

1987

Midlantic National Bank v. New Jersey Department of Environmental Protection: Supreme Court Balances Objectives of the Bankruptcy Code with State Environmental Laws

Jill C. Kosmin

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Recommended Citation

Jill C. Kosmin, *Midlantic National Bank v. New Jersey Department of Environmental Protection*: Supreme Court Balances Objectives of the Bankruptcy Code with State Environmental Laws, 18 Loy. U. Chi. L. J. 1209 (1987).

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Midlantic National Bank v. New Jersey Department of Environmental Protection: Supreme Court Balances Objectives of the Bankruptcy Code and State Environmental Laws

I. INTRODUCTION

Hazardous waste disposal sites pose severe risks to public health.¹ Consequently, states regulate the handling of toxic substances.² The cost of complying with these environmental regulations can be staggering.³ Voluntary bankruptcy becomes an attractive alternative to a company unable to afford environmental compliance costs.⁴ Bankruptcy law offers a temporary delay of the enforcement of most claims against the debtor and provides for an orderly and prioritized distribution of the debtor's assets to its creditors.⁵ Moreover, it permits less than one hundred percent re-

1. See, e.g., Solid Waste Management Act, N.J. STAT. ANN. § 13:1E-2(a) (West 1982).

2. See *infra* notes 64-76 and accompanying text.

3. The Environmental Protection Agency has estimated that the cleanup cost for 1,200-2,000 of the most dangerous hazardous waste sites would cost between 13.1 and 22 billion dollars. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 18, 20, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120, 6123. Additionally, the Commissioner of the Massachusetts Department of Environmental Management stated that the new environmental regulations have forced storage costs for hazardous chemical waste from approximately 24 dollars per barrel in the late 1970's to a present cost of 100 dollars per barrel. Marcus, *The Recycling of Chemical Waste*, N.Y. Times, January 8, 1984, § 3, at 4, col. 3. See also *Bankruptcy and Environmental Regulation: An Emerging Conflict*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10,099 (April 1983) [hereinafter *Emerging Conflict*].

4. See *Emerging Conflict*, *supra* note 3, at 10,099-10,100. See also Hoffman, *Environmental Protection and Bankruptcy Rehabilitation: Toward a Better Compromise*, 11 ECOLOGY L.Q. 671, 676 (1984). To file for bankruptcy, an entity does not have to be legally insolvent. Bankruptcy law allows a solvent business experiencing financial difficulties to file a bankruptcy petition. H.R. REP. NO. 595, 95th Cong. 1st Sess. 312, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6269 [hereinafter *HOUSE REPORT*]; S. REP. NO. 989, 95th Cong., 2d Sess. 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5795 [hereinafter *SENATE REPORT*]. The entity need only prove that its debts are greater than the fair value of all of its assets. 11 U.S.C. § 101(29)(1982 & Supp. III 1985).

5. See, e.g., 11 U.S.C. § 362 (1982 & Supp. III 1985) (automatic stay provision); 11

payment of debts.⁶ In many instances, this partial payment is considered payment in full.⁷

The use of bankruptcy law by debtors confronted with hazardous waste compliance costs may lead to a conflict between the objectives of federal bankruptcy laws and state environmental protection legislation.⁸ Bankruptcy law provisions may be construed to allow debtors to avoid compliance with state environmental laws. Thus, a state's exercise of its police power to protect public health and safety may be undermined.⁹ For example, a bankruptcy trustee¹⁰ may abandon property that is financially burdensome or of no value to the bankruptcy estate,¹¹ pursuant to section 554 of the Bankruptcy Reform Act of 1978, as amended (the "Code").¹² The abandonment of property encumbered by environmental liability separates the property from the estate so that the trustee can liquidate or reorganize the estate without the burden of the liability attached to the property.¹³ State officials, however, have contended that abandonment under certain circumstances contravenes state environmental protection laws by leaving property containing toxic waste unsupervised and by imposing cleanup costs on the state's

U.S.C. § 507 (1982 & Supp. III 1985) (priority of asset distribution). One of the primary benefits of bankruptcy for a debtor is the temporary relief from creditor action provided by the automatic stay of proceedings. 11 U.S.C. § 362 (1982 & Supp. III 1985). Pursuant to 11 U.S.C. § 362, upon the filing of a bankruptcy petition a creditor is stayed from proceeding to collect money from the debtor except as provided elsewhere in the bankruptcy laws. *Id.* See also Hoffman, *supra* note 4, at 676-79 (1984) (discussing the ability of solvent debtors to take advantage of the Bankruptcy Code).

6. See, e.g., 11 U.S.C. § 726 (1982 & Supp. III 1985) (setting forth the priority for claims to receive distribution of property from the bankruptcy estate).

7. 11 U.S.C. § 524(a) (1982 & Supp. III 1985) (stating the effect on claims after discharge of a debtor from bankruptcy).

8. See generally *Emerging Conflict*, *supra* note 3.

9. *Id.*

10. A bankruptcy trustee "is the representative of the estate" for the benefit of the creditors. 11 U.S.C. § 323 (1982). The specific powers of the trustee are enumerated throughout the Code.

11. 11 U.S.C. § 554(a) (1982 & Supp. III 1985). The abandonment of property encumbered by environmental liability separates the property from the estate so that the trustee can liquidate or reorganize the estate without the burden of the liability attached to the property. See 4 COLLIER ON BANKRUPTCY, 554.02[2] at 554-6 (L. King 15th ed. 1987).

12. The Bankruptcy Reform Act of 1978 is codified at 11 U.S.C. §§ 101-151326 (1982 & Supp. III 1985), and sections of 2, 7, 12, 15, 17-20, 22, 28, 29, 31, 33, 40-43, 46, 48, and 49 U.S.C. (1982 & Supp. III 1985). The Bankruptcy Reform Act was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 and the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

13. See 4 COLLIER ON BANKRUPTCY, *supra* note 11, 554.02[2] at 554-6.

taxpayers.¹⁴

When such conflicts arise, courts have attempted to balance the objectives of the Code with those of state environmental laws.¹⁵ In an attempt to reconcile bankruptcy abandonment and state environmental statutes, the United States Supreme Court in *Midlantic National Bank v. New Jersey Department of Environmental Protection* (“*Quanta*”)¹⁶ held that a trustee could not abandon property in contravention of state and local laws aimed at protecting public health and safety.¹⁷ The decision, however, was based on questionable legal analysis and failed to address important issues. These unaddressed issues include who should pay for the cleanup and how cleanup orders are to be enforced.¹⁸

This note first will provide a brief background of the Code and the concept of abandonment.¹⁹ It then will discuss state efforts to protect the environment.²⁰ Next, it will set forth the factual background of the *Quanta* case and analyze the decision of the Supreme Court.²¹ Finally, this note will explore the questions left unanswered by the Court in the *Quanta* decision.²²

II. BACKGROUND

A. *The Bankruptcy Reform Act of 1978 and the Concept of Abandonment*

1. The Bankruptcy Code, Chapter 11 and Chapter 7

The Code succeeded the Bankruptcy Act of 1898 (the “Act”)²³ and constituted the first major change in bankruptcy law in forty years.²⁴ Congress drafted the Code in response to the inadequacy

14. Brief for the New Jersey Department of Environmental Protection at 2, 11, 16-18, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805).

15. See *infra* notes 202-30 and accompanying text. See also *Ohio v. Kovacs*, 469 U.S. 274 (1985).

16. The court of appeals decision, reported at 739 F.2d 912 (3d Cir. 1984), is captioned “*In re Quanta Resources Corp.*”. Accordingly, the Supreme Court case is also generally referred to as the “*Quanta*” case.

17. *Quanta*, 106 S. Ct. 755, 762 (1986).

18. The parties considered as potential payors include: the debtor, secured creditors, unsecured creditors and the taxpayers.

19. See *infra* notes 23-62 and accompanying text.

20. See *infra* notes 63-76 and accompanying text.

21. See *infra* notes 77-198 and accompanying text.

22. See *infra* notes 199-256 and accompanying text.

23. Bankruptcy Act, ch. 541, 30 Stat. 544 (1897-98) (codified at 11 U.S.C. (1976) (repealed 1979)).

24. Chandler Act, ch. 575, 52 Stat. 840 (1938) (codified at 11 U.S.C. (1976) (repealed 1979)), had been the last major bankruptcy legislation before the Code was adopted.

of the system under the Act.²⁵ Specifically, Congress believed that the Act underemphasized debtor protection.²⁶ Accordingly, the Code emphasizes relief for the consumer-debtor²⁷ and promotes business rehabilitation by allowing for the total reorganization of a failing corporation.²⁸ The Code's main objectives are to give a debtor a "fresh start"²⁹ and to compensate creditors with an equitable distribution of the assets of the estate.³⁰ The fresh start is given to a debtor by discharging it from its pre-bankruptcy petition debts upon completion of the bankruptcy;³¹ the equitable distribution of assets is promoted by establishing a priority scheme for payments to creditors.³²

The Code provides for various types of bankruptcy proceedings.³³ A corporate debtor may take advantage of either of two

25. HOUSE REPORT, *supra* note 4, at 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5965 ("Both substantively and administratively, the bankruptcy system is straining on all sides to handle situations that the framers of the [Act] never dreamed would arise").

26. *Id.*, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5966. ("The Bankruptcy Act has not kept pace with the modern consumer credit society").

27. *Id.* "This bill makes bankruptcy a more effective remedy for the unfortunate consumer debtor." *Id.*

28. Chapter 11 of the Code (codified at 11 U.S.C. §§ 1100-1174 (1982 & Supp. III 1985)) governs corporate reorganization procedure. The Code also provides for an independent judiciary, as an arm of the United States District Court, to handle the large increase in bankruptcy filings. HOUSE REPORT, *supra* note 4, at 4, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 5965-66.

29. See HOUSE REPORT, *supra* note 4, at 118, 128, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6078, 6089. This "fresh start" results from discharging the debtor from pre-bankruptcy petition debts upon completion of the bankruptcy. *Id.*, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6089. "This section is the heart of the fresh start provisions of bankruptcy law." *Id.*, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6340 (referring to the provision codified at 11 U.S.C. § 727 (1982 & Supp. III 1985)). The act of discharge relieves the debtor of all pre-petition debts even though the liquidation or reorganization plan did not fully recompense the creditors. *Id.* It is important to note that there are exceptions to receiving a discharge. See 11 U.S.C. §§ 523, 727 (1982 & Supp. III 1985).

30. See HOUSE REPORT, *supra* note 4, at 165, 372-73, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6126, 6325-29. See also *Morgan Guaranty Trust Co. of New York v. American Savings & Loan Assoc.*, 804 F.2d 1487, 1491 (9th Cir. 1986) (section 362 of the Code "[S]eeks . . . to protect the creditors' rights to equality of distribution . . ."); *In re Tenna Corp.*, 801 F.2d 819, 823 (6th Cir. 1986) ("Congress' concern for equality of distribution among creditors is obvious").

31. See, e.g., 11 U.S.C. §§ 727, 1141(d) (1982 & Supp. III 1985).

32. 11 U.S.C. § 507 (1982 & Supp. 1985).

33. The Code contains provisions for liquidation (Chapter 7), municipal reorganization (Chapter 9), general reorganization (Chapter 11), reorganization for family farmers (Chapter 12), and reorganization for debtors with a regular income (Chapter 13). In a Chapter 7 liquidation proceeding, virtually all of the debtor's property as of the date of the bankruptcy petition's filing becomes property of the estate to be liquidated and distributed to creditors. See, e.g., 11 U.S.C. §§ 522, 704(1), 726 (1982 & Supp. III 1985).

types of bankruptcy proceedings:³⁴ a Chapter 11 reorganization³⁵ or a Chapter 7 liquidation. The fresh start concept is not relevant to a Chapter 7 liquidation proceeding because a corporate debtor who has filed a Chapter 7 petition cannot be discharged from its debts.³⁶ Instead, the primary objective in a corporate liquidation is to promote fair and efficient distribution of a debtor's assets among its creditors.³⁷ To accomplish this goal, a trustee is elected or appointed to liquidate the debtor's assets and distribute the proceeds to the debtor's creditors.³⁸ The Code carefully outlines the

Chapter 9 contains the provisions for the adjustment of debts of a municipality. 11 U.S.C. §§ 901-927 (1982 & Supp. III 1985). Chapter 11, providing for general reorganization, is a combination of Chapters VIII, X, XI and XII of the Act, which provided for general and railroad reorganization. Chapter 11 also may be used for liquidation purposes. 11 U.S.C. § 1174 (1982). Although the Code seems to suggest that any debtor eligible for Chapter 7 also is eligible to file under Chapter 11, 11 U.S.C. § 109(d) (1982 & Supp. III 1985), some case law suggests that an individual may not file a personal Chapter 11 petition. *See, e.g., Wamsganz v. Boatmen's Bank of De Soto*, 804 F.2d 503 (8th Cir. 1986). In a reorganization, a plan is confirmed to pay pre-petition creditors over time. *See, e.g., 11 U.S.C. §§ 1103, 1121-29, 1142, 1143* (1982 & Supp. III 1985). Sections 1200-1231, providing reorganization for farmers, were recently added to the Code by the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088. Finally, Chapter 13 provides for individual reorganization. Generally, the debtor retains his property and works out a payment plan with his creditors. *See, e.g., 11 U.S.C. §§ 1306, 1321* (1982).

34. 11 U.S.C. § 109(b), (d) (1982 & Supp. III 1985).

35. In a Chapter 11 reorganization proceeding, pre-petition management continues to operate the debtor's business unless a request is made for the appointment of a trustee. 11 U.S.C. § 1104 (1982 & Supp. III 1985). When the debtor continues to operate the business he is commonly referred to as a debtor-in possession. *Cf. 11 U.S.C. § 1101(1)* (1982 & Supp. III 1985). While the business continues to operate, the debtor drafts a plan setting forth a method for distributing assets to creditors. 11 U.S.C. §§ 1121-1129 (1982 & Supp. III 1985). If the debtor fails to file a plan, other parties in interest may do so. 11 U.S.C. § 1121(c) (1982 & Supp. III 1985). Certain creditors and the court must then approve the plan. 11 U.S.C. §§ 1126, 1129 (1982 & Supp. III 1985). (The complex procedure involved in the drafting and seeking approval of a plan is beyond the scope of this note.) After the court confirms the plan, with minor exceptions, the debtor is discharged from its pre-petition debts and the company is given a "fresh start." It may then operate as if it had not filed for bankruptcy. 11 U.S.C. § 1141(d) (1982 & Supp. III 1985). Of course, the debtor must operate its business in compliance with the plan. 11 U.S.C. § 1142 (1982 & Supp. III 1985).

36. 11 U.S.C. § 727(a)(1) (1982 & Supp. III 1985). The section provides that "[t]he court shall grant the debtor a discharge, unless the debtor is not an individual. . . ." *Id.*

37. 11 U.S.C. §§ 704, 726 (1982 & Supp. III 1985). *See also supra* note 30 and accompanying text.

38. 11 U.S.C. §§ 701, 702 (1982 & Supp. III 1985). An interim trustee is appointed at the commencement of the proceeding. 11 U.S.C. § 701 (1982 & Supp. III 1985). The interim trustee may be succeeded by a permanent trustee elected by the debtor's unsecured creditors. 11 U.S.C. § 702 (1982 & Supp. III 1985). The interim trustee becomes the permanent trustee if no permanent trustee is elected. 11 U.S.C. § 702(d) (1982 & Supp. III 1985).

trustee's powers and duties to accomplish this objective.³⁹ For example, under the Code a trustee is given the authority to release valueless property from the debtor's estate.⁴⁰ This practice is known as "abandonment".

2. The Evolution of Abandonment

The Bankruptcy Act of 1898 contained limited provisions governing abandonment.⁴¹ A trustee could exercise the abandonment power only under limited circumstances in a reorganization proceeding.⁴² Eventually, courts expanded the situations in which a trustee could abandon property that was non-beneficial to the estate.⁴³ By allowing the abandonment of property that was of no value to the estate or that was draining the estate's assets, courts enabled trustees to increase the funds available for distribution to creditors.⁴⁴

This judicially created power of abandonment was not unqualified. Courts imposed conditions on the trustee's power to abandon

39. See, e.g., 11 U.S.C. §§ 704-728 (1982 & Supp. III 1985); 28 U.S.C. § 959 (1982).

40. 11 U.S.C. § 554(a) (1982 & Supp. III 1985). The section provides as follows: "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." *Id.*

41. See Bankruptcy Act, ch. 541, 30 Stat. 544 (1897-98) (codified at 11 U.S.C. §§ 64(a)(4), 70(a)(2), 70(b), (1976) (repealed 1979)). The trustee could only abandon property which was burdened by taxes, applications for patents, copyrights or trademarks. *Id.* at §§ 64(a)(4); 70(a)(2). The trustee could also abandon executory leases. *Id.* at § 70(b). The term "executory contract" is not defined in the Act or the Code. An executory contract, however, generally is defined as a contract not completely performed by one side. See *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 522, n.6 (1984) (citing HOUSE REPORT, *supra* note 4, at 347, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6303-04; SENATE REPORT, *supra* note 4, at 581, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5844. See also 1 COLLIER BANKRUPTCY MANUAL ¶ 70.28 at 1009 (W. Hill, L. King, W. Laube 2d ed. 1978). Under the Act, the trustee was allowed to consider the benefit of the contract to the estate and assume or reject it. Bankruptcy Act, ch. 541, 30 Stat. 544 (1897-98) (codified at 11 U.S.C. § 70b (1976) (repealed 1979)). If the trustee rejected the contract the rejected party could then proceed against the estate as a creditor for the amount of his damages. *Fletcher v. Suprite*, 180 F.2d 669 (7th Cir. 1950).

42. Bankruptcy Act, ch. 541, 30 Stat. 544 (1897-98) (codified at 11 U.S.C. §§ 77, 187 (1976) (repealed 1979)).

43. Based on the right to reject executory contracts, the courts began to allow the rejection of other property from the estate. See, e.g., *American File Co. v. Garrett*, 110 U.S. 288, 295 (1884) ("[A]ssignees were not bound to accept property of onerous or unprofitable character."); *Federal Land Bank v. Nalder*, 116 F.2d 1004, 1007 (10th Cir.), cert. denied, 313 U.S. 578 (1941) (trustee may "decline to accept" or abandon burdensome property); *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 need not accept, or may abandon, burdensome property).

44. 4 COLLIER ON BANKR., *supra* note 11, ¶ 554.01 at 554-3.

property when competing public interests were present.⁴⁵ Beginning with *In re Chicago Rapid Transit Co.*,⁴⁶ the Court of Appeals for the Seventh Circuit held that the trustee of a debtor transit company could not cease operation of a branch railway line when local law required continued operation.⁴⁷ The court permitted the unexpired lease to be rejected but conditioned the rejection on compliance with state law.⁴⁸ Subsequently, in *Ottenheimer v. Whitaker*,⁴⁹ the Court of Appeals for the Fourth Circuit concluded that, in liquidating the estate of a barge company, the bankruptcy trustee could not abandon several barges when the abandonment would have resulted in the obstruction of a navigable passage in violation of federal law.⁵⁰ Finally, in *In re Lewis Jones, Inc.*,⁵¹ the Bankruptcy Court for the Eastern District of Pennsylvania required a debtor to seal underground steam lines before abandoning them.⁵² The court reasoned that this was necessary to safeguard the public welfare.⁵³

In contrast to the judicially created abandonment power, Congress codified the concept of abandonment in the Code without express qualification.⁵⁴ Section 554(a) of the Code provides that "[a]fter 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."⁵⁵ The legislative history to section 554 of the Code further suggests that Congress intended to grant a trustee the unqualified power to abandon such property.⁵⁶

The Code also altered the effect abandonment had regarding title to the debtor's property in a bankruptcy proceeding. Previously, under the Act, a trustee in a liquidation proceeding was vested with title to all of the property of the estate.⁵⁷ Abandonment

45. See *infra* notes 46-53 and accompanying text.

46. 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942).

47. *Id.* at 5.

48. *Id.*

49. 198 F.2d 289 (4th Cir. 1952).

50. *Id.* at 290.

51. 1 Bankr. Ct. Dec. 277 (CRR) (Bankr. E.D. Pa. November 7, 1974).

52. *Id.* at 280.

53. *Id.*

54. 11 U.S.C. § 554 (1982 & Supp. III 1985). Unqualified abandonment is procedurally governed by Bankruptcy Rule 6007. Bankr. R. 6007.

55. 11 U.S.C. § 554(a) (1982 & Supp. III 1985).

56. HOUSE REPORT, *supra* note 4, at 377, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6333.

57. Bankruptcy Act, ch. 541, 30 Stat. 544 (1897-98) (codified at 11 U.S.C. § 70(a) (1976) (repealed 1979)).

divested the trustee of the title and revested it in the debtor.⁵⁸ Under the Code, however, the trustee never assumes title to the assets of the estate;⁵⁹ he merely controls the assets for liquidation purposes.⁶⁰ Therefore, abandonment simply divests the trustee of control of the property.⁶¹ The debtor retains all title and claims to the property as he did before filing the bankruptcy petition.⁶²

B. State Environmental Law

Notwithstanding the benefit to creditors of ridding the estate of property which is draining available assets, state officials have raised the issue of whether use of the abandonment power to abandon property contaminated with hazardous waste violates state environmental laws.⁶³ Many states have enacted environmental protection statutes in response to increased concern regarding hazardous waste pollution.⁶⁴ State legislatures have recognized that generation, storage, disposal, and possible mismanagement of hazardous substances threatens the well-being of the state's residents and the environment.⁶⁵ State environmental regulatory agencies, therefore, have been created to control and monitor any facility, person, or action connected with hazardous waste that might pose a threat to the environment.⁶⁶

58. If the debtor was a corporation, the property reverted back to the corporate shell. In contrast, if the debtor was an individual, the property became that individual's free and clear of the bankruptcy proceeding. *Brown v. O'Keefe*, 300 U.S. 598, 602 (1937); *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).

59. 11 U.S.C. § 541(a)(3) (1982 & Supp. III 1985).

60. 11 U.S.C. § 704 (1982 & Supp. III 1985).

61. See 4 COLLIER ON BANKR. *supra* note 11, ¶ 554.02(2) at 554-6. The trustee abandons the property to "any party with a possessory interest", usually the debtor. HOUSE REPORT, *supra* note 4, at 377, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6333; SENATE REPORT, *supra* note 4, at 92, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5878.

62. *Mason v. Commissioner of Internal Revenue*, 646 F.2d 1309, 1310 (9th Cir. 1980); *In re Tarpley*, 4 Bankr. 145, 146 (Bankr. M.D. Tenn. 1980).

63. See *infra* note 14 and accompanying text.

64. See e.g., Water Pollution Control Act, CONN. GEN. STAT. ANN. §§ 22a-416 to -471 (West 1985 & Supp. 1986); Hazardous Waste Management Act, MICH. COMP. LAWS ANN. §§ 299.501-.551 (West 1984); Hazardous Waste Management Act, N.H. REV. STAT. ANN. §§ 147-A:1-20 (Supp. 1986); Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11 (West 1982 & Supp. 1986); Collection, Treatment & Disposal of Refuse and Other Solid Waste, N.Y. ENVTL. CONSERV. LAW §§ 27-0101 to-1321 (McKinney 1984 & Supp. 1987). The Federal government also has enacted substantial legislation. See *infra* note 160 and accompanying text.

65. See, e.g., N.J. STAT. ANN. § 13:1E-2 (West 1982); N.Y. ENVTL. CONSERV. LAW § 27-0900 (McKinney 1984 & Supp. 1987).

66. In New Jersey the state legislature passed the Solid Waste Management Act (the "New Jersey Act"). N.J. STAT. ANN. §§ 13:1E-1-176 (West 1982 & Supp. 1987). The

These regulatory agencies monitor the facilities and entities associated with them through licensing and reporting requirements.⁶⁷ Failure to procure a license or breach of a licensing agreement with a state environmental regulatory agency constitute violations of state statutes.⁶⁸ The unlawful disposal⁶⁹ or discharge⁷⁰ of hazardous waste, or personal or property damage caused by spills or disposal also may lead to sanctions.⁷¹ The sanctions for statutory violations include liability for cleanup costs,⁷² injunctive relief,⁷³ fines,⁷⁴ or possible imprisonment.⁷⁵ To date, nine states have enacted provisions permitting the state to recoup cleanup costs from the responsible party if the state has had to undertake the cleanup itself.⁷⁶

purpose of the N.J. Act is to provide a cohesive framework to govern the collection, disposal and use of solid waste products. N.J. STAT. ANN. § 13:1E-2 (West 1982). In New York, the legislature passed the Industrial Waste Management Act (the "New York Act"). N.Y. ENVTL. CONSERV. LAW §§ 27-0900 to-0925 (McKinney 1984 & Supp. 1987). The purpose of the N.Y. Act is to regulate the management, generation, storage, transportation, treatment and disposal of hazardous waste. N.Y. ENVTL. CONSERV. LAW § 27-0900 (McKinney 1984 & Supp. 1987). *See also* CONN. GEN. STAT. ANN. § 22a-422 (West 1985); N.H. REV. STAT. ANN. § 147-A:13-a (Supp. 1986).

67. The New Jersey Act, for example, provides that the New Jersey Department of Environmental Protection has the authority to regulate and provide registration requirements for solid waste collection and disposal facilities and operations. N.J. STAT. ANN. § 13:1E-2 (West 1982). The N.Y. Act provides standards applicable to generators, transporters, owners and operators of hazardous waste products and facilities and requires permits to be acquired for storage, transportation, treatment or disposal of hazardous waste. N.Y. ENVTL. CONSERV. LAW §§ 71-2707, -2709, -2711, -2713 (McKinney 1984 & Supp. 1987). *See also* CONN. GEN. STAT. ANN. §§ 22a-430, -450 (West 1985); MICH. COMP. LAWS ANN. §§ 299.509, .522, .537 (West 1984); N.H. REV. STAT. ANN. §§ 147-A:4, :11 (Supp. 1986).

68. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW §§ 27-0913, 71-2705 (McKinney 1984 & Supp. 1987).

69. *See, e.g.*, MD. HEALTH-ENVTL. CODE ANN. § 7-224 (1982 & Supp. 1986); N.Y. ENVTL. CONSERV. LAW § 71-2713 (McKinney 1984 & Supp. 1987).

70. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-451(a) (West 1985 & Supp. 1986); N.J. STAT. ANN. § 58:10-23.11(c) (West 1982).

71. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 21E § 5 (West 1986); OR. REV. STAT. § 466.205 (1985).

72. *See, e.g.*, CONN. GEN. STAT. ANN. § 22a-451(a) (West 1985 & Supp. 1986); MD. HEALTH-ENVTL. CODE ANN. § 7-221 (1982 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 21E § 5 (West Supp. 1986); N.H. REV. STAT. ANN. § 147-B:10 (Supp. 1986); N.J. STAT. ANN. § 58:10-23.11c (West 1982); N.Y. ENVTL. CONSERV. LAW § 71-2705 (McKinney 1984 & Supp. 1987); OHIO REV. CODE ANN. § 3734.22 (Page Supp. 1985); OR. REV. STAT. § 466.205 (1985); TENN. CODE ANN. § 68-46-202 (Supp. 1986).

73. *See, e.g.*, MD. HEALTH-ENVTL. CODE ANN. § 7-263 (1982 & Supp. 1986); N.J. STAT. ANN. § 13:1E-9 (West 1982).

74. *See, e.g.*, MD. HEALTH-ENVTL. CODE ANN. § 7-266 (1982 & Supp. 1986); N.Y. ENVTL. CONSERV. LAW § 71-2705 (McKinney 1984 & Supp. 1987).

75. *See, e.g.*, MD. HEALTH-ENVTL. CODE ANN. § 7-265 (1982 & Supp. 1986); N.Y. ENVTL. CONSERV. LAW § 71-2705 (McKinney 1984 & Supp. 1987).

76. *See* CONN. GEN. STAT. ANN. § 22a-452(a) (West 1985 & Supp. 1986); MD.

III. THE *QUANTA* CASE

A. *Factual Background*

Quanta Resources Corporation ("Quanta Resources" or the "Debtor")⁷⁷ processed waste oil at facilities located in both New York and New Jersey.⁷⁸ The New Jersey facility was operated pursuant to a temporary operating permit issued by the New Jersey Department of Environmental Protection (the "NJDEP").⁷⁹ In June of 1981 the NJDEP discovered that Quanta Resources had violated a covenant of its operating permit by accepting more than 400,000 gallons of oil contaminated with a highly toxic carcinogen, PCB. The NJDEP therefore, ordered Quanta Resources to cease operations.⁸⁰ Both parties then entered into negotiations concern-

HEALTH-ENVTL. CODE ANN. § 7-266 (1982 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1986); MICH. COMP. LAWS ANN. § 299.543 (West 1984); N.H. REV. STAT. ANN. § 147-B:10 (Supp. 1986); N.J. STAT. ANN. § 58:10-23.11f (West Supp. 1986); OHIO REV. CODE ANN. § 3734.22 (Supp. 1985); OR. REV. STAT. § 466.205 (1985); TENN. CODE ANN. § 68-46-209 (Supp. 1986). In all of these states, except Michigan, the statutes enable the state to obtain a lien against the decontaminated property for the amount owed for the cleanup. Michigan allows for cleanup costs expended by the state to be assessed against the site and collected and treated like state taxes. MICH. COMP. LAWS ANN. § 299.543 (West 1984).

In the five states where the state may acquire a lien to recoup cleanup costs expended, the lien is accorded "super-priority" over other liens on the property. See CONN. GEN. STAT. ANN. § 22a-452(a) (West 1985 & Supp. 1986); MASS. GEN. LAWS ANN. ch. 21E § 13 (West Supp. 1986); N.H. REV. STAT. ANN. § 147-B:10 (Supp. 1986); N.J. STAT. ANN. § 58:10-23.11f (West Supp. 1986); TENN. CODE ANN. § 68-46-209 (Supp. 1986). The enactment of state super-priority lien statutes covering environmental cleanup costs directly conflicts with the rights of secured creditors and the statutory priority scheme contained in the Code. See 11 U.S.C. § 507 (1982 & Supp. III 1985). These super-priority liens and their potential retroactive application also raise a constitutional issue concerning the impairment of secured creditors' rights. Specifically, the super-priority lien legislation raises questions under the "takings clause" of the Fifth Amendment of the United States Constitution which provides that "private property [shall not] be taken for public use without just compensation." U.S. CONST. amend. V. A detailed analysis of this issue is beyond the scope of this note.

77. Quanta Resources Corporation, a Delaware Corporation, was a wholly owned subsidiary of Quanta Holding Corporation, a subsidiary of Waste Recovery, Inc. Brief for Trustee at iii n.1, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805).

78. *Quanta*, 106 S. Ct. at 757. The property in New York, located in Long Island City, was owned by the Debtor. Brief for Trustee at iv, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805). The property in New Jersey, located in Edgewater, was leased by the Debtor from two individuals. Brief for New Jersey Department of Environmental Protection at 3, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805).

79. *Id.* at 757.

80. *Quanta*, 106 S. Ct. at 757. PCB is the abbreviation for polychlorinated biphenyl, a toxic element.

ing clean up of the facility.⁸¹

While the parties were still negotiating, Quanta Resources filed a voluntary Chapter 11 reorganization petition in the United States Bankruptcy Court for the District of New Jersey.⁸² The NJDEP issued an administrative order on the following day requiring Quanta Resources to clean up the site.⁸³ Later, the Debtor converted its reorganization petition to a Chapter 7 liquidation proceeding.⁸⁴

Following Quanta Resources' filing for bankruptcy in New Jersey, an investigation of the Quanta Resources facility in New York revealed that the Debtor had accepted and stored more than 70,000 gallons of waste oil, sludge, and other hazardous wastes, including oil contaminated with PCBs.⁸⁵ Compounding the problem, the containers storing the contaminated oil were deteriorating and the toxic oil was leaking into the soil.⁸⁶ An appraisal of the New York property revealed that the mortgages on the facility's property exceeded the property's value.⁸⁷ The trustee thus concluded that the estimated cost of disposing of the contaminated oil would be burdensome to the estate and attempted to sell the valueless property for the benefit of the creditors.⁸⁸ The attempt to sell

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Section 1112 of the Code allows a Chapter 11 debtor to convert his case to a Chapter 7 proceeding. 11 U.S.C. § 1112 (1982 & Supp. III 1985). Such a conversion is routine unless one of the limitations as specified in the section applies. *Id.*

85. *Quanta*, 106 S. Ct. 755, 758 (1986). The State of New York claimed that Quanta Resources and the bankruptcy trustee possessed and neglected hazardous substances, thereby endangering the public health and safety. Brief for New York at 2, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805).

86. *Quanta*, 106 S. Ct. at 758.

87. *Id.* In the judgment of the appraiser, the buildings on the property had no value because of their age and deteriorating condition. The appraiser estimated that the fair market value of the property was \$535,000, but stated that for "forced sale" purposes this value should be discounted by 20% to \$428,000. Neither the "fair market" nor the "forced sale" estimates took into consideration the contaminated state of the property or the expenditures which would be necessary in order to dispose of the oil on the site and render the property marketable. Brief for Trustee at 5, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805).

88. *Quanta*, 106 S. Ct. at 758. No party to the bankruptcy proceeding disputed that the site was burdensome and of inconsequential value to the estate. *Id.* In fact, at the beginning of the case, the trustee was required to maintain a 24-hour guard service at a cost to the estate in excess of \$1,000 per week. Brief for Trustee at 5, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805). At the abandonment hearing the trustee testified that he personally had borrowed \$20,000, most of which had gone to pay for the 24-hour security. *Id.*

the property, however, was unsuccessful. Subsequently, the trustee notified the creditors and the bankruptcy court that he would abandon the property if he did not receive an offer to purchase the property for a price in excess of the liens against it.⁸⁹ Both the State of New York and New York City objected to the trustee's proposal, claiming that abandonment would threaten the public's health and safety and would violate state environmental laws.⁹⁰

The bankruptcy court, however, approved the abandonment, noting that the State of New York was better equipped to clean up the site than the trustee.⁹¹ This decision was affirmed by the United States District Court for the District of New Jersey.⁹² The State of New York appealed the district court's decision to the Court of Appeals for the Third Circuit but proceeded to decontaminate the facility, except the polluted subsoil, at a cost of approximately \$2.5 million.⁹³ A divided panel⁹⁴ for the United States Court of Appeals for the Third Circuit reversed the district court's decision.⁹⁵ The court concluded that Congress intended to codify the judicial exceptions to unqualified abandonment, conditioning

89. Brief for Trustee at 5, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805). Greenpoint Oil Corporation ("Greenpoint") offered to purchase the property, subject to the mortgages and other liens, for \$3,000. The offer was approved by the bankruptcy court. Greenpoint subsequently withdrew its offer because of the hazardous conditions and violations existing at the property of which Greenpoint was not aware at the time of the offer. *Id.*

90. *Quanta*, 106 S. Ct. at 758. New York rested its objection on public policy considerations reflected in applicable local laws and Title 28, Chapter 959 of the United States Code, which requires a trustee's compliance with state law when managing or operating property in his possession as a trustee. *Id.*

91. *Id.* Shortly after the bankruptcy court approved the abandonment of the New York site, the trustee gave notice of his intent to abandon the personal property at the New Jersey site, consisting mainly of the contaminated oil. *Id.* Because the New Jersey site was leased by the Debtor the application was limited to the personal property at the site. Although the NJDEP objected that the estate had sufficient funds to protect the public from the dangers posed by the hazardous waste, the bankruptcy court approved the abandonment. *Id.* Because the abandonments of the New Jersey and New York facilities raised similar issues and the New York case already was pending before the court of appeals the parties in the New Jersey litigation consented to NJDEP's taking a direct appeal from the bankruptcy court to the court of appeals. The direct appeal was taken pursuant to Section 405 (c)(1)(B) of the Code. *Id.* at 759.

92. *Id.* at 758. The district court opinion is unpublished.

93. *Id.* Upon abandonment the trustee also removed the 24-hour guard service that had been hired and shut down the fire-suppression system operating at the site. *Id.*

94. In his dissent, Judge Gibbons argued that the codification of the power of abandonment in the Code permitted abandonment without exception. *In re Quanta Resources Corp.*, 739 F.2d 912, 923 (3d Cir. 1984) (Gibbons, J., dissenting). The dissent also noted there were Takings Clause implications raised by the majority's holding. *Id.* at 924-25.

95. *Quanta*, 106 S. Ct. 755, 759 (1986). See *In re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984).

or disallowing abandonment when important public interests were present.⁹⁶ The trustee responded to the appellate court decision by filing a petition for rehearing with the court of appeals.⁹⁷ After the petition was denied, Midlantic National Bank, a creditor of the Debtor, applied to the United States Supreme Court for a writ of certiorari, which was granted on February 19, 1985.⁹⁸

B. The Supreme Court Opinion

1. The Majority

In a five-to-four decision, the United States Supreme Court affirmed the court of appeals decision.⁹⁹ The Court held that Congress did not intend section 554(a) of the Code to preempt all state and local laws.¹⁰⁰ Specifically, the Court held that the bankruptcy court did not have the power to authorize abandonment of property containing toxic waste without imposing conditions on the abandonment that would adequately protect the public's health and safety.¹⁰¹

The Court's decision was based on four conclusions. First, the Court determined that Congress intended to codify the pre-Code, judicially restricted doctrine of abandonment.¹⁰² Second, the Court noted that other sections of the Code were expressly subordinate to laws designed to promote public health and safety.¹⁰³ Third, the Court concluded that section 959(b) of Title 28 of United States Code ("section 954(b)"), which requires that a bankruptcy trustee manage the bankrupt estate in accordance with state law, supported a finding that Congress did not intend the Code to preempt state law.¹⁰⁴ Finally, the Court stated that Con-

96. *In re Quanta*, 739 F.2d at 923. The court of appeals remanded both cases back to the bankruptcy court for further proceedings. *Id.*

97. Brief for Trustee at 9, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805).

98. 469 U.S. 1207 (1985). At the time the petition for certiorari was filed the administration of the Debtor's estate was virtually complete. All assets, other than those abandoned by the trustee were liquidated. Distribution was made to the secured creditors at the time the assets securing their liens were sold, and administrative expenses incurred by the trustee were paid to the extent funds were available. Brief for Trustee at 9, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805).

99. *Quanta*, 106 S. Ct. at 759.

100. *Id.* at 762.

101. *Id.* The Court failed, however, to indicate whether adequate protection must rise to the state statutory standards.

102. See *infra* notes 106-07 and accompanying text.

103. See *infra* notes 108-12 and accompanying text.

104. See *infra* notes 115-16 and accompanying text.

gress recognized the importance of environmental protection, noting the numerous statutes passed by Congress to protect the environment and public health and safety.¹⁰⁵

The Court began its analysis by stating that the pre-Code, judicially created doctrine limiting abandonment power to protect legitimate state or federal interests doctrine was a well-recognized judicial doctrine that Congress intended to codify in section 554(a) of the Code.¹⁰⁶ The Court reasoned that, in accordance with rules of statutory construction, a statute should not be interpreted as inconsistent with a judicially created concept unless Congress specifically provides that the statute is intended to change the judicial interpretation.¹⁰⁷

The Court further concluded that Congress did not intend to give a bankruptcy court "carte blanche" to ignore non-bankruptcy law.¹⁰⁸ The Court noted that section 362 of the Code, which provides that all proceedings against a debtor are stayed once a bankruptcy petition is filed, does not prevent the government from continuing to sue the debtor to protect public health and safety.¹⁰⁹ In support, the Court specifically referred to the exception found in section 362(b)(5) of the Code, which permits the government to enforce non-monetary judgments against a debtor's estate.¹¹⁰ Looking to the legislative history of this section, the Court indicated that the exception applies when a governmental unit sues a debtor for violation of state regulatory laws.¹¹¹ The Court reasoned that, because Congress expressly limited other powers of the trustee when the public's health and welfare were concerned, Congress presumably intended to similarly restrict the trustee's abandonment power.¹¹² Thus, the Court concluded that Congress could not have intended to discard prior judicial restrictions on abandonment when enacting the Code. The Court also cited its decision in *National Labor Relations Board v. Bildisco &*

105. See *infra* notes 117-18 and accompanying text.

106. *Quanta*, 106 S. Ct. at 759-60.

107. *Id.*

108. *Id.* at 760.

109. *Id.* at 760-61 (citing section 362(b)(5) of the Code).

110. *Id.* at 761. See *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984). But see *In re Kovacs*, 681 F.2d 454 (6th Cir. 1982), *vacated*, 459 U.S. 1167 (1983).

111. *Quanta*, 106 S. Ct. 755, 761 (1986) (citing HOUSE REPORT, *supra* note 4, at 343, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6299; SENATE REPORT, *supra* note 4, at 52, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5838).

112. *Id.* at 760.

Bildisco,¹¹³ as authority for the proposition that filing a bankruptcy petition does not relieve a debtor from all of its non-bankruptcy law obligations.¹¹⁴

As additional evidence that Congress did not intend the Code to preempt state law, the Court referred to section 959(b), which requires that a bankruptcy trustee manage and operate the property of the estate without violating state law.¹¹⁵ The Court acknowledged that Section 959(b) did not directly apply to section 554(a) of the Code, but maintained that it provided further support for the proposition that Congress intended to limit the Code's preemption of state laws.¹¹⁶

Finally, the Court stated that Congress emphasized the goal of protecting the environment against toxic pollution by enacting several federal statutes to promote this goal.¹¹⁷ The Court reasoned that these statutes further evidenced Congress' intent to limit the bankruptcy trustee's abandonment power when it contravenes state and local environmental protection laws.¹¹⁸

2. Dissent

Justice Rehnquist, in his dissent, began his criticism of the majority opinion by stressing that the language of section 554(a) of the Code is absolute, and the only limitation on the trustee's abandonment power is that the property is valueless or otherwise burdens the estate.¹¹⁹ He also argued that the cases relied on by the majority as evidence of a judicially created exception to the trustee's abandonment power failed to support the majority's holding.¹²⁰

113. 465 U.S. 513 (1984).

114. *Quanta*, 106 S. Ct. at 760.

115. *Id.* at 761-62.

116. *Id.* at 762.

117. *Id.* The Court cited to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985), and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985). *Quanta*, 106 S. Ct. 755, 762 (1986).

118. *Quanta*, 106 S. Ct. at 762.

119. *Id.* at 763-64 (Rehnquist, J., dissenting). The dissent authored by Justice Rehnquist was joined by Chief Justice Burger and Justices White and O'Connor. *Id.* at 763.

120. *Id.* at 764-65. The dissent distinguished the cases relied on by the majority. *Id.* First, the dissent pointed out that in *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952), the court dealt with a conflict between a judicial interpretation of the Act and another federal statute, not a conflict between state and federal law. *Quanta*, 106 S. Ct. at 764-765 (Rehnquist, J., dissenting). Next, the dissent noted that in *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. 277 (CRR) (Bankr. E.D. Pa. November 7, 1974), the decision was also based on an interpretation of the judge-made nature of the abandonment power, not a codified abandonment power. *Quanta*, 106 S. Ct. at 765 (Rehnquist, J., dissenting). Finally, the dissent notes in *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), *cert.*

The dissent further contended that the majority's reliance on section 362(b)(5) of the Code, the automatic stay exception, was misplaced because this provision demonstrated that Congress made express exceptions for state police power whenever it intended to subordinate to state law the rights of the trustee.¹²¹ Therefore, Justice Rehnquist argued that the absence of an express exception indicated that Congress only intended to restrict the trustee's power if the property was not of value to the estate.¹²²

Next, the dissent addressed the NJDEP's argument that the bankruptcy court may use its equitable powers to support an exception to abandonment that would contravene state law.¹²³ Justice Rehnquist stated that a bankruptcy court could not use its equity power, even to enforce sound public policy, at the expense of the interests the Code was designed to protect.¹²⁴ The dissent then concluded that forcing the trustee to expend the estate's assets to clean up the sites would contradict the Code's purposes.¹²⁵

Justice Rehnquist acknowledged the Court's concern that abandonment may increase the dangers resulting from toxic waste, but suggested that notification requirements connected with abandonment would give state authorities adequate opportunity to prevent the aggravation.¹²⁶ The dissent conceded, however, the court

denied, 317 U.S. 683 (1942), the propriety of conditioning abandonment was not before the court of appeals. *Quanta*, 106 S. Ct. at 765 (Rehnquist, J., dissenting).

121. *Quanta*, 106 S. Ct. 755, 766 (1986) (Rehnquist, J., dissenting).

122. *Id.*

123. *Id.* at 766-67. Section 105(a) of the Code gives a bankruptcy court power to take any action necessary or appropriate to carry out the provisions of the Code. 11 U.S.C. § 105(a) (1982 & Supp. III 1985). This section is generally construed to mean that a bankruptcy court is a court of equity. *In re Chinichian*, 784 F.2d 1440, 1443 (9th Cir. 1986); *In re Ranch House of Orange Brevard, Inc.*, 773 F.2d 1166, 1169 (11th Cir. 1985). *See also* *Bank of Marin v. England*, 385 U.S. 99, 103 (1966) (finding the same equity principle in the Act). As a court of equity, the bankruptcy court has broad remedial powers and may look to substance, rather than form, to devise an appropriate remedy when the remedy at law is inadequate. *Chinichian*, 784 F.2d at 1443; *Ranch House*, 773 F.2d at 1169.

124. *Quanta*, 106 S. Ct. at 766 (Rehnquist, J., dissenting). Bankruptcy courts are courts of equity. *See* 11 U.S.C. § 105 (1982 & Supp. III 1985). Therefore, in accordance with the goals of a Chapter 7 proceeding, equitable distribution of the estate to creditors should be weighed heavily against any competing interests. The bankruptcy court must weigh the equities in light of the goals which the Code seeks to advance. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984).

125. *Quanta*, 106 S. Ct. at 766.

126. *Id.* at 767. Section 554(a) of the Code provides for abandonment only after notice and a hearing. 11 U.S.C. § 554(a) (1982 & Supp. III 1985). Further, Bankruptcy Rule 6007 also requires the trustee or debtor-in-possession to give notice to all parties in interest prior to abandonment. Bankr. R. 6007(a). Justice Rehnquist suggests, that upon notice, the state authorities could secure the danger posed by the site. Midlantic National

could narrowly restrict a trustee's abandonment if the abandonment would create a genuine emergency that the trustee would be uniquely able to prevent.¹²⁷

Finally, the dissent noted the majority had failed to acknowledge that the states' interests extended beyond protecting public health and safety, and included protecting the public coffers.¹²⁸ The dissent reasoned that, by prohibiting abandonment and forcing a cleanup, the states' interests in protecting the public coffers would be placed ahead of the claims of the other creditors, a result Congress could not have intended.¹²⁹

IV. ANALYSIS OF THE MAJORITY OPINION

The dangers posed by hazardous toxic waste are great. It is, however, Congress' role, and not that of the courts, to decide whether state environmental protection interests should prevail over the Code's objectives. Congressional concern with environmental protection is not disputed, particularly in light of the vast federal legislation on the subject. This concern, however, should not lead the judiciary to legislate exceptions to an unqualified statute.¹³⁰ The Court's holding in *Quanta*, which limited a trustee's abandonment power because of a toxic waste danger, may have been based on good public policy. Nevertheless, it was not consistent with Congressional intent in enacting section 554(a) of the Code.¹³¹ The *Quanta* holding, therefore, conflicts with Congress'

Bank v. New Jersey Department of Environmental Protection, 106 S. Ct. 755, 767 (1986) (Rehnquist, J., dissenting).

127. *Quanta*, 106 S. Ct. at 767. Justice Rehnquist referred to the United States' Brief as amicus curiae in which the United States suggested that there might be limits on the authority of a trustee to abandon dynamite sitting on a furnace in the basement of a schoolhouse. *Id.*

128. *Id.* at 767.

129. *Id.*

130. See *Howe v. Smith*, 452 U.S. 473 (1981); *Rubin v. United States*, 449 U.S. 424 (1981); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *United States v. Donruss Co.*, 393 U.S. 297 (1969). See also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The Court, in *Griswold* noted, "[w]e do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions." *Griswold*, 381 U.S. at 482. Moreover, the Court previously disapproved of attempts to impose conditions or limitations upon various Code provisions when the plain reading of the Code sections did not allow for such restrictions. See *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) ("[f]urthermore, it is apparent that Congress . . . knew how to limit the application of a provision when it desired to do so"); *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984) ("[o]bviously Congress knew how to draft an exclusion . . . when it wanted to").

131. *In re Union Scrap Iron & Metal Co.*, 49 Bankr. 477, 478 (Bankr. D. Minn. 1985) (rejecting the third circuit *Quanta* majority decision and adopting the opinion of the dis-

objectives in enacting the Code.

A. Statutory Interpretation

A straightforward analysis of section 554(a) reveals that the trustee's abandonment power was intended to be unqualified. When statutory interpretation is required, a court's function is to give effect to Congress' intent.¹³² Under recognized rules of statutory construction, such intent is determined by first looking to the statute's language.¹³³ If a statute is unclear on its face a court should then look to its legislative history to aid in the interpretation of the express language.¹³⁴ The language of section 554(a) of the Code is absolute.¹³⁵ It provides for no exceptions to the trustee's abandonment power.¹³⁶ The trustee need only prove that the property is "burdensome" or of "inconsequential value and benefit" to the estate.¹³⁷ In *Quanta*, there was no dispute that the hazardous waste sites were valueless and burdensome to the estate, and that the trustee did not have sufficient assets available to finance a cleanup of the Quanta Resources sites.¹³⁸ These costs would have far exceeded the property's value once it was returned to an uncontaminated state.¹³⁹ Therefore, based on the express language of the statute, the trustee should have been allowed to

sent). If Congress' policies conflict with one another Congress must prioritize or synthesize them. The courts can do so only to the extent provided for by the legislature. The courts cannot legislate. See *infra* note 130.

132. *United States v. Agrillo-Ladlad*, 675 F.2d 905, 908-09 (7th Cir. 1982). See also 2A N.J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 45.05 and cases cited therein (Sands 4th ed. 1984).

133. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Howe v. Smith*, 452 U.S. 473, 480 (1981); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). See also SINGER, *supra* note 132, at § 46.01 and cases cited therein.

134. *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *United States v. Donruss Co.*, 393 U.S. 297, 303 (1969). See also *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173-74 (1978); *American Federation of Labor and Congress of Industrial Organization v. Donovan*, 757 F.2d 330, 334 (D.C. Cir. 1985).

135. 11 U.S.C. § 554(a) (1982 & Supp. III 1985).

136. *Id.* See also *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 764 (1986) (Rehnquist, J., dissenting) in which the dissent noted that there is no legislative history which suggests that Congress intended to limit the trustee's power in any other way. The dissent found no evidence that Congress intended to codify prior case law when it enacted section 554(a) of the Code. *Quanta*, 106 S. Ct. at 764. Further, the dissent noted that the Court previously had been unwilling to read into unqualified statutory language exceptions or limitations based upon legislative history unless the legislative history clearly demonstrated such intent. *Id.* (citing *Garcia v. United States*, 469 U.S. 70 (1984)).

137. 11 U.S.C. § 554(a) (1982 & Supp. III 1985).

138. *Quanta*, 106 S. Ct. at 758.

139. See *supra* note 87 and accompanying text.

abandon the sites.¹⁴⁰

Because the language of section 554(a) of the Code is clear on its face, the *Quanta* Court erred in looking to the statute's legislative history.¹⁴¹ Assuming, however, that the Court was justified in analyzing the section's legislative history, the Court should have heeded its previous acknowledgement that only a clear showing of contrary intent in the legislative history would justify a limitation on unqualified statutory language.¹⁴² Not only was there no clear showing of contrary intention in the legislative history of section 554(a) of the Code, but the existing history was minimal, vague,

140. The Court's statutory interpretation has constitutional implications that the majority failed to address. Specifically, article VI, clause 2 of the United States Constitution, known as the "Supremacy Clause", provides that federal law preempts state law when the two conflict. U.S. CONST. art. VI, cl. 2. Federal law not only explicitly allows the trustee to abandon any property burdensome to the estate, but also instructs the trustee to do so as expeditiously as possible. 11 U.S.C. §§ 554(a), 704(1) (1982 & Supp. III 1985). The state environmental laws at issue in *Quanta* are in direct conflict with Congress' intent because they usurp the bankruptcy court's power by conditioning abandonment on compliance with state environmental laws. Throughout the Code, the bankruptcy court is entrusted with the power to monitor the trustee's actions in connection with the property of the estate. See, e.g., 11 U.S.C. §§ 363, 364, 554 (1982 & Supp. III 1985). New Jersey law mandates that the trustee consult with the NJDEP before taking certain actions in connection with the property of the estate. N.J. STAT. ANN. § 13:1K-9(a) (West Supp. 1986). As a result, the bankruptcy court is no longer reviewing and ratifying some of the trustee's actions. In effect, the denial of the trustee's right to abandon results in a distribution of assets among creditors pursuant to state law, not the Code. Applying the Supremacy Clause, the conflicting state law should not control.

The Court in *Quanta*, nevertheless, made state-protected common welfare paramount to the Congress' objectives. The *Quanta* holding allows the states to require a trustee to retain and administer valueless and unprofitable property, and, further, requires the estate to pay for the cleanup of the sites with assets which would otherwise be available for distribution to creditors. These requirements amount to a priority rearrangement in favor of the states, which is contrary to the express purpose of the Code. As previously noted, section 726 of the Code governs the order of distribution of property of the estate in a Chapter 7 proceeding. 11 U.S.C. § 726 (1982 & Supp. III 1985). Section 507 of the Code governs priorities. 11 U.S.C. § 507 (1982 & Supp. III 1985). In a case with no unencumbered assets it is highly unlikely that a general creditor would recover full payment of its claim. States, by means of their own laws, cannot devise priorities among creditors of the debtor which the Code does not recognize. Pursuant to the Code the states are merely unsecured creditors with pre-petition claims against the estate. 11 U.S.C. § 502 (1982 & Supp. III 1985). See *Southern Railway Co. v. Johnson Bronze Co.*, 758 F.2d 137, 139-40 (3d Cir. 1985).

141. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (absent clear and express legislative intent to the contrary, a statute's language is conclusive). See also *Western Coal Traffic League v. United States*, 694 F.2d 378, 391 (5th Cir. 1982) ("[B]revity does not necessarily imply ambiguity. When a statute is clear [the court] should read it to mean what it says, however succinctly").

142. *Garcia v. United States*, 469 U.S. 70, 75 (1984). See also *Glenn Electric Co., Inc. v. Donovan*, 755 F.2d 1028, 1032-33 (3d Cir. 1985); *Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority*, 667 F.2d 1327, 1334-35 (11th Cir. 1982).

and only indirectly related to the issue of whether abandonment should be qualified.¹⁴³

Despite the unequivocal language of section 554(a) of the Code and the absence of any contrary legislative history, the Court concluded that Congress intended to incorporate prior case law into the legislation, including "well-recognized" restrictions on a trustee's abandonment power.¹⁴⁴ In the past, the Court has found it acceptable to incorporate prior case law into enacted legislation in three instances. The first instance is when Congress has expressly noted such an intent.¹⁴⁵ The second instance is when Congress re-enacts a statute without change.¹⁴⁶ In this situation, Congress is deemed to have knowledge of judicial interpretations of the statute prior to its re-enactment and, therefore, the interpretations are deemed adopted in the statute as re-enacted.¹⁴⁷ The third instance is when Congress adopts a new law incorporating sections of prior law.¹⁴⁸ Again, there is a presumption that Congress had knowledge of any judicial interpretation given to the prior law and therefore the interpretations are deemed incorporated into the new law.¹⁴⁹

As previously noted,¹⁵⁰ there is no indication that Congress expressly intended to incorporate prior case law when it enacted section 554(a) of the Code. In addition, neither of the second two instances applies to the enactment of section 554(a) of the Code because, in enacting the section, Congress adopted a new law that had not previously been codified. Unless the Court has expanded the rules of statutory construction, there is no authority for the proposition that Congress should be deemed aware of the prior judicial interpretation of the non-statutory abandonment rules or

143. See HOUSE REPORT, *supra* note 4, at 377, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6333; SENATE REPORT, *supra* note 4, at 92, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5878. The legislative history does no more than paraphrase the codified section. *Id.* See also *United States v. Bornstein*, 423 U.S. 303, 310 (1976) (the absence of specific legislative history does not negate the court's duty to give meaning to the language of the statute "in light of the evident legislative purpose in enacting the law in question").

144. *Quanta*, 106 S. Ct. at 759.

145. *Id.* at 764 (Rehnquist, J., dissenting) (the dissent expressed the Court's previous unwillingness to limit statutory language absent a clear mandate by Congress). See also *supra* note 130 and accompanying text.

146. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *Singer*, *supra* note 140, at § 49.09 and cases cited therein.

147. *Id.*

148. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

149. *Id.*

150. See *infra* note 143 and accompanying text.

that the prior common law principles should be deemed to be incorporated into new legislation.

To arrive at the conclusion that Congress incorporated the pre-Code abandonment doctrine into section 554 of the Code, the Court relied on only one case, *Edmonds v. Compagnie Generale Transatlantique*.¹⁵¹ In that case, the Court concluded that Congress intended for judicial doctrine to be incorporated into a statute when enacting an "important and controversial change" in existing law, unless Congress explicitly stated otherwise.¹⁵² The *Edmonds* case, however, does not support the majority's interpretation of section 554 of the Code because, although unqualified abandonment was not codified in the Act,¹⁵³ the general concept of abandonment had long been accepted.¹⁵⁴ The enactment of section 554(a) of the Code was not, therefore, a codification of a controversial change in existing law.

Finally, the majority's "well-recognized" abandonment restriction is based on only three cases, none of which are premised on statutory abandonment.¹⁵⁵ The three pre-Code cases involved represent judicially-created doctrine; and the absence of a statutory abandonment provision considerably influenced each of the courts in reaching the decision to limit the trustee's abandonment power.¹⁵⁶ Codification of an abandonment rule, unqualified in its terms, addresses the concerns of these early court decisions. Congress' enactment of section 554(a) of the Code and its failure to include exceptions, despite including them elsewhere in the Code,¹⁵⁷ indicates that Congress did not intend a limited application of section 554(a) of the Code.

The Court's statutory interpretation simply is not consistent with the Code's mandates and objectives. A trustee has a duty to

151. 443 U.S. 256 (1979).

152. *Id.* at 266-67.

153. *See supra* notes 41-53 and accompanying text.

154. *Id.*

155. *See In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942); *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952); *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. 277 (CRR) (Bankr. E.D. Pa. November 7, 1974). The dissent contended that even if the cases were supportive of the majority, three isolated cases did not constitute settled law for purposes of assuming that Congress intended to codify them absent some expression of this intent. *Quanta*, 106 S. Ct. at 765 (Rehnquist, J., dissenting).

156. *See, e.g., Chicago Rapid Transit*, 129 F.2d at 5; *Ottenheimer*, 198 F.2d at 290. The court in *Chicago Rapid Transit* recognized that Congress could preempt state regulation via legislation, but held that, absent such a mandate in "fit language", state regulations will prevail over the abandonment power. *Chicago Rapid Transit*, 129 F.2d at 5.

157. *See, e.g.*, 11 U.S.C. §§ 362(a), 362(b), 522(b) (1982 & Supp. III 1985).

reduce the debtor's property to cash as quickly as possible to secure funds for distribution to the creditors in accordance with the Code.¹⁵⁸ Abandonment serves the creditors' interests by expeditiously obtaining a fair amount in settlement of their claims.¹⁵⁹ If the trustee is prohibited from abandoning burdensome or valueless property from the estate, assets will be drained from the estate and the creditors will receive less. By limiting the trustee's abandonment power when Congress did not do so, the Court has effectively amended the Code in a manner that conflicts with the goal of fair and equitable distribution to creditors.

B. Code Deference to State Police Power

Environmental and hazardous waste problems existed long before Congress enacted the Code. Given the numerous federal statutes concerned with such issues, Congress obviously knew of them at the time it drafted the Code.¹⁶⁰ Accordingly, Congress could have provided an exception to section 554(a) of the Code by prohibiting abandonment of property containing hazardous waste that threatened public health. As the *Quanta* Court noted in an earlier case, Congress has limited the application of other bankruptcy provisions.¹⁶¹

The majority cited section 362(b)(5) of the Code as an example of Congressional intent to subordinate the Code to a state's power to protect public health and safety.¹⁶² Section 362(b)(5) of the Code, however, illustrates that Congress provides an exception when it intends that an exception apply.¹⁶³ The absence of such an exception in section 554(a) of the Code, therefore, suggests that the right to abandon is not subject to any public health and safety exception.

The Court also looked to Section 959(b) as further support for

158. 11 U.S.C. § 704 (1982 & Supp. III 1985).

159. *In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984).

160. Reflecting a growing anxiety about the threat that hazardous chemicals pose to the public health and environment Congress, in the past ten years, has enacted several new statutes and amended existing ones. *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985); Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) Pub. L. 99-499, 100 Stat. 1613; Air Pollution Prevention and Control Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982 & Supp. III 1985); Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985).

161. *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985).

162. *Quanta*, 106 S. Ct. at 761.

163. *See Id.* at 766 (Rehnquist, J., dissenting).

its holding. The Court reasoned that Section 959(b) supported its conclusion that Congress did not intend the Code to preempt all state laws.¹⁶⁴ The section states that "a trustee . . . shall manage and operate the property in his possession as such trustee . . . according to the requirements of the valid laws of the state in which such property is situated"¹⁶⁵ Nonetheless, Section 959(b) does not support the majority conclusion because it does not apply to a liquidation proceeding.¹⁶⁶ The terms "manage and operate" make the section applicable only to a Chapter 11 reorganization.¹⁶⁷

Although it did not construe Section 959(b), the court in *In re Adelphi Hospital Corp.*,¹⁶⁸ specifically noted that a trustee in a Chapter 7 proceeding "[I]s in no sense a manager of an institutions operations. . . ."¹⁶⁹ A trustee, the court stated, is only a fiduciary of the bankruptcy court who must supervise the debtor and the estate and liquidate and distribute the estate's assets for the greatest benefit to the creditors.¹⁷⁰ In *Quanta*, the waste processing facility was not being operated, but was merely being liquidated to maximize proceeds. Consequently, under standards enunciated in *Adelphi Hospital Corp.*,¹⁷¹ the trustee of Quanta Resources was not a manager. Although a trustee may be authorized under certain circumstances to continue to conduct business with respect to the property, the trustee's sole function in *Quanta* was to liquidate the assets.¹⁷²

Both the Supreme Court and the appellate court conceded that

164. ¶124 Cong. Rec. 11,092 (1978) (remarks of Rep. Edwards, Chairman of the Subcommittee on Civil and Constitutional rights of the House Committee on the Judiciary), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 6436, 6444-45.

165. 28 U.S.C. § 959(b) (1982).

166. See J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 66.04(4) at 1913 (2d. ed. 1982) ("But § 959(b) applies only to the receiver in his operation of the property in his possession. It does not apply to the distribution of the estate."). Cf. *In re Adelphi Hospital Corp.*, 579 F.2d 726, 729 n.6 (2d Cir. 1978) (per curiam) (in pre-Code liquidation proceeding the trustee "[I]s in no sense a manager of an institution's operations."). See also *Missouri v. United States Bankruptcy Court, for the Eastern District of Arkansas*, 647 F.2d 768, 778 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *Austrian v. Williams*, 216 F.2d 278, 285 (2d Cir. 1954), cert. denied, 348 U.S. 953 (1955).

167. See *infra* notes 168-77 and accompanying text.

168. 579 F.2d 726 (2d Cir. 1978).

169. *Id.* at 729 n.6.

170. *Id.*

171. *Id.* Brief for Trustee at 12, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805). The Quanta Resources trustee did not operate the waste processing facility as a waste processing facility. Rather, the facility was merely a part of the Debtor's estate being liquidated to pay creditors.

172. *Adelphi Hospital*, 579 F.2d 726.

Section 959(b) was not independently sufficient to compel the trustee to clean up the site before abandoning it.¹⁷³ The court of appeals, following a lengthy analysis of the section, concluded that the section was not an independent bar to the trustee's exercise of the abandonment power when such abandonment was in contravention of state law.¹⁷⁴ The Supreme Court also acknowledged that the section was not directly applicable to abandonment under section 554(a) of the Code and "therefore does not delimit the precise conditions on abandonment."¹⁷⁵ The Supreme Court and the Court of Appeals' maintain that Congress did not intend to preempt state law when section 554 of the Code is applied in a Chapter 7 proceeding.¹⁷⁶ Nevertheless, the Court's own acknowledgements that section 959(b) is not directly applicable to section 554 of the Code, together with the logical construction of section 959(b), render the section unsupportive of such an argument.¹⁷⁷

Moreover, abandonment does not violate the state environmental laws that section 959(b) seeks to assure are not violated. Both the applicable New York and New Jersey environmental protection statutes were drafted to prevent the disposal or discharge of a hazardous substance into the environment.¹⁷⁸ New York law prohibits the knowing or reckless disposal of hazardous waste¹⁷⁹ and New Jersey law prohibits the act of discharging hazardous substances.¹⁸⁰ Thus, in order to violate these statutes, the trustee's action of abandoning contaminated property must involve or be equated with the actual disposal or discharge of hazardous waste.¹⁸¹ In *Quanta*, neither the trustee nor the debtor's creditors'

173. *Quanta*, 106 S. Ct. at 761-62; *In re Quanta Resources Corp.*, 739 F.2d 912, 919 (3d Cir. 1984).

174. *In re Quanta*, 739 F.2d at 919.

175. *Quanta*, 106 S. Ct. at 761-62. The Court cited to 28 U.S.C. § 959(b) only as support for its contention that Congress did not intend the Code to preempt all state law that may constrain the trustee. *Id.*

176. *Quanta*, 106 S. Ct. at 759; *In re Quanta Resources Corp.*, 739 F.2d at 918.

177. Justice Rehnquist, writing for the dissent in *Quanta*, also rejected the majority's reliance on section 959(b), particularly in light of the Court's own concession that the section does not directly apply to section 554(a) of the Code. *Id.* at 766 (Rehnquist, J., dissenting). Further, the dissent asserted that the trustee's filing of an abandonment petition did not constitute management or operation of the property as required by section 959(b). *Id.*

178. See *infra* notes 179-80 and accompanying text.

179. N.Y. ENVTL. CONSERV. LAW §§ 71-2711,-2713 (McKinney 1984 & Supp. 1987).

180. N.J. STAT. ANN. § 58:10-23.11c (West 1982).

181. In New York the concept of abandonment must be equated with knowingly or recklessly "discharg[ing], dispos[ing], or plac[ing] . . ." of the hazardous waste where it might enter the environment. N.Y. ENVTL. CONSERV. LAW § 71-2702 (McKinney 1984

actions constituted a "disposal" as statutorily defined.¹⁸² The trustee never took title to the property, and upon abandoning it, stood as if he never had an interest in it.¹⁸³ The trustee's sole act of taking custody of the property containing hazardous waste for purposes of liquidating a debtor's estate and then abandoning cannot be considered an affirmative act of disposing hazardous waste into the environment. Instead, any disposal or discharge is a result of the debtor's pre-petition conduct.¹⁸⁴ Thus, abandonment merely leaves pre-petition violations unrepaired, it does not amount to a discharge of hazardous waste by the trustee.¹⁸⁵

C. *The Bildisco Decision*

A further flaw in the *Quanta* Court's reasoning is found in its application of the holding in *National Labor Relations Board v. Bildisco & Bildisco*.¹⁸⁶ The *Quanta* majority cited *Bildisco* for the proposition that a debtor is not relieved of all non-bankruptcy obligations merely by filing a petition in bankruptcy.¹⁸⁷ In *Bildisco*, a debtor in possession requested permission from the bankruptcy court, pursuant to section 365 of the Code, to reject its collective bargaining agreement with a labor union.¹⁸⁸ The parties had agreed that the unexpired collective bargaining agreement was an executory contract, and pursuant to section 365 of the Code, the

& Supp. 1987). In New Jersey the concept of abandonment must be equated with an act resulting in the "[r]eleasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping" of the hazardous waste into the environment. N.J. STAT. ANN. § 58:10-23.11b(h) (West 1982).

182. Although it is beyond the scope of this note to consider possible creditor liability under federal environmental legislation, it is important to note that recent cases involving such legislation are suggesting that a lender or other creditor may be liable for clean-up costs if they are an "owner" or "operator" of a contaminated facility. See *United States v. Mirabile*, No. 84-2280 (E.D. Pa. September 6, 1985); *United States v. Maryland Bank and Trust Co.*, 632 F. Supp. 573 (D. Md. 1986). See also *infra* note 231.

183. See *supra* notes 59-62 and accompanying text.

184. It would be a different matter if the trustee had actually operated the property in his possession whereby the post-petition operation resulted in the violation of environmental laws.

185. Brief for Trustee at 23-24, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755 (1986) (Nos. 84-801, 84-805). Individuals responsible for placing the hazardous material at the site remain subject to criminal liability. *In re Quanta Resources Corp.*, 739 F.2d 912, 926 (3d Cir. 1984) (Gibbons, J., dissenting). Moreover, because the trustee does not take title to the assets he is not the owner of the assets. Accordingly, a trustee should not be held liable under laws that hold property owners liable for discharge of hazardous waste.

186. 465 U.S. 513 (1984).

187. *Quanta*, 106 S. Ct. at 760.

188. *Bildisco*, 465 U.S. at 518.

trustee could reject it.¹⁸⁹ The bankruptcy court approved the trustee's rejection and the district court affirmed the decision.¹⁹⁰ The labor union then filed an unfair labor practice charge against the debtor.¹⁹¹ The National Labor Relations Board (the "NLRB") found a violation of the National Labor Relations Act construing the rejection of the collective bargaining agreement as a unilateral change of the terms of the agreement.¹⁹² The United States Court of Appeals for the Third Circuit held that the collective bargaining agreement could be rejected if the debtor was able to show that the agreement was burdensome to the estate and if the equities favored rejection.¹⁹³ The Supreme Court in *Bildisco* affirmed the appellate court's decision.¹⁹⁴ The Court held that the language of section 365 of the Code included all executory contracts except those expressly exempted.¹⁹⁵ The Court further concluded that Congress knew how to draft an exclusion and its failure to do so indicated that Congress intended collective bargaining agreements to fall within the section.¹⁹⁶

In response to the Supreme Court's decision in *Bildisco*, Congress amended the Code, adding section 1113.¹⁹⁷ This section provides for the exclusion of collective bargaining agreements from section 365 of the Code, an interpretation the *Bildisco* Court would not infer.¹⁹⁸

Congress' reaction to *Bildisco* provides one plausible explanation for the *Quanta* Court's interpretation of section 554(a) of the Code. The Court apparently read a qualification into an otherwise unqualified statute in anticipation of Congress' reaction to a contrary decision. It is not the judiciary's role, however, to interpret a statute on the basis of an expected response by Congress. Instead, a court may look only to existing evidence of Congressional intent.¹⁹⁹

V. IMPLICATIONS

The effect of the Court's decision is the subordination of the

189. *Id.* at 521-22. Section 365 of the Code allows a trustee, after court approval, to assume or reject executory contracts. 11 U.S.C. § 365(a) (1982 & Supp. III 1985).

190. *Bildisco*, 465 U.S. at 518.

191. *Id.* at 518.

192. *Id.* at 518-19.

193. *Id.* at 519-21.

194. *Id.* at 517.

195. *Id.* at 521.

196. *Id.* at 522-23.

197. 11 U.S.C. § 1113 (Supp. III 1985).

198. *Id.* See also *Bildisco*, 465 U.S. 513 (1984).

199. *Doski v. Goldseker Co.*, 539 F.2d 1326, 1332 (4th Cir. 1976).

Code to state environmental laws in the interest of public health and safety. On the surface, this is certainly an admirable result. Its ramifications, however, reach beyond the limited issue addressed by the Court in *Quanta*. Because a court should address only the issues before it, a court often fails to consider peripheral issues and the impact of its decisions. Conversely, when Congress legislates, it may raise and consider all issues prior to the enactment of a statute. In its interpretation of section 554 of the Code the Court failed to consider that the trustees and lower courts charged with implementing the decision are left without guidance regarding the manner in which this should be done. Thus far, lower courts have inconsistently interpreted a trustee's duties regarding clean up of contaminated property prior to abandonment.²⁰⁰ Additionally, the lower courts have inconsistently determined what source of money is to be used for cleanup costs.²⁰¹

A. Scope of the Holding

Following the Third Circuit decision in *Quanta*, bankruptcy courts inconsistently interpreted the holding. Some courts strictly adhered to the opinion and denied abandonment;²⁰² others rejected the decision completely.²⁰³ Still other courts avoided the decision by distinguishing the facts of the cases before them from those in *Quanta*.²⁰⁴ Following the Supreme Court's *Quanta* decision, bankruptcy court decisions reflect continued confusion regarding the review of trustees' abandonment petitions.²⁰⁵

The decision in *In re Commercial Oil Service, Inc.*,²⁰⁶ is illustrative of this confusion. In that case, the bankruptcy court dismissed a Chapter 7 filing because the court determined that the *Quanta* holding made the trustee responsible for the cleanup of hazardous materials illegally stored at the debtor's property.²⁰⁷ The court dis-

200. See *infra* notes 202-30 and accompanying text.

201. See *infra* notes 231-49 and accompanying text.

202. Matter of National Smelting of New Jersey, Inc., 49 Bankr. 1012 (Bankr. D. Colo. 1985) (court followed *Quanta* and rejected abandonment).

203. *In re Catamount Dyers, Inc.*, 50 Bankr. 790 (Bankr. D. Vt. 1985) (court rejected *Quanta* and allowed abandonment of the polluted property); *In re Union Scrap Iron & Metal Co.*, 49 Bankr. 477 (Bankr. D. Minn. 1985) (court rejected *Quanta* and allowed abandonment where there were no unencumbered assets available to pay for the cleanup).

204. *In re A & T Trailer Park, Inc.*, 53 Bankr. 144 (Bankr. D. Wy. 1985) (court distinguished *Quanta* and approved abandonment in a no asset chapter 7 proceeding; the court found no violation of the state law by the act of abandonment).

205. See *infra* notes 206-30 and accompanying text.

206. 58 Bankr. 311 (Bankr. N.D. Ohio 1986).

207. *Id.* at 317. The court found that the Supreme Court opinion in *Ohio v. Kovacs*,

missed the case to avoid this consequence, stating that "the trustee who is unfamiliar with the hazardous waste disposal should not bear such an onerous burden."²⁰⁸

In *In re Oklahoma Refining Co.*,²⁰⁹ the bankruptcy court presented a different interpretation of the *Quanta* holding. The estate contained no unencumbered assets that could be used to clean up the debtor's polluted property.²¹⁰ The court noted that the trustee faced a "formidable dilemma", but stated that a strict reading of *Quanta* called for compliance with state environmental laws and regulations.²¹¹ The bankruptcy court, however, rejected such a strict interpretation and instead interpreted *Quanta* as requiring the bankruptcy court to regard state environmental laws and regulations as one factor in deciding whether to approve the abandonment petition.²¹² The court in *Oklahoma Refining* reasoned that strict compliance with state environmental laws could create "a bankruptcy case in perpetuity" because a trustee lacking adequate assets to meet state law requirements could not abandon the property and the estate could not be closed.²¹³ The court, therefore, concluded that, because the site did not present an immediate harm to public health or safety, as in *Quanta*, abandonment would not aggravate the existing situation.²¹⁴

Similarly, in *In re Franklin Signal Corp.*,²¹⁵ the bankruptcy court permitted abandonment of fourteen drums containing hazardous chemicals.²¹⁶ The estate contained essentially no assets.²¹⁷ In analyzing whether abandonment was appropriate, the bankruptcy

469 U.S. 274 (1985), also required state law compliance by the trustee. *Commercial Oil*, 58 Bankr. at 317.

208. *Commercial Oil*, 58 Bankr. at 317. The possible personal liability of a trustee is another concern left unaddressed by the Court. If a trustee does not have sufficient resources to comply with state law the result could be criminal liability. This will surely have a negative effect on the trustee program. See *In re Charles George Land Reclamation Trust*, 30 Bankr. 918 (Bankr. D. Mass. 1983) (no private party would agree to serve as trustee).

209. 63 Bankr. 562 (Bankr. W.D. Okla. 1986).

210. *Id.* at 563.

211. *Id.* at 565. The issue of whether section 554(a) of the Code may be limited by all state health and police power laws, or only those relating to toxic waste and environmental protection, was also not addressed by the Court, and remains unresolved.

212. *Id.*

213. *Id.*

214. *Id.*

215. 65 Bankr. 268 (Bankr. D. Minn. 1986).

216. *Id.* at 274. The court relied on the broad reading of *Quanta* given by the court in *In re Oklahoma Refining Co.*, 63 Bankr. 562 (Bankr. W.D. Okla. 1986). *Franklin Signal*, 65 Bankr. at 274.

217. 65 Bankr. at 269-70.

court determined that the Supreme Court did not intend to restrict all abandonment that contravenes state law. Rather, abandonment could not be approved by the court until the trustee attempted to protect the public health and welfare by undertaking "adequate precautionary measures."²¹⁸ Accordingly, the *Franklin Signal* court suggested several factors a bankruptcy court should consider in evaluating whether a trustee may abandon property.²¹⁹ First, the court must determine whether there is imminent danger to the public health and safety. Second, the court must evaluate the extent of probable harm to the public and the environment. Third, the court must consider the amount and type of hazardous waste. Finally, the court must examine the cost to bring the property into compliance with environmental laws and the amount and type of funds available for cleanup.²²⁰ In *Franklin Signal*,²²¹ the court found that the trustee met the minimum conditions to permit abandonment.²²² The court distinguished the case from *Quanta* by noting that the issue under consideration was not one of public safety, but one of money and who must pay the cleanup costs.²²³

In direct contradiction to *In re Franklin Signal Corp.*²²⁴ are the cases of *In re Stevens*²²⁵ and *In re Peerless Plating Co.*²²⁶ Those cases held that abandonment could not be approved until the trustee brought the property into full compliance with relevant state and federal environmental laws.²²⁷ The court in *Peerless Plating*, however, did advocate a narrow construction of the exception to unconditional abandonment.²²⁸ The court noted that a trustee may abandon property contaminated with hazardous waste under three circumstances.²²⁹ First, if the environmental laws in question were so onerous that they interfered with the bankruptcy adjudication, abandonment would be approved. Second, abandonment would be approved if the environmental laws were not reasonably

218. *Id.* at 271-72.

219. *Id.*

220. *Id.*

221. 65 Bankr. 268 (Bankr. D. Minn. 1986).

222. *Id.* at 273.

223. *Id.* at 274. The court found that the drums containing hazardous waste involved no imminent threat to public health. *Id.* Whether this is a distinguishing factor is questionable. Clearly *Quanta* also involved the issue of who pays for cleanup. *See infra* notes 228-43 and accompanying text.

224. 65 Bankr. 268 (Bankr. D. Minn. 1986).

225. 68 Bankr. 774 (D. Me. 1987).

226. 70 Bankr. 943 (Bankr. W.D. Mich. 1987).

227. *Stevens*, 68 Bankr. at 781; *Peerless Plating*, 70 Bankr. at 946.

228. 70 Bankr. 943, 946-47.

229. *Id.* at 947.

designed to protect the public health and safety from identified hazards. Finally, abandonment would be permitted if the violation caused by abandonment would merely be speculative or indeterminate.²³⁰

In summary, the Supreme Court's opinion in *Quanta* did not provide guidelines for trustees or bankruptcy courts required to evaluate the trustees' decisions. The Court's holding has led to confusion. The decision has made it necessary for Congress to balance the goals of the Code against those of environmental legislation. At this time, the bankruptcy courts must determine what constitutes "adequate precautionary measures" and how the estates, with varying amounts of assets, are to fund the measures. These issues were left unaddressed by the Court in *Quanta*.

B. Who Pays?

One of the key issues left unresolved following the *Quanta* decision is how the debtor's estate will bear the cost of cleanup. Ensuring that the estate continues to hold title to property not in compliance with environmental regulations does not ensure that funds will be available to pay for cleanup. When there is no actual or potential equity in the property of the estate, the only source of funding appears to be the public coffers.²³¹ The *Quanta* decision,

230. *Id.*

231. The Federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") Pub. L. 99-499, 100 Stat. 1613, provides for emergency response to and enforcement of cleanup of dangerous conditions caused by past or present hazardous contamination of the environment. Further, CERCLA imposes liability on a wide range of individuals, most notably the "owner" or "operator" of the facility. 42 U.S.C. § 9707 (1982). Recent court decisions have construed this provision to include those who control but do not own the facility and entities whose ownership is passive. See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (present owner held liable although its actions did not contribute to the environmental problem); *United States v. Maryland Bank and Trust Co.*, 632 F. Supp. 573 (D. Md. 1986) (lender who purchased contaminated property at foreclosure sale held liable); *United States v. South Carolina Recycling and Disposal, Inc.*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 20895 (D. S.C. August 24, 1984) (passive lessee/sublessor held liable); *United States v. Carolawn Co.*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 20698 (D. S.C. June 15, 1984) (firm that acted as a conduit in transfer of a legal title which it held for one hour held liable); *United States v. Argent Corp.*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 20616 (D. N.M. May 4, 1984) (passive owner/lessor held liable). The result of these cases is that an unwary lender or other creditor may become a source of cleanup funding. Although these cases all involve violations of federal environmental legislation, state laws which parallel the federal law could be analyzed similarly by the state courts.

For example, New York has established the Hazardous Waste Removal Fund, N.Y. STATE FIN. LAW § 97-b (McKinney 1984 & Supp. 1987). This fund is similar to the

however, lends no guidance regarding how this issue should be resolved.²³²

1. Administrative Expenses

An estate's assets are often insufficient to pay all creditors in full. In such situations, the Code accords a priority of payment of all administrative expenses.²³³ Administrative expenses are defined as expenses incurred to preserve the estate.²³⁴ Thus, for an expense to qualify as administrative, it must benefit the estate.²³⁵ Cleanup costs may be categorized as administrative expenses if a trustee operated the debtor's property to the benefit of the estate in violation

federal superfund in providing state funds for emergency cleanup. N.Y. STATE FIN. LAW § 97-b (McKinney 1984 & Supp. 1987). It is also similar to the federal legislation because both owners and operators of the site could be held liable for cleanup costs. N.Y. ENV'T'L CONSERV. LAW § 27-1313 (McKinney 1984 & Supp. 1987). New York's fund does not, however, establish a "super-priority" property lien. The term "super-priority" is not a codified term. As the name implies, super-priority means that the lien would be paid off first in the distribution of the assets of the estate.

232. The result of the Court's opinion in *Quanta* is that application of state environmental statutes holds the trustee and the estate liable for the debtor's pre-petition conduct when application of the Code would not do so. The court itself, however, previously acknowledged that the Code did not intend such a result. In its decision in *Ohio v. Kovacs*, 469 U.S. 274, 284-85 n.12 (1985), the Court, when discussing the "usual duties" of a bankruptcy trustee, noted that

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

The Court did not indicate who must pay for the cleanup. Because the trustee is prohibited from abandoning the property he must expend assets of the estate to bring the property into compliance with state law. These assets rightfully belong to the creditors of the estate. Although creditors normally bear the risk that their security may be less valuable than anticipated, they generally have no expectation that they will be liable to the extent of their investment for a debtor corporation's violations of the law. This is especially true as to laws which arose after credit was extended to a debtor. Arguably, creditors now have notice of possible liability when lending to entities which are connected with hazardous waste. Nevertheless, the effect of requiring the creditors to bear the loss is that less credit may be extended to companies who might have any connection with environmentally endangering products. There is not evidence that Congress intended or would accept this result. In fact, Congress drafted the Code to avoid such a result by allowing the trustee to abandon burdensome property. *See also supra* note 37 and accompanying text.

233. 11 U.S.C. § 507(a)(1) (1982 & Supp. III 1985).

234. 11 U.S.C. § 503 (b)(1)(A) (1982 & Supp. III 1985). It is inappropriate to categorize costs or expenses arising from pre-petition conduct as administrative expenses because, by definition, they must arise after commencement of the case. *Id.*

235. 3 COLLIER ON BANKRUPTCY ¶ 503.03 at 503-15 (L. King 15th ed. 1986).

of environmental laws, and as a result, the state had to perform and fund the cleanup. Cleanup costs also could be categorized as administrative expenses if the cleanup was beneficial in some other way to the trustee in his liquidation of the estate. The expenditure of the estate's assets by the Quanta Resources trustee to clean up the hazardous waste contamination would benefit the public at the expense of the creditors. Therefore, the states' reimbursement claims should not be given administrative expense priority. Rather, they should be satisfied in accordance with section 726 of the Code concerning distribution of the property of the estate.²³⁶

Because the *Quanta* majority failed to lend guidance regarding the proper characterization of the cleanup costs, courts are categorizing these costs as administrative expenses.²³⁷ In *In re T.P. Long Chemical, Inc.*,²³⁸ the court held that the debtor's liability to the Environmental Protection Agency (the "EPA") for cleanup costs was an administrative expense.²³⁹ The costs were incurred to remedy the post-petition release of hazardous substances and the estate's unsecured assets were insufficient to cover the costs.²⁴⁰ Therefore, the EPA requested payment from the proceeds of the sale of the property subject to a secured creditor's lien.²⁴¹ The court concluded that the EPA's cleanup did not confer a benefit on

236. 11 U.S.C. § 726 (1982 and Supp. III 1985).

237. See *infra* notes 238-39 and accompanying text. But see *Southern Railway Co. v. Johnson Bronze Co.*, 758 F.2d 137 (3d Cir. 1985) (cleanup costs were not allowed as administrative expenses) (case decided before the Supreme Court's *Quanta* opinion was issued); *In re Wall Tube & Metal Products Co.*, 56 Bankr. 918 (Bankr. E.D. Tenn. 1986) (court denied administrative expense characterization for cleanup costs because such a characterization would give governmental entities incentive to delay cleanup) (case decided before the Supreme Court's *Quanta* opinion was issued). Because administrative expenses are not generally satisfied out of secured assets, when the debtor has many secured debts, it is questionable whether administrative claim status would be sufficient to give recovery. See *Matter of Trim-X, Inc.*, 695 F.2d 296, 301 (7th Cir. 1982). Administrative expenses should not be confused with § 506(c) expenses. Section 506(c) of the Code allows for the recovery from proceeds of secured property of the necessary costs and expenses of preserving the property to the extent of benefit to the security holder. 11 U.S.C. § 506(c)(1982 & Supp III 1985) (emphasis added).

238. 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

239. The court based its decision on the conclusion that the estate could not avoid the liability imposed by a federal statute because of the Third Circuit's decision in *Quanta*. Therefore, such costs were actual and necessary to the estate. *Id.* at 286-87. See also *In re Peerless Plating Co.*, 70 Bankr. 943 (Bankr. W.D. Mich. 1987) (post-petition cleanup expenses of pre-petition environmental hazard classified as administrative expenses); *In re Mowbray Engineering Co., Inc.*, 67 Bankr. 34 (Bankr. M.D. Ala. 1986) (EPA was allowed decontamination costs as administrative expenses).

240. *T.P. Long Chemical*, 45 Bankr. at 281.

241. *Id.* at 287. The EPA based its request on § 506(c) of the Code, which allows a trustee to recover certain administrative expenses from secured property. *Id.* See *supra* note 237.

the secured creditor. Thus, the EPA could not recover its costs from the property that was subject to a creditor's lien, notwithstanding that such costs amounted to administrative expenses.²⁴²

Recently, in *In re Stevens*,²⁴³ the United States District Court for the District of Maine also held that the costs of post-petition cleanup of a pre-petition environmental hazard could be recovered as an administrative expense.²⁴⁴ The court concluded that the *Quanta* decision implied an exception to the general rule that bankruptcy courts have no authority to elevate a pre-petition claim to an administrative priority.²⁴⁵ The court found that *Quanta* changed the criteria for determining the allowance of administrative expenses under the Code.²⁴⁶ The court also relied on the decision in *T.P. Long Chemical*²⁴⁷ and concluded that, because the trustee could not abandon the polluted property, cleanup remained the responsibility of the estate.²⁴⁸ The court did not consider whether a security interest could be destroyed or where the administrative funds would come from in a no-asset estate case.²⁴⁹

242. *T. P. Long Chemical, Inc.*, 45 Bankr. at 289-90. But see *In re Distrigas Corp.*, 66 Bankr. 382 (Bankr. D. Mass. 1986) (administrative expense claim for clean-up costs could be given priority ahead of prior secured creditors, if necessary).

243. 68 Bankr. 774 (D. Me. 1987).

244. *Id.* at 783.

245. *Id.* at 780.

246. *Id.* The court reached this conclusion even though the Court in *Quanta* never addressed the issue.

247. 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

248. *Stevens*, 68 Bankr. at 780.

249. The fifth amendment of the Constitution allows for the taking of private property if the owner receives "just compensation". U.S. CONST. amend. V. In the *Quanta* case, the Third Circuit dismissed any Takings Clause issue in a footnote by reasoning that because the states were enforcing their environmental protection laws pursuant to their police power, there was no Taking Clause issue. *In re Quanta Resources Corp.*, 739 F.2d 912, 922 n.11. (3d Cir. 1984). In arriving at such a conclusion, the court of appeals failed to consider previous Supreme Court opinions, which held that a taking may still occur notwithstanding a valid exercise of a state's police power. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). See also, *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016 (1984). The Supreme Court in *Quanta* did not address the issue. Nevertheless, the practice is arguably unconstitutional. To require a trustee in bankruptcy to administer and clean up valueless property and exhaust all assets of the estate which would otherwise be available for distribution to creditors holding a duly perfected security interest constitutes an uncompensated taking. The Supreme Court previously has stated that the public interest cannot require the use of assets of the debtor's estate which results in a confiscation of practically the entire estate because such a confiscation is adverse to the Takings Clause. *In re New York, New Haven and Hartford Railroad Co.*, 330 F. Supp. 131, 147 (D. Conn. 1971) (contained operation of a railroad). See also HOUSE REPORT, *supra* note 4, at 423, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6379 (referring to the provision codified at 11 U.S.C. § 1169 (1982)). The Supreme Court stated that no matter how great the public need, private property cannot be taken even for wholly public use

2. Dismissal

Assuming that the trustee cannot abandon the property and the secured creditors' security cannot be used, the question of who pays for the cleanup remains unanswered. Finding no one to pay, one court solved this problem by dismissing the bankruptcy proceeding, leaving it up to the debtor and its creditors to work out the situation on their own.²⁵⁰ In *In re Commercial Oil Services, Inc.*,²⁵¹ the bankruptcy court for the Northern District of Ohio dismissed a Chapter 7 case because it was impossible for the trustee to manage the waste disposal site in compliance with state law.²⁵² This result was unfair and inconsistent with the Code's objectives. A debtor should not be denied relief under the Code because he could not afford to pay his debts. This is contrary to the basic precepts of bankruptcy law.²⁵³

VI. CONCLUSION

The Court's decision in *Quanta* effectively precludes orderly liquidation of a debtor's estate when a debtor is obliged, after filing a petition in bankruptcy, to comply with certain other federal or state statutes.²⁵⁴ The Court reached its decision even though the Code indicates no legislative intent to deny such a debtor the rights and protections of the Code.

Abandonment by the trustee is not hostile to the states' rights to assert non-priority liens against the abandoned property or to pursue claims for reimbursement against the estate. It permits state agencies to proceed with necessary clean up and to pursue all remedies available to them under the Code.²⁵⁵ Furthermore, environ-

without just compensation and that the burden of the relief afforded in the public interest must be paid by the public. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935). Because the Court avoided the entire Takings Clause issue, it provided no guidance regarding just compensation for a destroyed security interest.

250. *In re Commercial Oil Services, Inc.*, 58 Bankr. 311 (Bankr. N.D. Ohio 1986).

251. *Id.*

252. *Id. Accord In re Charles George Land Reclamation Trust*, 30 Bankr. 918 (Bankr. D. Mass. 1983) (case decided before the Supreme Court's *Quanta* opinion was issued). Section 707 of the Code empowers the court to dismiss a bankruptcy case for cause shown. 11 U.S.C. § 707 (1982 & Supp. III 1985). The issue of cause is within the bankruptcy court's discretion. *In re Heatley*, 51 Bankr. 518, 519 (Bankr. E.D. Pa. 1985). See 11 U.S.C. § 1112 (1982 & Supp. III 1985) as to dismissal of a Chapter 11 case.

253. The Code states when a Chapter 7 proceeding may be dismissed. 11 U.S.C. § 707 (1982 & Supp. III 1985). Failure by the debtor to pay pre-petition debts is not included among the provisions.

254. The *Quanta* decision also may destroy all possibilities of an effective reorganization by draining all of the assets of the estate to fund a cleanup.

255. The states may file any unsecured pre-petition claims pursuant to 11 U.S.C.

mental policy is not advanced by leaving hazardous waste sites under the control of a trustee in bankruptcy because the trustee often cannot even afford to maintain a security guard at the site, let alone finance a cleanup of the property. Instead of restricting abandonment, individual state legislatures or Congress should enact legislation preventing the utilization of the Code by a debtor to avoid liability for cleanup costs of toxic waste hazards.

Application of the Code mandates that, absent Congressional amendment, the state is a general creditor with a pre-petition claim for cleanup expenses.²⁵⁶ In holding that state and local toxic waste disposal laws are not preempted by section 554(a) of the Code, the Court has superimposed a judicially-created police power exception to common law abandonment on the trustee in lieu of the federally codified power to abandon burdensome property of the debtor's estate. It is not the role of the courts to substitute their judgment for that of the legislature. The Court's opinion in *Quanta*, therefore, represents an unconstitutional usurpation of the legislature's power.

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§ 501 (1982 & Supp. III 1985). The states may have a secured claim as well. *See supra* note 76 and accompanying text.

256. 11 U.S.C. § 502 (1982 & Supp. III 1985). *See Southern Railway Co. v. Johnson Bronze Co.*, 758 F.2d 137, 139-40 (3d Cir. 1985).

