to emerge as a going concern, and creditors will generally be paid out of the anticipated future income of the debtor.

B. Environmental Regulations

It is only recently that the risks posed by hazardous wastes have aroused public concern and prompted extensive legislation. Hazardous wastes include a frightening array of "acids and bases, synthetic organic compounds, fuel by-products, toxic metals, explosives, and infectious organic materials from hospitals and scientific laboratories." To exacerbate the problem, storage facilities are often inadequate or have eroded over time, thus allowing wastes to seep into water supplies, soil and air.

Because there are so many different types of wastes, effective legislation in this area must be as broad as possible. Indeed, Congress addressed the hazardous waste problem by enacting the Resource Conservation and Recovery Act of

17. Chapter 13 is also available to individuals but will not be discussed in this article. See 11 U.S.C. §§ 1301-1330 (1982 & Supp. IV 1986).
1976 (RCRA)\textsuperscript{22} to regulate the handling of future generated waste. Then in 1980, Congress recognized the need to address the problem of waste already generated by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\textsuperscript{23}.

The RCRA allows regulatory authorities to track hazardous wastes from generation to storage. The RCRA dictates that the Environmental Protection Agency (EPA) maintain a list of hazardous wastes\textsuperscript{24} and further provides that wastes may only be stored at sites in compliance with EPA standards.\textsuperscript{25} For violations of these regulations, the RCRA authorizes civil and criminal penalties.\textsuperscript{26} The CERCLA established a fund, commonly known as "Superfund," to pay for the clean up of hazardous waste sites.\textsuperscript{27} In effectuating clean up of the sites, the EPA can either order site owners to clean up the sites\textsuperscript{28} or pay for the clean up of the property itself, using Superfund money, and then sue the site owner for reimbursement.\textsuperscript{29}

Both the RCRA and the CERCLA rely on the state’s cooperation. The RCRA contemplates considerable state involvement. The RCRA specifically authorizes states to

\textsuperscript{26} 42 U.S.C. § 9606(b) (1982). Penalties can be quite substantial; treble damages equal to three times the clean up costs may be requested for failure to comply with the CERCLA. 42 U.S.C. § 9607(c)(3) (1982).
\textsuperscript{27} Superfund actually refers to the Hazardous Substance Response Trust Fund. 42 U.S.C. § 9631 (1982). Superfund revenues are collected from a tax on certain petroleum and chemical manufacturers. 42 U.S.C. § 9631(b) (1982). In New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985), the court stated that Congress intended for responsible parties to be strictly liable under the CERCLA, even though there is no explicit provision stating so. See generally Murphy, The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities, 41 Bus. Law. 1133 (1986).
\textsuperscript{28} 42 U.S.C. § 9606 (1982). The EPA, under CERCLA, may bring an action for emergency injunctive relief where there is evidence of an "imminent and substantial endangerment" to the public. \textit{Id.}
\textsuperscript{29} The President can use Superfund monies to fund clean up action pursuant to 42 U.S.C. § 9604(a)(1) (1982), and the President has authority to take action to recover the costs of those remedial measures under 42 U.S.C. §§ 9604(b), 9611(a) (1982).
enforce its provisions\textsuperscript{30} and, additionally, authorizes the EPA to help develop\textsuperscript{31} and provide federal funds for state programs.\textsuperscript{32} The CERCLA, on the other hand, does not contain provisions for state regulation, but does require states to fund clean up in certain instances.\textsuperscript{33} Many states have passed their own legislation,\textsuperscript{34} and it is these state environmental regulations that usually conflict with the Code.

III. THE GOVERNING BANKRUPTCY PROVISIONS

The Code's abandonment\textsuperscript{35} and automatic stay\textsuperscript{36} provisions are the two primary means\textsuperscript{37} available to a debtor to afford relief from potential toxic waste clean up costs. After a brief explanation of the priority system in bankruptcy, this section of the Comment will discuss both of these provisions; subsequent sections, however, will only focus on the Code's abandonment provision.

A. The Priority Scheme

In general, when an estate is distributed to creditors, certain unsecured claims are paid pursuant to a priority scheme set forth by Congress.\textsuperscript{38} Section 507 establishes seven different types of claims and expenses which are prioritized for payment, with administrative expenses occupying the highest position.\textsuperscript{39} Claims not classified as priority claims under section

\begin{itemize}
\item \textsuperscript{30} 42 U.S.C. §§ 6904(a), 6942(b) (1982).
\item \textsuperscript{33} 42 U.S.C. § 9604(c) (1982).
\item \textsuperscript{34} See National Conference of State Legislatures, Hazardous Waste Management: A Survey of State Legislation (1982).
\item \textsuperscript{37} There may also be other provisions in the Code which would grant relief to a toxic waste site owner. For example, 11 U.S.C. § 105(a) (1982 & Supp. IV 1986) could be used by a court to halt an environmental agency's efforts to force the clean up of a site when enforcement would impose a hardship on the bankrupt estate's creditors. This section provides that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." \textit{Id.}
\item \textsuperscript{39} \textit{Id.} An administrative expense is defined as "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case . . . ." 11 U.S.C. § 503(b)(1)(A) (1982 & Supp. IV 1986).
\end{itemize}
507 are labeled general unsecured claims and are paid after section 507 claims are satisfied.\textsuperscript{40}

An environmental agency seeking to clean up property containing hazardous wastes will typically proceed in one of two ways: the agency will either bring an action against the debtor to compel clean up, or the agency will clean up the site itself and then seek reimbursement from the site owner. In the latter situation, an issue arises as to what priority attaches to the agency’s claim. To increase the likelihood of recovering its clean up costs from the bankrupt’s estate, an environmental agency may argue that its claim constitutes an administrative expense. Arguably, because administrative expenses under section 503 have been construed as being expenses incurred \textit{after} the filing of the bankruptcy petition that are necessary to administer and preserve the estate for the benefit of creditors,\textsuperscript{41} a claim against a debtor in liquidation for toxic waste generated by the debtor’s \textit{pre-petition} activity cannot appropriately be categorized as an administrative expense; compliance with the environmental agency would deplete, not preserve, the limited assets of the estate for other creditors. Nevertheless, the United States District Court for the District of Maine in \textit{In re Stevens} \textsuperscript{42} recently found an environmental agency’s claim for post-petition clean up of a pre-petition hazard to be a first priority administrative expense where the hazard in question constituted an imminent and identifiable danger.\textsuperscript{43}


\textsuperscript{41} See \textit{In re Chicago, Rock Island & Pac. R.R.}, 756 F.2d 517 (7th Cir. 1985), where the court stated, ‘‘Administrative expenses consist of all the expenses incurred after the order for relief that are necessary to administer the estate . . . .’’ \textit{Id.} at 519 (quoting 3 COLLIER ON BANKRUPTCY ¶ 507.04[1][a] at 507-24 (15th ed. 1984)). See also \textit{In re Armormflte Precision, Inc.}, 43 Bankr. 14, 16 (D. Me. 1984), where the court described administrative expenses as payments given to those \textquoteleft who either help preserve and administer the estate . . . or who assist with rehabilitation of the debtor so that all creditors will benefit\textquoteright and \textit{In re Pierce Coal and Constr., Inc.}, 65 Bankr. 521, 530 (N.D. W. Va. 1986), where the court noted that \textquoteleft prepetition expenses occasioned by the prebankruptcy debtor are not entitled to administrative priority."

\textsuperscript{42} 68 Bankr. 774 (D. Me. 1987).

\textsuperscript{43} \textit{Id.} at 783. See also \textit{In re Chicago, Rock Island & Pac. R.R.}, 756 F.2d at 520 (in dicta the court recognized expenses could be prioritized as administrative expenses if necessary \textquoteleft to avert imminent danger\textquoteright since this reclassification would have benefited creditors by protecting the estate from tort liability); \textit{In re Peerless Plating Co.}, 70 Bankr. 943, 948 (W.D. Mich. 1987) (The court stated that even if the EPA’s claim arose pre-petition, the estate could not avoid liability since CERCLA § 9607 imposes liability
B. Section 362 — The Automatic Stay

In general, the bankruptcy process through section 362 temporarily halts or "stays" the enforcement of claims against the debtor that arose before the debtor filed for protection under the Code. During the pendency of the case, the debtor is granted a "breathing spell" from its creditors, and the creditors are assured that the assets of the debtor will not be dissipated due to some creditors enforcing claims ahead of others.

Although an environmental agency would normally fall within the ambit of the stay, a governmental agency acting under its police or regulatory power is exempt from the stay under section 362(b)(4). However, the Code provides an exception to the exception; a governmental unit, acting pursuant to its police or regulatory power, will still be subject to the automatic stay if it is seeking to enforce a money judgment against the debtor.

A governmental agency which attempts to compel a debtor to clean up a hazardous waste site will invariably be on the "owner or operator" of a facility. The court construed "owner" to include a bankrupt estate. But see Security Gas & Oil, Inc. v. West Virginia, 70 Bankr. 786, 795 (N.D. Cal. 1987) (stating that "[a] duty to clean up an environmental hazard created pre-petition is generally not one of the obligations entitled to priority under the Bankruptcy Code.").

44. Section 362 provides:

(a) [A] petition filed under section 301, 302 or 303 of this title ... operates as stay ... of (1) the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case ... (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case ... (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate ....


46. A governmental unit is considered an "entity" for purposes of the automatic stay. 11 U.S.C. § 101(14) (Supp. IV 1986).


48. 11 U.S.C. § 362(b)(5) (1982). This exception is consistent with the intent of the Code to treat creditors equally. If the state agency were merely seeking to recover money from the debtor, its claims would be no different from claims asserted by other creditors. See supra note 45 and accompanying text.
acting pursuant to its police or regulatory power and would therefore be excepted from the automatic stay under section 362(b)(5). But if the agency’s claim against the debtor takes the form of an injunction compelling clean up, the characterization of this injunction becomes the pivotal issue in determining whether the environmental agency will be exempt from the automatic stay. Consequently, if a court reasons that an agency’s injunction implicitly requires the debtor to spend money to comply with it and should therefore be regarded as a money judgment, the agency’s claim against the debtor will fall within the purview of the automatic stay.

Indeed, recent court decisions on whether to except an agency’s clean up claim from the automatic stay have often rested on whether the court considered the particular agency’s actions to compel clean up to be efforts to enforce a money judgment within the meaning of section 362(b)(5). However, courts have not been able to agree on when an injunction constitutes a money judgment, and as a result, decisions on this issue have not been uniform.

C. Section 554 — The Abandonment Provision

Section 554 of the Code 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 and benefit to the estate.” Once property is abandoned, it is effectively separated from the estate and any con-
comitant obligations to clean up the toxic wastes on the property cannot be paid out of the bankrupt debtor's estate.\footnote{Kovacs, 468 U.S. at 284 n.12. But see CERCLA, 42 U.S.C. § 9607(a)(2) (1982) (imposing liability for clean up costs upon "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous wastes were disposed of").}

Section 554, unlike section 362, appears to be unequivocal in its language and provides for no explicit exceptions that would limit its applicability. Despite its seemingly unambiguous language, some judges believe there are exceptions inherent in section 554 and do not believe that Congress intended for debtors to possess an absolute right of abandonment, particularly in the face of hazardous waste concerns.\footnote{See Midlantic Nat’l Bank v. New Jersey Dep’t of Envtl. Protection, 106 S. Ct. 755 (1986). See infra notes 61-70 and accompanying text.} Conversely, others have argued that section 554 should not be construed to allow for judicial discretion to deny abandonment; instead, abandonment should be automatically granted upon a showing of burdensomeness or inconsequential value.\footnote{See supra note 55 and accompanying text; infra notes 71-72 and accompanying text.}

\textbf{D. The Section 554 Conflict}

When a state environmental agency opposes a trustee's motion to abandon property containing hazardous wastes, the courts are faced with the difficult decision of having to choose which competing policy should take precedence. If the debtor is forced to comply with state environmental regulations, the spirit of the Code is compromised. If abandonment is denied and clean up of the property is ordered, the funds used to remedy the hazardous waste problem deplete the debtor's estate, leaving less or no money available for distribution to other creditors. Such a result is violative of the intent of the Code, which was designed, in part, to provide some guarantee that the estate of the debtor would be distributed in an orderly fashion and that no one creditor would receive preferential treatment.\footnote{See supra note 45 and accompanying text.}

Alternatively, allowing a debtor to escape liability by abandoning real estate containing toxic wastes presents an equally unpalatable result. Permitting debtors to pollute the
environment with impunity offends basic principles of fairness; concerns for public health and safety are compelling reasons why environmental regulations should supercede the trustee's abandonment rights under section 554. Indeed, the plethora of state and federal toxic waste legislation evidences a strong public policy in favor of cleaning up toxic wastes.58

The legislative history of section 554 indicates that Congress did not contemplate how this section would operate in the environmental context.59 As a result, courts have engaged in considerable guesswork to determine what Congress would have wanted had it foreseen the problems in this area.60

IV. THE CASE LAW

A. The Midlantic Decision

_Midlantic National Bank v. New Jersey Department of Environmental Protection,_61 the first case to address a trustee's right to abandon a toxic waste site, exemplifies the conflict between the intent of the Code and state environmental concerns. In Midlantic, Quanta Resources Corporation (Quanta), a waste oil processor, faced extensive clean up costs after the New Jersey Department of Environmental Protection (NJDEP) discovered that Quanta had accepted over 400,000 gallons of oil contaminated with PCB, a toxic carcinogen. However, before negotiations with NJDEP were completed, Quanta filed for reorganization under Chapter 11 of the Code. The NJDEP subsequently issued an administrative order re-

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58. See *supra* notes 20-34 and accompanying text.
quiring Quanta to clean up its New Jersey site. Because of its grim financial condition, Quanta converted the action to a liquidation proceeding under Chapter 7 and a trustee was assigned. After Quanta filed for bankruptcy, it became apparent that Quanta had similar hazardous waste problems at its New York facility. When the sale of the New York property proved to be fruitless, the trustee gave notification that he intended to abandon the property pursuant to section 554(a).

After both the bankruptcy court62 and the District Court for the District of New Jersey63 approved abandonment of the New York site,64 the trustee gave notice of his intention to abandon the property at the New Jersey location.65 Abandonment of wastes at the New Jersey site was also approved by the bankruptcy court.66

On appeal,67 however, the United States Circuit Court of Appeals for the Third Circuit reversed the lower courts' decisions to permit abandonment.68 After granting certiorari, a divided Supreme Court affirmed the third circuit's decision and held that abandonment is not allowed "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."69 In reaching its decision to deny abandonment, the Court relied heavily on the underlying legislative intent of section 554. The Court assumed that when Congress codified the judge-made rule of abandonment in section 554, it necessarily included the "well-recognized" common law exceptions to the

64. After the New York site was abandoned, the trustee removed the guard service and fire suppression service at the site; New York then decontaminated the site at a cost of approximately $2.5 million. Midlantic, 106 S. Ct. at 758.
65. The property abandoned at the New Jersey site consisted primarily of the contaminated oil. Id. The Midlantic Court noted that "[t]he trustee was not required to take even relatively minor steps to reduce imminent danger, such as security fencing, drainage and diking repairs, sealing deteriorating tanks, and removing explosive agents." Id. at 758 n.3.
67. Because the abandonment of both the New York and New Jersey facilities presented the same issues, the parties involved in the litigation surrounding the New Jersey site consented to NJDEP's taking a direct appeal to the Court of Appeals for the Third Circuit under 11 U.S.C. § 405(c)(1)(B) (1982).
69. Midlantic, 106 S. Ct. at 762.
rule, namely that a trustee’s power of abandonment cannot abrogate certain state and federal laws.\textsuperscript{70}

In a vigorous dissent, Justice Rehnquist argued that the language of section 554 is clear and without exception in granting a trustee the right to abandon property.\textsuperscript{71} Rehnquist similarly relied on the legislative history of section 554, but unlike the majority, found that it does not “suggest that Congress intended to limit the trustee’s authority to abandon burdensome property where abandonment might be opposed by those charged with the exercise of state police or regulatory powers.”\textsuperscript{72}

\textbf{B. The Midlantic Paradox}

On its face, the Court’s decision to deny abandonment in \textit{Midlantic} appears to be a well-intentioned one, with concerns of public health and safety prevailing over the Code. Yet, the import of the decision leaves unanswered an issue of critical importance; that is, even when abandonment of toxic waste property is disallowed, who should ultimately pay for the clean up?\textsuperscript{73}

A paradox created by \textit{Midlantic} surfaces in two different contexts: first, when a debtor files for liquidation under Chapter 7 but has no cash, and second, when a debtor files for bankruptcy but has cash from the liquidation of non-toxic assets. Under the controlling analysis of \textit{Midlantic}, the trustee of an estate with no cash in a Chapter 7 liquidation will not be permitted to abandon property containing hazardous waste until he makes the necessary expenditures to bring the property into compliance with governing state regulations;\textsuperscript{74} but he is precluded from complying if the debtor’s estate has no

\textsuperscript{70} Id. at 759-60. Section 554 was an attempt to codify the common law rule of abandonment for the first time. See 4 \textsc{collier on bankruptcy} § 554.01 (15th ed. 1987).

\textsuperscript{71} \textit{Midlantic}, 106 S. Ct. at 763-64 (Rehnquist, J., dissenting).

\textsuperscript{72} Id. at 764.

\textsuperscript{73} The Court stated, “New York is claiming reimbursement for its expenditures as an administrative expense. That question, however, like the question of the ultimate disposition of the property, is not before us.” \textit{Midlantic}, 106 S. Ct. at 758 n.2. When the case was before the Third Circuit on appeal, Justice Gibbons described the majority, in not addressing from which “pocket” the clean up costs would come, as being “irresponsible.” \textit{Quanta}, 739 F.2d at 925 (Gibbons, J., dissenting).

\textsuperscript{74} See supra note 69 and accompanying text.
money. Indeed, this lack of money is often the very reason why the debtor initially sought protection under the Code. Conceivably, the trustee in this situation could find himself amidst a bankruptcy with no resolution.

Similarly, a debtor who has filed for Chapter 7 liquidation but has cash from the liquidation of non-toxic assets presents a problematic scenario. Because *Midlantic* did not address the priority of payment issue, the state agency, according to many courts, will occupy the position of a general unsecured creditor, and as such, will follow last behind other creditors in the distribution of the debtor’s estate. Thus, in these circumstances, the state agency can successfully oppose a trustee’s motion to abandon property, but has an unlikely chance of ever having its claim paid because of its low priority in the distribution of the estate. It is important to note that even if the state agency’s claim for clean up costs were to be elevated to the level of an administrative expense, thereby entitling it to payment ahead of other creditors, the debtor’s available cash for distribution to other creditors would be drained; the creditors of the estate would then bear a disproportionate burden of remedying a public problem. In this situation, one creditor, a state agency, would have received preferential treatment in recovering from the debtor — a result clearly not contemplated by the Code.

A debtor filing a Chapter 11 plan of reorganization and emerging as a going concern, presents the only scenario where adherence to the *Midlantic* decision is actually a workable solution and does not pose much of a policy conflict. Here, because the debtor is continuing in business, the costs of clean up can appropriately be considered an administrative expense. This treatment of clean up costs would not offend section 503, since it is anticipated that the debtor will expend funds in the ordinary course of business.

Thus, under a strict reading of *Midlantic*, once a trustee’s motion to abandon property with hazardous waste is denied, it is virtually impossible to state with any certainty how the ultimate resolution of the bankruptcy will be accomplished.

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75. See supra note 73 and accompanying text.
76. See supra note 41 and accompanying text.
77. See supra notes 10-11 and accompanying text.
since *Midlantic* never addressed who should pay for clean up. The next section, however, will examine how a trustee moving for abandonment of hazardous waste property is likely to fare based on cases following *Midlantic*.

**C. Post-Midlantic Cases**

The cases following *Midlantic* stand for the proposition that abandonment will be permitted, even where state environmental laws are violated, when the debtor cooperates with state environmental agencies and takes reasonable steps to prevent any immediate harm to the public.

In *In re Oklahoma Refining Co.*,78 the Bankruptcy Court for the Western District of Oklahoma was presented with a factual situation similar to that of *Midlantic*.79 In *Oklahoma Refining*, the trustee was seeking to abandon real estate surrounding the bankrupt estate's oil refinery. Sixty-five years of refining crude oil at this site resulted in extensive surface contamination. Efforts to sell the property, as in *Midlantic*, were unsuccessful and the only cash the trustee had was cash collateral, which section 363(c)(2)(A) prohibited him from using.80 The Oklahoma Water Resources Board and the Oklahoma State Department of Health, concerned about potential groundwater contamination, opposed any move by the trustee to abandon the property and argued that the trustee should use cash collateral to comply with state clean up laws.

The court noted the “formidable dilemma” of the trustee and stated that strict compliance with state environmental laws, pursuant to *Midlantic*, could “create a bankruptcy case in perpetuity and fetter the estate to a situation without resolve.”81

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78. 63 Bankr. 562 (W.D. Okla. 1986).
79. The court stated, “Unquestionably this case is similar to *Midlantic* and we are only called upon to apply that holding.” Id. at 562.
80. Section 363(c)(2)(A) provides: “The trustee may not use, sell, or lease cash collateral . . . unless . . . each entity that has an interest in such cash collateral assets consents . . .” 11 U.S.C. § 363(c)(2)(A) (1982). In *Oklahoma Refining*, the creditors with an interest in the cash collateral objected to its use as clean up funds. *Oklahoma Refining*, 63 Bankr. at 564.
The bankruptcy court escaped the *Midlantic* quandry by assigning it a narrow reading. The court decided that the Supreme Court did not intend to create such a "predicament" and instead intended for courts, in determining whether to permit abandonment, to merely take state environmental laws and regulations into consideration. The bankruptcy court further interpreted the *Midlantic* decision as requiring a determination of whether abandonment would present an "immediate and menacing" threat to public health and safety. After deciding that the debtor had been fairly cooperative with the state environmental agency and that pollution at the site did not present an immediate and menacing harm, the court permitted abandonment.

Like the *Oklahoma Refining* court, the Bankruptcy Court for the Western District of Minnesota in *In re Franklin Signal Corp.* interpreted *Midlantic* as requiring something less from the trustee seeking to abandon toxic waste property than strict compliance with applicable state laws. In resolving the dispute between the trustee and the Wisconsin Department of Natural Resources, the *Franklin Signal* court indicated that the *Midlantic* court was not attempting to bar abandonment in every situation where state laws were violated. Rather, the court was concerned with merely limiting a trustee's power of abandonment to ensure that necessary measures would be taken by the trustee to adequately protect the public health and safety.

Like the *Oklahoma Refining* court, the *Franklin Signal* court promoted a less restrictive interpretation of *Midlantic*. However, the *Franklin Signal* court set forth the following five factors which should be considered by a bankruptcy court in determining whether to permit the abandonment of a hazard-

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82. In *Midlantic*, the Supreme Court stated in a footnote that it was only recognizing a narrow exception to a trustee's power of abandonment. *Midlantic*, 106 S. Ct. at 762 n.9. The court in *Oklahoma Refining* noted this language, which helped it escape the difficulties of having to follow a strict construction of *Midlantic*. *Oklahoma Refining*, 63 Bankr. at 565.


84. *Id.* The court noted that abandonment in this case "will not aggravate the existing situation, create a genuine emergency nor increase the likelihood of disaster or intensification of polluting agents." *Id.*

85. 65 Bankr. 268 (D. Minn. 1986).

86. *Id.* at 271.
ous waste site: (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 cost to bring the property into compliance with environmental laws; and (5) the amount and type of funds available for clean up. 87 The Franklin Signal court went on to say that at a minimum, Midlantic would require the trustee to conduct an investigation of the hazardous wastes on the property and to give notice to the appropriate state and federal agencies. 88

Finally, another case interpreting Midlantic, In re Pierce Coal & Construction, Inc. 89 is consistent with the other post-Midlantic cases in limiting the trustee's power to abandon property only in situations where imminent and identifiable harm is present.

Based on recent case law following the Midlantic decision, it appears that a court, in considering whether to permit abandonment of a toxic waste site, will not be constrained to automatically deny abandonment where state laws are violated, as Midlantic would seem to suggest. Instead, recent case law indicates that a court will examine the particular facts of each case, with weight given to any reasonable steps taken by the debtor to minimize the hazard and the general willingness of the debtor to cooperate with the appropriate agencies. The trustee's right to abandon property seems to be completely barred only where the threat of imminent harm exists. Therefore, the cases following Midlantic have escaped its deficiencies by recognizing only a narrow exception to the trustee's power of abandonment.

V. CONSTRAINTS ON THE DEBTOR

A. Bad Faith Use of Section 554

Because there are provisions of the Code which provide a debtor with the means to avoid hazardous waste clean up, will

87. Id. at 272.
88. Id. at 273. It is interesting to note that the court considered section 144.76(6) of the Wisconsin Statutes, which authorizes the use of state funds to clean up certain hazardous waste spills. Id. at 272 n.7. The Franklin court stated, "Apparently, the State of Wisconsin has anticipated that in certain instances the public will be responsible for hazardous waste cleanup." Id.
debtor use the Code in bad faith to shield themselves from liability? This particular question has been answered affirmatively by many commentators who believe such abuse to be rampant. Indeed, although the United States Code requires "good faith" for the confirmation of a plan of reorganization, the remainder of the Code is devoid of any good faith requirements for filing for bankruptcy. However, there are sufficient impediments, both within and without the Code, to prevent such flagrant abuse. It is important to note that there are undoubtedly debtors facing potentially ruinous clean up costs who perceive bankruptcy to be their only viable option. In this situation, although toxic waste liability may have been the motivating force propelling the debtor into bankruptcy, the decision to file is not necessarily one made in bad faith.

Alternatively, where a debtor contemplating bankruptcy is motivated by a bad faith purpose, the general undesirability of bankruptcy serves as one disincentive to the debtor to file. In addition to the stigma of declaring bankruptcy, the debtor is likely to incur tremendous costs during the administration of the bankruptcy that otherwise would not have been incurred.


92. See generally ALTMAN, supra note 3. Altman found that of all the bankruptcies he studied in 1980, ninety-four percent of the companies were identified as having lack of experience or incompetence as the primary contributing factor of the bankruptcy, and only 0.5 percent were in bankruptcy because of fraud. Id. at 40.


When bankruptcy is triggered when it is not needed, firms are subjected to an environment that they would not have otherwise experienced. Clearly, bankruptcy brings administrative costs that would not have been incurred otherwise. To the extent that these administrative costs make adjustment in bankruptcy more costly and less productive than informal adjustment, social losses result. Id. at 22. See also Comment, Developments In The Law — Toxic Waste Litigation, 99 HARV. L. REV. 1462, 1583 n.71 (1986) (discussing why bankruptcy is not in the best interest of a solvent corporation since shareholders are ranked last in the priority of distribution).
Moreover, certain provisions within the Code, namely sections 305,94 707,95 and 1112,96 should allay fears that debtors will use the Code solely to circumvent environmental regulations. All three of these provisions give the bankruptcy court considerable discretion to dismiss a debtor's petition for bankruptcy. Both section 707 and section 1112 allow a bankruptcy court to dismiss "for cause,"97 while section 305(a) requires that dismissal by a court serve the best interests of the debtor and the creditors.98 These provisions have been invoked by the courts in several recent decisions to prevent debtors from flouting state environmental laws by filing for bankruptcy.

For example, in In re Martin,99 the court found that three solvent debtors filed for bankruptcy primarily to "escape the financial consequences of their alleged conduct of polluting the environment . . . ."100 The court dismissed the debtors' petitions for bankruptcy, pursuant to section 1112(b) of the Code, and indicated in its decision that bankruptcy cannot be used "for the sole purpose of frustrating a legitimate process of a non-bankruptcy forum."101

On the other hand, it would be more difficult for a creditor to base a motion to dismiss upon section 305(b) since this section dictates that dismissal by the court must be predicated on a finding that the best interests of the debtor and the creditor would be served.102 In re Commercial Oil Service, Inc.103 dem-

97. 11 U.S.C. § 707(a) (Supp. III 1985) provides: "The court may dismiss a case under this chapter only after notice and a hearing and only for cause . . . ." 11 U.S.C. § 1112(b) (1982) provides:

[O]n request of a party in interest, and after notice and a hearing, the court may convert a case under this chapter to a case under Chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause . . . .

98. 11 U.S.C. § 305(a)(1) (1982) provides: "The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if — (1) the interests of creditors and the debtor would be better served by such dismissal or suspension . . . ."
100. Id. at 495.
101. Id. (citing In re Winn, 43 Bankr. 25 (M.D. Fla. 1984) and Furness v. Lilienfield, 35 Bankr. 1006 (D.Md. 1983)).
102. See supra note 98.
103. 58 Bankr. 311 (N.D. Ohio 1986).
onstrates how difficult it is for a creditor to prove to the court that dismissal will be in the best interests of the debtor, particularly when the debtor voluntarily filed for bankruptcy. In refusing to dismiss the debtor's petition for bankruptcy where the debtor had voluntarily filed, the court in *Commercial Oil* noted that "it defies credulity to say that the Debtor's interest would be better served by a dismissal [sic] when the Debtor voluntarily sought the mechanics of Chapter 11 for the purpose of rehabilitation and a fresh start." It then applied this reasoning to a Chapter 7 liquidation and refused to dismiss the debtor's petition under section 305(b). Nevertheless, the court in *Commercial Oil* did permit the petition to be dismissed under section 707, which only requires a showing of "cause."

**B. Criminal Sanctions**

The imposition of criminal sanctions against debtors who violate state environmental regulations might discourage debtors from using the Code solely to escape toxic waste liability since criminal fines imposed by a governmental unit are nondischargeable in bankruptcy under section 523(a)(7). The penalty against the debtor, however, to be nondischargeable, cannot be "compensation for actual pecuniary loss." Consequently, if a state imposes a fine on the debtor merely to recover its anticipated clean up costs, the amount is not a penalty within the meaning of section 523(a)(7), but rather is compensation for a pecuniary loss to the state agency.

In *In re Tinkham*, the debtor contended that a civil penalty against him for dumping toxic wastes was actually compensation to the state of New Hampshire for an actual pecuniary loss and was therefore dischargeable in bankruptcy. The court noted that the penalty in question of $10,000 per day for every day of violation actually punished the debtor, accomplishing a fundamental purpose of a penalty, and was

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104. *Id.* at 315 (quoting *In re Pine Lake Village Apartment Co.*, 16 Bankr. 750, 753 (S.D.N.Y. 1982)).
105. The court considered the health, safety and welfare of the community to be "cause" within the meaning of § 707. *Commercial Oil*, 58 Bankr. at 316.
107. *Id*.
not just an attempt to reimburse the agency for future costs it would incur in cleaning up the property.\textsuperscript{109} Perhaps the mere presence of stiff criminal sanctions would encourage debtors to comply with state environmental regulations before bankruptcy ever becomes a consideration.

VI. Resolution of the Conflict

A. The Need for Legislation

Thus far, there has been no satisfactory resolution of the conflict between the abandonment provision of the Code and environmental regulations. Although it is not likely that Congress intended for the Code to shield debtors from hazardous waste liability, the unambiguous language of section 554 indicates that a trustee is allowed to abandon property upon a showing of burdensomeness or lack of value, regardless of any environmental violations.\textsuperscript{110} While courts may feel compelled to limit debtors' use of section 554 to undermine environmental regulations,\textsuperscript{111} the role of the courts is not to legislate but to enforce laws.\textsuperscript{112} Accordingly, courts, as mere enforcers of the law, are powerless to redress this problem without a legislative response.

\textsuperscript{109} Id. at 213.

\textsuperscript{110} See supra note 53 and accompanying text.

\textsuperscript{111} See supra notes 61-72.

\textsuperscript{112} The United States Bankruptcy Court in In re Wall Tube & Metal Prods. Co., 56 Bankr. 918 (E.D. Tenn. 1986), discussed the undesirability of judicial legislation. The court, in deciding whether a state agency's claim for clean up costs was an administrative expense, stated:

The question before this court is not whether public policy might justify the enactment of well-considered and carefully crafted legislation affording some type of priority treatment to environmental clean-up expenses. The question is whether the particular expenses claimed in this proceeding come within the language and purpose of the current statute . . . . There are dangers to judicially legislating here by stretching § 503(b) beyond its intended scope — among them, the potential for unwittingly creating an incentive for governmental authorities to postpone environmental cleanup activities for financially strategic reasons in order to gain the advantage of priority treatment in a bankruptcy context.

Id. at 927. See also In re Catamount Dyers, Inc., 50 Bankr. 790, 795 (D. Vt. 1985) (commenting on the Quanta majority "attempting to graft its view of proper public policy onto the Bankruptcy Code").
B. Amendment of Section 554

As section 554 now stands, a bankruptcy court is required to make findings only concerning the burdensomeness and inconsequential value of the property in question. One solution would be to amend section 554 to require the court to make additional findings of whether clean up costs of the property in question exceed the value of the property once rehabilitated. If expending money for clean up would ultimately make the property salable for a price exceeding the clean up costs, these costs would then be "necessary" to preserve the estate for the benefit of creditors and could then appropriately be considered first priority administrative costs within the meaning of section 503. Alternatively, where the clean up costs exceed the ultimate value of the property, abandonment should be allowed. Although the costs of this situation will be forced on the environmental agency (that is, the public), the public, rather than creditors, can more easily absorb these costs.

However, abandonment under section 554 should also be predicated on a finding of good faith. Such a requirement would preclude the solvent debtor from using the abandonment provision to escape liability. A good faith requirement embodied in section 554 comports with the overall intent of the Code, which contemplates that good faith will be used by debtors in filing for bankruptcy. It is also interesting to note that the rejection of a collective bargaining agreement under section 1113 of the Code, a situation conceptually similar to the abandonment of property, requires a finding of good faith.

Finally, section 554 could be further qualified to provide that in no case can abandonment occur without at least minimal safety measures being taken to temporarily ensure that public health and safety are not compromised. This qualifi-

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113. See supra note 53 and accompanying text.
114. See supra note 39.
115. See supra notes 94-105 and accompanying text for a discussion of provisions of the Code which allow dismissal of a bankruptcy petition upon a finding of a lack of good faith.
117. This requirement would prevent the situation in Midlantic from recurring. In Midlantic, after abandonment was allowed by the lower courts, the trustee was not
cation would codify to some extent the reasoning of *Midlantic National Bank v. New Jersey Department of Environmental Protection*\(^{118}\) and its progeny which state that property cannot be abandoned where there is an imminent harm.\(^{119}\)

Although no solution is flawless, at least the above solutions work within the framework of the Code and limit the situations where a debtor will completely escape responsibility for clean up costs. Perhaps one of these alternatives, combined with other measures, such as criminal sanctions\(^{120}\) and more stringent compliance requirements, will curb the problems in this area.\(^{121}\)

**VII. CONCLUSION**

A debtor's use of section 554 to avoid toxic waste liability seriously undermines attempts to enforce environmental regulations. But denial of abandonment ultimately forces creditors to fund clean up and thereby contravenes the intent of the Code. Further complicating this issue is the Supreme Court's denial of abandonment in *Midlantic*, which is good public policy but unworkable in certain situations. In the wake of *Midlantic*, courts have been forced to maneuver around the Supreme Court's decision.

Amending section 554 to require additional findings, including the costs of cleaning up the property and the presence of good faith, forces the costs of clean up on the debtor, where

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119. See *id.; In re Franklin Signal Corp.*, 65 Bankr. 268, 272 (D. Minn. 1986); *In re Oklahoma Refining Co.*, 63 Bankr. 562 (W.D. Okla. 1986). Some additional factors discussed in *Franklin Signal* might also be incorporated into § 554. Here, the court stated that the following should be considered when deciding whether to permit abandonment: (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 cost to bring the property into compliance with environmental laws, and; (5) the amount and type of funds available for clean up. *Franklin Signal*, 65 Bankr. at 272.

120. See supra notes 106-09 and accompanying text.

121. State superliens are commonly suggested solutions in this area. A superlien is a lien on the liable party's property which takes priority over any prior perfected liens. Note, *The Constitutionality of Retroactive State Superliens for Toxic Waste Cleanup Reimbursement*, 8 CARDOZO L. REV. 161 (1986). However, these liens are often challenged on constitutional grounds for impairing the interests of secured creditors and thus constituting a "taking" under the fifth amendment. *Id.* at 178-79.
appropriate, and forces the cost on the public only where absolutely necessary. The amendment of section 554, combined with other measures, would not only clarify the law for the courts, thereby eliminating much guesswork, but would also establish acceptable public policy without violating the intent of the Code.

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