Personal Liability of a Bankruptcy Trustee since Midlantic National Bank v. New Jersey Department of Environmental Protection: The Environmental Law and Bankruptcy Code Conflict Threatens to Engulf Bankruptcy Trustees

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PERSONAL LIABILITY OF A BANKRUPTCY TRUSTEE
SINCE MIDLANTIC NATIONAL BANK v. NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION: THE
ENVIRONMENTAL LAW AND BANKRUPTCY CODE
CONFLICT THREATENS TO ENGULF BANKRUPTCY
TRUSTEES

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I. INTRODUCTION

The adoption of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^1\) by Congress in 1980, coupled with the present trend by state and federal governments toward adopting more expansive environmental legislation, has amplified the conflict between environmental laws and the Bankruptcy Code (Code),\(^2\) resulting in an ever increasing amount of time and money spent on litigation. It is clear that on both a theoretical and a practical level these two areas of law continue to conflict\(^3\) causing protracted and often costly legal dis-

3. See e.g., In re Quanta Resources., 739 F.2d 912, 915 (3d Cir. 1984), aff’d,

(403)
theses. These problems have intensified recently due largely to the United States Supreme Court's decision in *Midlantic National Bank v. New Jersey Dep't of Envtl. Protection*, the implications of which are still being played out in courts across the nation. One of the primary problems created by the *Midlantic* decision has been the potential exposure of bankruptcy trustees to personal liability under federal and state environmental laws.

This Comment will examine the personal liability of a bankruptcy trustee under both CERCLA and state environmental laws, with a particular emphasis on the impact of the *Midlantic* decision on the potential liability of bankruptcy trustees under such laws. This Comment will initially review the relevant policies and provisions of both the Bankruptcy Code and CERCLA. This Comment will then present a brief overview of the *Midlantic* decision and its impact on the conflict between the Bankruptcy Code and federal and state environmental laws. Finally, this Comment will examine those situations where a bankruptcy trustee could be held personally liable in a bankruptcy proceeding involving assets of a debtor which are contaminated by hazardous wastes.


5. 474 U.S. 494 (1986). For a further discussion of the *Midlantic* decision and its impact, see infra notes 44-63 & 92-129 and accompanying text.
II. THE BANKRUPTCY CODE AND CERCLA

A. The Bankruptcy Code

The core purposes of the Code are to provide the bankruptcy debtor with a “fresh start” and to facilitate the dispensation of the creditors’ claims against the debtor. The Code is designed to provide the debtor with relief from and eventual dismissal of debts, thus allowing the debtor to begin anew. At the same time, by facilitating the collection and liquidation of the debtor’s assets, the Code seeks to maximize the amount of compensation available to creditors out of the debtor’s estate before final dismissal of their claims. The bankruptcy process begins when a bankruptcy petition is filed either by the debtor voluntarily, or by the debtor’s creditors. After the confirmation of the petition by a bankruptcy court, a trustee is appointed to oversee the debtor’s estate. Under the Code, a debtor has the option of either liq-

6. Traditionally, one purpose of Bankruptcy law was to provide the debtor with a “fresh start.” Burlington v. Crouse, 228 U.S. 459, 473 (1913). However, the present Bankruptcy Code, enacted in 1978, does not allow the debts of “nonindividuals” (corporations and partnerships) to be discharged under Chapter 7 of the Code. 11 U.S.C. § 727(a)(1). Thus, for nonindividual debtors, the fresh start purpose of Chapter 7 has been abrogated. See In re Quanta Resources Corp., 739 F.2d 912, 915 n.7 (1984).

7. Kothe v. R.C. Taylor Trust, 280 U.S. 224 (1930). “The broad purpose of the Bankruptcy Act is to bring about equitable distribution of the bankrupt’s estate among creditors holding just demands.” Id. at 227; see also In re Franklin Signal Corp., 65 Bankr. 268, 270 (Bankr. D. Minn. 1986) (“[t]he underlying purpose of abandonment is to enable the trustee to efficiently reduce the debtor’s property to money for distribution to creditors”).


11. 11 U.S.C. § 303. Following the confirmation of a petition for bankruptcy, a bankruptcy estate which is separate and distinct from the debtor is created. 11 U.S.C. § 541. The assets of the debtor are then placed into the bankruptcy estate. Id.

12. In a Chapter 7 proceeding, an interim trustee must be appointed once the court accepts the bankruptcy petition. 11 U.S.C. § 701. The interim trustee serves only until a regular trustee is appointed pursuant to section 702. 11 U.S.C. § 702. Conversely, under section 1104, the court has the power to appoint a trustee in a Chapter 11 proceeding only upon the request of a “party in interest,” and only for cause or if the appointment is “in the interests of creditors, any equity security holders, and other interests of the estate.” 11 U.S.C. § 1104(a).

13. For the purposes of this Comment, the provisions of the Code dealing with individual debtors will not be covered as generally, only corporate or commercial debtors own or operate polluted or contaminated property. See 11 U.S.C. §§ 1301-1330. Furthermore, eligibility under the individual debtor provisions is limited by the amount and type of debts of the debtor. 11 U.S.C. § 109(e). These limits, considering the costs involved in the cleanup of most
uidating its assets under Chapter 7, or "reorganizing" under Chapter 11.

A Chapter 7 liquidation entails the conversion into cash of all of the debtor's assets not exempted by the Code and the distribution of these proceeds to creditors. In contrast, Chapter 11 may be utilized by a debtor to both reorganize its business and restructure and pay back a certain amount of its previous debts.

A bankruptcy trustee is given certain powers, duties, and obligations under the Code which it is required to carry out. Under section 325 a trustee is the "representative of the estate," and "has the capacity to sue and be sued." Additionally, section 363 authorizes the trustee to "use, sell, or lease" property of the estate. Beyond these general powers, duties, and purposes, the obligations of a trustee may differ depending on whether the debtor is subject to Chapter 7 or Chapter 11 of the Code.

Under Chapter 7, the main duty of a trustee is to "collect and reduce to money the property of the estate for which such trustee

polluted properties, generally preclude the debtor from using the individual debtor provisions.

15. Id. §§ 1101-1174.
16. Id. §§ 701-766. Exemptions under the Code are dealt with in section 522. Id. § 522. These exemptions are designed with an individual or Chapter 13 debtor in mind, and are not really relevant to a debtor facing environmental liability. Id.
17. Id. §§ 1101-1174. The end product of a Chapter 11 reorganization is supposed to be a healthy and operational business. To this end a Chapter 11 debtor may operate its business during bankruptcy as a way of both maintaining the business and providing income with which to pay off its creditors. Id. § 1107. See Comment, Abandonment of Toxic Wastes Under Section 554 of the Bankruptcy Code, 71 Marq. L. Rev. 353, 355 (1988) [hereinafter Toxic Wastes Under the Bankruptcy Code].
19. Id. § 323. Under the Bankruptcy Code the trustee does not technically hold title to the property of the estate, but nonetheless has "certain powers associated with ownership." In re T.P. Long Chem., Inc., 45 Bankr. 278, 283 (Bankr. N.D. Ohio 1985).
20. 11 U.S.C. § 363. Under section 363(c), the trustee has the power to operate the debtor's business "in the ordinary course of business." Id. The trustee further has the power to operate the debtor's business not in the ordinary course of business, but this requires notice to creditors of the estate and a court hearing. Id. § 363(b). Essentially section 363 gives the trustee the ability to run the debtor's business as may be necessary in the course of the bankruptcy proceeding. "[T]he Bankruptcy Code gives the trustee wide-ranging management authority over the debtor." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 352 (1985).
21. For a discussion of the general powers, duties, and purposes of a bankruptcy trustee, see supra note 12 and infra notes 23, 26 & 27 and accompanying text.
serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest." Therefore, a Chapter 7 trustee’s actions are carried out with the intent of collecting, liquidating, and distributing as much of the debtor’s property to creditors as possible.

In contrast, Chapter 11 focuses on the reorganization of the debtor’s estate. Unlike a Chapter 7 proceeding in which a trustee must be appointed, whether a trustee is appointed under Chapter 11 is determined by the court. Once a trustee is appointed in a Chapter 11 proceeding, the trustee acts essentially as, and in place of, the debtor with respect to the bankruptcy estate. Under Chapter 11, a trustee is authorized to operate and reorganize the debtor’s business. Any actions taken are thus taken with the intent of ending bankruptcy with an operational business.

B. CERCLA

Adopted by Congress in 1980 to address the problem of generated environmental waste, CERCLA operates by using “a trust fund . . . known as the ‘Hazardous Substance Superfund,’” more

23. See Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930); In re Quanta Resources Corp., 739 F.2d 912, 915 (3d Cir. 1984) (“The purpose of a liquidation proceeding under Chapter 7 . . . is to provide a fair distribution of the debtor’s assets among the creditors; to that end, a trustee for the creditors is appointed by the court or elected by the creditors”). Id. To the extent necessary to carry out the liquidation, a Chapter 7 trustee does have the limited power to operate the debtor’s business, but such power must first be authorized by the bankruptcy court. 11 U.S.C. § 721.
25. For a discussion of when a trustee is appointed under the Bankruptcy Code, see supra note 12.
26. 11 U.S.C. § 1106. In this regard section 1106(a)(1) requires the trustee to perform basic trustee functions enumerated under section 704 of the Code. Id. § 1106(a)(1). Further, section 1106 (a)(2) requires that the trustee perform the basic duties of the debtor required by section 521 of the Code. Id. § 1106(a)(2). In addition, section 1106(a)(5) requires that the trustee either submit a plan of reorganization, tell the court why the trustee will not submit such a plan, or “recommend conversion of the case to a case under Chapter 7, 12, or 13 of this title or dismissal of the case.” Id. 1106(a)(5).
27. Id. § 1108. As noted previously, a Chapter 7 trustee must first get court approval before operating the debtor’s business. Id. § 721. The Chapter 11 trustee, however, has automatic approval to operate the debtor’s business unless the court revokes that authorization. Id. § 1108.
commonly known as “Superfund.”\(^29\) Under CERCLA the President is authorized to require the liable party or parties to cleanup the hazardous waste site, or in the alternative, to authorize the government, under the auspices of the Environmental Protection Agency (EPA), to cleanup the site with funds taken from “Superfund.”\(^30\) The EPA may then bring suit against the responsible party or parties for the reimbursement of expended funds.\(^31\) Furthermore, the EPA is authorized under CERCLA section 106 to obtain such injunctive relief “as may be necessary” when the public health or safety is threatened by the release or potential release of a hazardous substance.\(^32\)

Liability under CERCLA is expansive, and courts in the past decade have consistently enlarged the categories of persons liable under the Act.\(^33\) Section 107(a) of the Act imposes liability on four classes of persons: (1) the present owner and operator of a “facility”;\(^34\) (2) any past owner of a facility who owned the facility

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29. I.R.C. § 9507 (1988). The Superfund is created by section 9507 of the Internal Revenue Code. *Id.* Funding for the Superfund is obtained from taxes on the environment, and from monies recovered under the various sections of CERCLA. *Id.*


31. *Id.* Where there is the release or threatened release of a hazardous substance, the President is “authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.” *Id.* § 104(a)(1), 42 U.S.C. § 9601(a)(1). CERCLA section 104(a)(1) gives the President the power to take action to clean up hazardous waste sites. *Id.* CERCLA section 104(b) gives the President the power to sue the liable parties for Superfund monies expended for the clean up of hazardous waste sites. *Id.* § 104(b), 42 U.S.C. § 9604(b).


34. CERCLA § 101(9), 42 U.S.C. § 9601(9). CERCLA section 101(9) defines “facility” as:

- (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

*Id.*
at the time of the disposal of “hazardous substances”;\(^\text{35}\) (3) any
person who generated hazardous waste or arranged for the trans-
port or disposal of hazardous waste; and (4) any person who ac-
cepts or accepted hazardous waste for transport or disposal.\(^\text{36}\)
Such liability is imposed not only where hazardous substances are
“released,”\(^\text{37}\) but also where there is a “threatened release” of a
hazardous substance.\(^\text{38}\) Liability under CERCLA is also joint and
several, thus a single liable party could be forced to pay the entire
costs of cleaning up a hazardous waste site.\(^\text{39}\) Further, section

35. “Hazardous substance” is defined at CERCLA section 101(14). \(\text{Id.}\)
36. \(\text{Id.} \) § 107(a), 42 U.S.C. § 9607(a). Section 107(a) of CERCLA states the
following:

Notwithstanding any other provision or rule of law, and subject
only to the defenses set forth in subsection (b) of this section -
(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance
owned or operated any facility at which such hazardous substances
were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for
disposal or treatment, or arranged with a transporter for transport
for disposal or treatment, of hazardous substances owned or pos-
sessed by such person, by any other party or entity, at any facility or
incineration vessel owned or operated by another party or entity
and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for
transport to disposal or treatment facilities, incineration vessels or
sites selected by such person, from which there is a release, or a
threatened release which causes the incurrence of response costs,
of a hazardous substance, shall be liable for -
(A) all costs of removal or remedial action incurred by the United
States Government or a State or an Indian tribe not inconsis-
tent with the national contingency plan;
(B) any other necessary costs of response incurred by any other
person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural re-
sources, including the reasonable costs of assessing such in-
jury, destruction, or loss resulting from such a release; and
(D) the costs of any health assessment or health effects study car-
rried out under section 9604(i) of this title . . . .

\(\text{Id.}\)
37. The term “release” is defined under section 101(22). \(\text{Id.} \) § 101(22), 42
38. CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4). Where there is a sub-
stantial threat of the release of a hazardous substance or a “substantial threat of
release into the environment of any pollutant or contaminant which may present
an imminent and substantial danger to the public health or welfare,” section
104(a) of CERCLA gives the President the power to take necessary steps “to protect
the health or welfare of the environment.” \(\text{Id.} \) § 104(a), 42 U.S.C.
§ 9604(a). The costs of such remedial measures are then made recoverable
makes responsible parties liable for “all costs of removal or remedial action in-
107(a)(1), which deals with present owners and operators, has been interpreted as imposing strict liability.\textsuperscript{40} 

Liability under CERCLA is not premised on who actually dumped or disposed of the hazardous waste.\textsuperscript{41} CERCLA also makes parties liable for clean up costs incurred by private parties, incurred by the United States Government . . . not inconsistent with the national contingency plan." \textit{Id}. This provision gives the EPA the power to go after those responsible parties who have sufficient funds to reimburse the federal government for cleanup costs. \textit{Id}. Thus a liable party could be held responsible for the costs of cleaning up an entire hazardous waste site even if its hazardous waste is only a fraction of the total amount of hazardous waste on the site. \textit{Id}. CERCLA, however, gives liable parties a right of contribution. \textit{Id}. \S 113(f)(1), 42 U.S.C. \S 9613(f)(1). Section 113(f)(1) states in part "[a]ny person may seek contribution from any other person who is liable or potentially liable under section [1]07(a) of this title . . . ." \textit{Id}. A cause of action under section 113(f)(1) is governed by federal law and the court is given the power to "allocate response costs among liable parties using such equitable factors as the court determines are appropriate." \textit{Id}. However, a suit for contribution against other parties could very well be an exercise in futility. The EPA will likely have discovered and included in its suit those obviously responsible parties who have available funds and are easily held liable. The discovery of other more obscure responsible parties could be expensive, and there is no guarantee that once discovered they will have any funds with which to contribute. Further, assuming such parties could be found, the task of determining which hazardous substances belong to whom and what part of the cleanup costs should be apportioned thereto is a very technical, drawn out, difficult, and costly process. \textbf{Superfund Section 301(e) Study Group No.97-12, Injuries and Damages from Hazardous Wastes - Analysis and Improvement of Legal Remedies} (1982) (report to Congress in compliance with section 301(e) of Comprehensive Environmental Response, Compensation, and Liability Act of 1980) [hereinafter \textit{Section 301(e) Study}]. In the study, commissioned by CERCLA section 301(e), 42 U.S.C. \S 9651(e), the study group pointed out some basic problems in private environmental suits, and although the study dealt with actions under common law, the procedural and evidentiary problems tend to be the same: "The identification of proper parties defendant is a recurring problem because long latency periods (for injuries caused by exposure to hazardous waste), changes of ownership of disposal sites, changes in the nature of wastes deposited, and multiplicity of exposure may leave liabilities unclear and the choice of defendants uncertain." \textit{Section 301(e) Study} at 31.

40. \textit{See} New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). The court in \textit{Shore Realty}, in rejecting the argument that section 107 requires that causation must be shown, held that section 107(a)(1) "unequivocally imposes strict liability." \textit{Id}. "We note that although the term 'strict' was deleted at the last minute . . . it still appears that Congress intended to impose a strict liability standard subject only to the affirmative defenses listed in \S 107(b)." United States v. Price, 577 F. Supp. 1103, 1113-14 (D.N.J. 1983) (citation omitted); \textit{see In re T.P. Long Chemical, Inc.}, 45 Bankr. 278, 282 (Bankr. N.D. Ohio 1985) ("The liability imposed by section 107(a) of CERCLA is strict liability."). However, no provision explicitly imposing strict liability exists in CERCLA.

41. \textit{See In re} 82 Milbar Boulevard, Inc., 91 Bankr. 213 (Bankr. E.D.N.Y. 1988). In \textit{Milbar} the debtor was a corporation whose primary asset was commercial real estate and buildings. \textit{Id}. The debtor/present owner was forced into bankruptcy because a former tenant had improperly disposed of hazardous waste on the property, thus imposing CERCLA liability on the present owner of the property despite the fact that the debtor/present owner had nothing to do with the dumping. \textit{Id}. But in CERCLA section 107(b) there is a narrow excep-
to the extent that such costs are "consistent with the national contingency plan." 42 Such expansive liability under CERCLA, in addition to the extreme costliness of cleaning up a hazardous waste site, can often force a liable individual or company into bankruptcy. 43

III. THE MIDLANTIC DECISION

The Supreme Court's decision in Midlantic is an excellent example of the conflict between the Code and state and federal environmental laws. The Midlantic decision dealt with a bankruptcy trustee's ability to abandon burdensome property of the estate under section 554 of the Bankruptcy Code 44 when the property in question was in violation of state and federal environmental laws. 45 Property is generally abandoned when it is worthless, when it would cost more to clean up than its eventual sale price, or when it is costing the estate money to maintain and there is no real possibility of a future sale. 46

The debtor in Midlantic, Quanta Resources Corporation (Quanta), operated two waste oil treatment facilities, one in New York and the other in New Jersey. 47 After the discovery at the

43. In the Midlantic case, the cleanup of just one of the polluted properties involved cost of $2.5 million. Midlantic, 474 U.S. at 498. For a discussion of the costliness of environmental cleanup, see supra note 4. Often when a small company is involved, the cleanup costs of only a small amount of toxic waste, in combination with the company's debts, can force the company into bankruptcy. See In re Franklin Signal Corp., 65 Bankr. 268 (Bankr. D. Minn. 1986); In re T.P. Long Chem., Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985).
44. Midlantic, 474 U.S. 494. Section 554 of the Code gives the trustee the power to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). Upon abandonment of the property, the bankruptcy estate's interest terminates, and title to and interest in the property reverts to the debtor. T.P. Long Chemical, 45 Bankr. at 284-85.
45. Midlantic, 474 U.S. 494. By abandoning contaminated property under section 554 of the Code, a bankruptcy trustee is often endangering the public health and welfare, thus violating the main purpose of most environmental legislation. See id. at 499 n.3 (abandoned toxic waste oil presented "risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact").
46. See In re Smith-Douglass, Inc., 75 Bankr. 994 (E.D.N.C. 1987) (facility not operational, cost of maintenance was $11,000 a month, no sale could be consummated), aff'd, 856 F.2d 12 (4th Cir. 1988).
47. Midlantic, 474 U.S. 494. The Midlantic decision thus involved not only New Jersey laws and governmental agencies, but the laws and governmental agencies of both the State and the City of New York. Id.
New Jersey facility of over 400,000 gallons of oil contaminated with a toxic carcinogen, Quanta filed for bankruptcy in New Jersey under Chapter 11 of the Code.\textsuperscript{48} Oil contaminated with toxic substances was subsequently found on the New York property.\textsuperscript{49} Unable to find a buyer for the New York property, the court-appointed trustee gave notice of his intent to abandon the New York property under section 554 of the Code.\textsuperscript{50} The State and the City of New York objected to the abandonment, arguing that it would threaten the public's health and safety in violation of state and federal environmental laws.\textsuperscript{51} The Bankruptcy Court for the District of New Jersey approved the abandonment, and the Federal District Court for the District of New Jersey affirmed.\textsuperscript{52} Shortly thereafter the trustees moved to abandon the New Jersey

\textsuperscript{48} Id. at 497. Subsequent to the bankruptcy filing in New Jersey, 70,000 gallons of contaminated oil were discovered at the New York facility. Id. After the bankruptcy filing the New Jersey Department of Environmental Protection (NJDEP) issued an order requiring Quanta to cleanup the New Jersey site. Id. About a month after filing under Chapter 11 of the Code Quanta converted its bankruptcy action to a Chapter 7 liquidation. Id. Both the New York and New Jersey facilities were contaminated with polychlorinated biphenyls, which are extremely toxic and hazardous chemicals. In re Quanta Resources Corp., 739 F.2d 912, 913 (3d Cir. 1984). The New York site, further, was located at the geographical center of New York City, posing an obviously serious health risk to a large number of people. Id.

\textsuperscript{49} Midlantic, 474 U.S. at 497.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 498. New York based its argument largely on section 959(b) of the Judiciary Code, 28 U.S.C. § 959(b), which requires in part as follows:

\begin{itemize}
\item[(b)] [A] trustee, receiver or manager appointed in any court pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.
\end{itemize}


Abandonment, argued New York, would be in violation of section 959(b) since it would violate state and federal environmental laws. Midlantic, 474 U.S. at 498. New York's case for reversal was helped by the fact that subsequent to receiving approval to abandon the sites, the trustee halted a 24-hour guard service and turned off the fire suppression system, greatly increasing the risk of harm to the public. Id. Prior to this time, however, the trustee had personally borrowed and spent $20,000 on the property, largely on the 24-hour guard service. Cosetti & Friedman, Midlantic National Bank, Kovacs and Penn Terra: The Bankruptcy Code and State Environmental Law - Perceived Conflicts and Options for the Trustee and State Environmental Agencies, 7 U. Pitt. L. & Comm. J. 65, 70 (1987) (emphasis added). Further, none of the parties involved disputed the fact that the properties were "burdensome" and of "inconsequential value to the estate," and thus came under section 554 of the Code. Midlantic, 474 U.S. at 497.

\textsuperscript{52} Midlantic, 474 U.S. at 498.
property, which was also approved by the bankruptcy court.\textsuperscript{53} This decision and the earlier district court decision were appealed directly to the United States Court of Appeals for the Third Circuit, which reversed the bankruptcy and district court decisions, holding that a bankruptcy trustee did not have the power under the Code to abandon property of a bankruptcy estate in contravention of state environmental protection laws.\textsuperscript{54}

In affirming the Third Circuit's opinion, the Supreme Court found that before the passage of the 1978 Bankruptcy Code any power a trustee had to abandon property was given to him by the courts.\textsuperscript{55} With the enactment of section 554 of the Code in 1978, the Court determined that Congress had intended to codify this judge-made power.\textsuperscript{56} The Court found that since this pre-Code power to abandon was prohibited by pre-Code courts in circumstances where such abandonment would contravene state police powers, such a limitation also extended to section 554 of the Code.\textsuperscript{57} The Court stated the following: "Thus, when Congress enacted section 554, there were well recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws."\textsuperscript{58}

The Supreme Court found additional support for its holding in Congress' "obvious" concern for the state of the environment,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{53} Id.
\item \textsuperscript{54} In re Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984). Prior to the 1978 passage of the Bankruptcy Code, any abandonment powers which the trustee had were created by judge-made law. Id. at 916. The Third Circuit examined this judge-made abandonment power and concluded that Congress intended to codify it in section 554 of the Code. Id. The Quanta court held that the pre-Code abandonment power was limited by state police powers protecting the public interest: "[W]here important state law or general equitable principles protect some public interest, they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their supersession by the abandonment power." Id. at 918. The court stated that since Congress intended to codify this law in section 554 of the Code, section 554 must be similarly limited. Id.
\item \textsuperscript{55} Midlantic, 474 U.S. at 500.
\item \textsuperscript{56} For a discussion of this argument, see supra note 54.
\item \textsuperscript{57} Midlantic, 474 U.S. at 500.
\item \textsuperscript{58} Id. at 501. The Midlantic Court also found support in 28 U.S.C. section 959(b), which it used as evidence that Congress did not intend for the Bankruptcy Code to pre-empt all state laws. Midlantic, 474 U.S. at 505. The absence of any Code provision which suggests that a trustee can abandon property in contravention of state laws further supports this position, held the Court. Id. at 502.
\end{enumerate}
\end{footnotesize}
as evidenced by its recent adoption and stiffening of environmental legislation such as CERCLA.\(^{59}\) In summary, the Court held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identifiable hazards."\(^{60}\)

In an aggressive dissent, Justice Rehnquist criticized the majority’s opinion as being unsupported by the law and contrary to the goals of the Code.\(^{61}\) The Court not only misread the pre-Code case law concerning the abandonment power, argued Justice Rehnquist, but also failed to support its holding that Congress intended to codify that pre-Code case law.\(^{62}\) Furthermore, by preventing the abandonment of burdensome property and requiring the trustee to expend assets of the estate to clean up contaminated property, the majority’s opinion was in direct conflict with the purposes of the Code.\(^{63}\)

59. *Id.* at 506. It is somewhat difficult to understand how the Court could argue that the 1980 passage of CERCLA evidenced an intent by Congress in 1978 to limit a trustee’s abandonment power under the Bankruptcy Code. Justice Rehnquist stated in his dissent in *Midlantic* that section 554 of the Code:

[M]akes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations. Indeed, as the Court notes, when Congress was so concerned it expressed itself clearly, specifically exempting some environmental injunctions from the automatic stay provisions of section 362 of the Code.

*Id.* at 509 (emphasis in original).

60. *Id.* at 507 (footnote omitted). In a footnote to this holding the Court stated that this exception to the abandonment power is a "narrow one," and that "[t]he abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Id.* at 509 n.9. The Court neglected to give any guidance, however, as to how to determine which laws are "reasonably designed to protect the public health or safety," and simply stating that the exception is a "narrow one" does not make it so. See *id.* at 516 (Rehnquist, J. dissenting).

61. *Midlantic*, 474 U.S. at 507 (Rehnquist, J. dissenting). At one point Justice Rehnquist criticized the Court’s use of a treatise on bankruptcy in support of its opinion: "[t]he reference to Collier is not part of the Code’s ‘legislative history in any meaningful sense of the term.’" *Id.* at 512 (quoting Board of Governors, FRS v. Dimension Financial Corp., 474 U.S. 361, 372 (1986)).

62. *Id.* at 510-12. Justice Rehnquist argued that in the pre-Code cases cited by the majority the abandonment power was limited because it was only a judge-made power, and in those cases abandonment would have been contrary to an Act of Congress. *Id.* at 511. Thus, the pre-code cases cited by the majority stand only for the proposition that as between a judge-made power and an act of Congress, the act of Congress must rule. *Id.* The majority’s restriction on abandonment, stated Justice Rehnquist, "rests on a misreading of three pre-code cases, the elevation of that misreading into a ‘well-recognized’ exception to the abandonment power, and the unsupported assertion that Congress must have meant to codify the exception." *Id.* at 507-08.

63. *Id.* at 514-15.
IV. THE FRAMEWORK FOR PERSONAL LIABILITY OF A BANKRUPTCY TRUSTEE

A. Bankruptcy Trustee Liability in General

Before the potential liability of a bankruptcy trustee since the Midlantic decision can be examined, a basic framework of liability must first be established. This section will examine bankruptcy trustee liability generally, and then will discuss bankruptcy trustee liability with respect to federal and state environmental laws and Chapters 7 and 11 of the Code.

The standard for liability of a bankruptcy trustee was established by the Supreme Court in the case of Mosser v. Darrow.\(^{64}\) The Mosser case subsequently gave rise to a split among the circuits as to the proper standard for bankruptcy trustee liability.\(^{65}\) The Tenth Circuit in Sherr v. Winkler\(^{66}\) refused to hold a bankruptcy trustee personally liable for negligent acts and interpreted Mosser as imposing personal liability only where the trustee "acts willfully and deliberately in violation of his fiduciary duties."\(^{67}\)

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64. 341 U.S. 267 (1951). In Mosser, the bankruptcy trustee was appointed to reorganize two bankrupt trusts which consisted of two holding companies holding the securities of twenty-seven corporations. Id. at 268. The trustee employed two people who had prior experience with the holding companies and who managed the two holding companies for him. Id. at 269. Further, the two employees were given permission by the trustee to trade in the securities of the corporations held by the trust. Id. The two employees, through trading both for and to themselves and the trusts, made a substantial profit for themselves. Id. Although the Mosser court stated that there was no indication that the trustee's actions were corrupt, it nonetheless held him personally liable for the amount of profits made by the two employees in their self-interested transactions. Id. at 275. The court stated, "[e]quity tolerates in bankruptcy trustees no interest adverse to the trust." Id. at 271.


66. 552 F.2d 1367 (10th Cir. 1977).

67. Id. at 1375. The Fourth and Sixth Circuits have followed the Tenth Circuit's reading of Mosser. See Yadkin Valley Bank & Trust Co. v. McGee, 819 F.2d 74 (4th Cir. 1987); Ford Motor Credit Co. v. Weaver, 680 F.2d 451 (6th Cir. 1982). In truth, the split among the circuits appears to be the result of a semantical distinction and a misreading of the Mosser case by the Sherr court. The Sherr court read Mosser as imposing personal liability for willful and deliberate violations of his duties, and official liability for acts of negligence. Sherr, 552 F.2d at 1375 (emphasis added). Trustees who were held to be liable in their "official capacity" were surcharged by the court. Id. According to Black's Law Dictionary, a "surcharge" is "[t]he imposition of personal liability on a fiduciary for willful or negligent misconduct . . .." BLACK'S LAW DICTIONARY 1441 (6th ed. 1990). Thus, the Tenth Circuit's distinction between "personal" and "official" liability is for the most part non-existent. Indeed, the Tenth Circuit's test for "official" liability for negligence is the same test other circuits use to impose
The Ninth Circuit in *In re Cochise College Park, Inc.*, 68 held, however, that "'[a]lthough a trustee is not liable in any manner for mistakes in judgement where discretion is allowed, he is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law." 69 Despite the split among the circuits, however, a bankruptcy trustee can, in essence, be personally liable for intentional and negligent violations of his duties under the law. 70

B. Trustee Liability Under Chapter 7 of the Bankruptcy Code

The potential for personal liability of a bankruptcy trustee in a case involving contaminated property of the estate can arise in a number of ways under Chapter 7. As previously discussed, a bankruptcy trustee will be liable for willful or negligent violations of his duties. 71 There is also the potential for liability under federal legislation such as CERCLA and under state environmental laws when the property of the estate is polluted with hazardous waste.

One way potential liability could arise would be where a Chapter 7 trustee was operating the debtor's business under section 721 of the Code 72 and at the same time generating toxic waste. Unless the trustee properly disposes of those toxic wastes

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68. 703 F.2d 1339 (9th Cir. 1983).
69. Id. at 1357 (citations omitted). The Cochise court stated that a trustee must "exercise that measure of care and diligence that an ordinarily prudent person under similar circumstances would exercise." Id. at 1357. The Second Circuit has adopted the Ninth Circuit's approach. *In re Gorski*, 766 F.2d 723 (2d Cir. 1985).
70. *In re Center Teleproductions, Inc.*, 112 Bankr. 567 (Bankr. S.D.N.Y. 1990) ("[w]here trustee negligently fails to discover his agent's negligence, negligently obtains a court order, or negligently or willfully carries out a court order he knew or should have known he wrongfully procured . . . personal liability will attach").
71. For a discussion of the liability of a bankruptcy trustee for willful or negligent violations of his duties, see supra notes 67 & 69 and accompanying text.
72. 11 U.S.C. § 721. Under this section of the Code the trustee, with permission of the court, may operate the debtor's business to the extent necessary
he could face liability under CERCLA section 107(a)(3)\textsuperscript{73} and any other applicable state laws.\textsuperscript{74} But since the Chapter 7 trustee cannot operate the debtor's business without approval of the court, the extent to which the trustee may be liable will depend on the extent to which the court authorizes the trustee to generate toxic waste.\textsuperscript{75}

Another potential avenue for the personal liability of a Chapter 7 bankruptcy trustee was created by the \textit{Midlantic} decision. Under \textit{Midlantic}, the trustee cannot abandon contaminated prop-

to liquidate the business. For a further discussion of a trustee's operation of a debtor's business, see \textit{supra} note 20 and accompanying text.

\textsuperscript{73} 42 U.S.C. § 9607(a)(3). Section 107(a)(3) imposes liability on the generators of toxic waste. \textit{Id.} Bankruptcy trustees will not be liable under sections 107(a)(1) and 107(a)(2), the "owner and operator" sections, because bankruptcy trustees are exempted from such liability under the CERCLA definition of "owner and operator." CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). Section 101(20)(A) states in part: "\{t\}he term 'owner or operator' means . . . (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy . . . to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand." \textit{Id.} Thus, in the case of bankruptcy, the trustee presumably is precluded from being an owner or operator under CERCLA.

In a much more limited sense, where the Chapter 7 trustee is running a transportation, storage or disposal site for hazardous waste, the trustee could be liable under CERCLA section 107(a)(4), which imposes liability on anyone who transports, stores or treats hazardous waste improperly. 42 U.S.C. § 9607(a)(4).

\textsuperscript{74} Under section 959(b) of the Judiciary Code, a federally appointed trustee must "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b). Thus, if the trustee does not comply with applicable state hazardous waste statutes, he would be in violation of his duties as a trustee and subject to personal liability. \textit{See Wisconsin v. Better-Brite Plating, Inc.}, 466 N.W.2d 239 (Wis. Ct. App. 1991).

\textsuperscript{75} It is doubtful that a court would hold a trustee personally liable for generating hazardous substances where the bankruptcy court authorized him to do so. \textit{Wisconsin v. Better-Brite Plating}, 466 N.W.2d 239. At the same time, a trustee generating waste without permission from the court would certainly seem to be subject to personal liability both under CERCLA and under the common law for willful or negligent violation of his duties.

Further, one could question the ability of a bankruptcy court to authorize a trustee to generate hazardous wastes. Such an event would seem to contradict the purposes of CERCLA. This is but one more example of the clash between CERCLA and the Bankruptcy Code. On one hand one can question whether a bankruptcy court should be able to authorize a trustee to generate hazardous waste, but on the other hand not allowing a court to do so would impair the functioning of the bankruptcy system. Further complicating matters is the operation of section 959(b) of the Judiciary Code, which requires the trustee to operate the debtor's business in compliance with applicable state law. 28 U.S.C. § 959(b). Thus to some extent the trustee can only generate hazardous wastes to the extent that he can do so under state law. \textit{See In re Better-Brite Plating, Inc.}, 105 Bankr. 912 (Bankr. E.D. Wis. 1989).
Property unless it is in compliance with state environmental laws. In a situation where the Chapter 7 estate has no available funds with which to clean up contaminated property, the estate will be prohibited from abandoning such property and the trustee may be held responsible for the cleanup of the hazardous waste. Because the cost of cleanup can be great, many companies expend a large part, or all, of their assets on cleanup prior to the case reaching Chapter 7; therefore, in many instances, the appointed trustee is left with little, or no, assets. Coupled with the Midlantic limitation on abandonment of burdensome property of the estate, this costliness creates a situation where a court may well impose personal liability on a bankruptcy trustee—that is, where the Chapter 7 estate has little or no unencumbered assets and is saddled with property contaminated with hazardous wastes which

76. Midlantic, 474 U.S. at 507.

77. Before a bankruptcy trustee will become personally liable, the Chapter 7 estate must have no available source for funds with which to effect a clean up of the contaminated property. This would mean that the estate must have no unencumbered assets and, further, no uncontaminated assets subject to a security interest. If there were uncontaminated secured assets, the trustee could potentially use them as a source of funds under Bankruptcy Code section 363(e) and thus could avoid personal liability. 11 U.S.C. § 363(e). Section 363 states as follows:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Id.

To use the secured assets, the trustee must be able to provide adequate protection for the secured party. Id. What constitutes “adequate protection” is to be determined by the court, but examples thereof are given in section 361. 11 U.S.C. § 361. However, to provide “adequate protection” to a secured party will most likely require that the trustee have some asset of value. Thus, in a Chapter 7 case where unencumbered assets are being consumed to cleanup contaminated property of the estate, chances are that when the trustee is forced to attempt to use secured assets as a source of funds for cleanup there will be no uncontaminated assets with which to provide adequate protection.


79. See In re Smith-Douglass, Inc., 856 F.2d 12 (4th Cir. 1988) (bankruptcy case converted from Chapter 11 to Chapter 7 with no unencumbered assets); In re 82 Milbar Blvd., Inc., 91 Bankr. 213, 214 (Bankr. E.D.N.Y. 1988) (“The debtor filed a voluntary Chapter 7 petition . . . having exhausted its liquid assets in litigation concerning pollution . . . of the debtor’s only substantial asset”). There is also the case where the only asset of the debtor is contaminated property, and even worse, where the only asset is contaminated property and the net value of the property clean is less than the cost of cleanup. Id.
the trustee cannot abandon.80

C. Trustee Liability Under Chapter 11 of the Bankruptcy Code

The situation in a Chapter 11 proceeding presents a different scenario than under Chapter 7. In a Chapter 11 proceeding the bankruptcy trustee81 does not need the approval of the court to operate the debtor's business.82 Thus, if the trustee in the operation of the debtor's business generates hazardous wastes, the trustee will be subject to potential liability under CERCLA section 107(a)(3).83 Unlike the Chapter 7 scenario, however, the Chapter 11 trustee will not be able to rely on the bankruptcy court's authorization to generate hazardous waste as a defense against personal liability.84 If the debtor's business entails the generation of hazardous waste, the trustee is likely to run afoul of the CERCLA generator liability provision. Therefore, unless a Chapter 11 trustee can properly dispose of hazardous waste, the trustee generates and transports hazardous waste at his or her own risk.

Unlike a Chapter 7 proceeding, Midlantic liability is much more limited under Chapter 11. If the estate is capable of remaining in Chapter 11, it necessarily has enough funds to remain operational.85 Thus the trustee will most likely have a source of

80. It must be stressed that the estate in this scenario does not have an alternative source of funds for cleanup. The different possible sources of funds are many: the estate may be able to impose liability on the shareholders of a bankrupt corporation by "piercing the corporate veil" under state law; the debtor, though liable under CERCLA, may be able to sue other parties liable under CERCLA for contribution under CERCLA section 113(f), 42 U.S.C. § 9613(f); the debtor may be able to draw on any uncontaminated, but secured, assets. 11 U.S.C. § 363(e).

81. In the normal Chapter 11 case, the debtor retains possession of its property and the management and control functions of that property. See 11 U.S.C. § 1107. A Chapter 11 trustee is appointed only on request of a "party in interest or the United States Trustee," and only for cause or if the appointment is "in the interests of creditors." 11 U.S.C. § 1104. Thus, in the normal course of a Chapter 11 proceeding, a trustee generally will not be appointed.

82. 11 U.S.C. § 1108. Section 1108 of the Bankruptcy Code states as follows: "[u]nless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business." Id.


84. Without the approval of the bankruptcy court, the Chapter 11 trustee could also be liable under section 959(b) of the Judiciary Code, for not operating the debtor's business in compliance with state laws. 28 U.S.C. § 959(b). The trustee presumably would also be liable under Mosser v. Darrow, 341 U.S. 267 (1951), for willful violation of his duties.

85. If a debtor did not have a source of funds with which to operate its
funds with which to effect the cleanup, or at least the maintenance of, the contaminated property. If the estate did not have sufficient funds to remain operational, the proceeding would in all likelihood be converted to a Chapter 7 liquidation under section 1112 of the Code.\textsuperscript{86} The conversion of a Chapter 11 proceeding to Chapter 7 "terminates the service of any trustee or examiner that is serving in the case before such conversion."\textsuperscript{87} The Chapter 11 trustee would be potentially liable due to the \textit{Midlantic} decision in a situation where there are not sufficient funds to maintain a Chapter 11 proceeding or to maintain a contaminated property,\textsuperscript{88} and where the Chapter 11 proceeding is not being converted or is taking a long time to convert.\textsuperscript{89} In such a situation, the responsibility of maintaining the contaminated property could fall upon the Chapter 11 trustee.\textsuperscript{90} Thus, in Chapter 11, the

\footnotesize{business, it is most likely that the case would be converted under section 1112 of the Bankruptcy Code. 11 U.S.C. § 1112. For a discussion of conversion under section 1112, see infra note 86.  

86. 11 U.S.C. § 1112. Section 1112 of the Code allows the debtor or a party in interest to request the conversion of the proceeding to Chapter 7. \textit{Id.} Section 1112(b) states that a party in interest or the United States Trustee may request conversion to Chapter 7 for cause, including, among other reasons: "(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; (2) inability to effectuate a plan; (3) unreasonable delay by the debtor that is prejudicial to creditors; . . . ." \textit{Id.} If the estate had a contaminated asset, the liability from which made it unlikely that a reorganization would be successful, rather than needlessly wasting the assets of the estate, or in order to protect secured assets, the creditors of the estate would most likely request a conversion.  

87. 11 U.S.C. § 348. Therefore, once a proceeding is converted to Chapter 7, any personal liability of the Chapter 11 trustee under \textit{Midlantic} would be cut off. \textit{Id.} Liability for negligent or willful acts committed before conversion, however, would still exist.  

88. For a discussion of the \textit{Midlantic} duty to maintain, see infra notes 122-29 and accompanying text.  

89. At least two parties would desire to see a bankruptcy proceeding in this scenario remain in Chapter 11, the debtor and the secured creditor of the contaminated property. As long as the proceeding remains in Chapter 11, the debtor and the secured creditor of the contaminated party are benefited because there is a larger source of funds from which to draw on in Chapter 11, thus making it more likely that the property will be cleaned up and their ultimate liability avoided.  

For the purposes of this Comment, the liability of a party with a secured interest in contaminated property will not be addressed, as the discussion of such liability is beyond the scope of this Comment. Suffice it to say that such liability is possible. See, \textit{e.g.}, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990); United States v. Maryland Bank & Trust Co., 632 F.Supp. 573 (D. Md. 1986).  

90. The costs of maintaining a contaminated property can be quite high. As in the Chapter 7 scenario, for the trustee to be personally liable the estate must have no alternative source of funds with which to maintain the property. Because of the nature of Chapter 11 and the powers of the Chapter 11 trustee, it
Midlantic duty to maintain the property is a trap which could impose personal liability on the unwary trustee. Such liability would be short-lived, however, because the trustee as a party in interest could always petition the court for a conversion of the proceeding to Chapter 7.\textsuperscript{91}

V. PERSONAL LIABILITY OF A BANKRUPTCY TRUSTEE

A. Liability Following the Midlantic Decision

In the case of \textit{In re 82 Milbar Boulevard, Inc.},\textsuperscript{92} the Bankruptcy Court for the Eastern District of New York recognized that as a result of the \textit{Midlantic} decision there was the potential for personal liability of a Chapter 7 trustee.\textsuperscript{93} The debtor in \textit{Milbar} was a corporation whose primary asset was a piece of real estate polluted with toxic wastes.\textsuperscript{94} The case came before the bankruptcy court on a motion by the debtor corporation's trustee to either dismiss the case pursuant to section 305 of the Code, or to authorize the abandonment of all of the debtor's assets.\textsuperscript{95} After refusing to dismiss the case under section 305, the \textit{Milbar} court reviewed the \textit{Midlantic} decision and pointed out a basic flaw in that decision:

The holding in \textit{Midlantic} implies a duty on the part of the trustee which is independent of the estate's ability to

\textsuperscript{91} For a discussion of the conversion of a bankruptcy proceeding from Chapter 11 to Chapter 7, see supra note 86 and accompanying text.

\textsuperscript{92} 91 Bankr. 213 (Bankr. E.D.N.Y. 1988).

\textsuperscript{93} \textit{Milbar}, 91 Bankr. at 219. Since the \textit{Midlantic} Court did not deal specifically with the potential for personal liability of a bankruptcy trustee, such liability could be imposed by implication from the \textit{Midlantic} holding. \textit{See In re Better-Brite Plating, Inc.}, 105 Bankr. 912 (Bankr. E.D. Wis. 1989); \textit{In re Microfab, Inc.}, 105 Bankr. 161 (Bankr. D. Mass. 1989); \textit{In re 82 Milbar Blvd., Inc.}, 91 Bankr. 213 (Bankr. E.D.N.Y. 1988).

\textsuperscript{94} \textit{Milbar}, 91 Bankr. at 214. In \textit{Milbar}, the debtor’s prior tenant had generated and disposed of toxic waste on the properties in question, thus contaminating them. \textit{Id.} Originally the debtor and its prior tenant had an agreement whereby the prior tenant had agreed to cleanup the site. \textit{Id.} However, the prior tenant filed for bankruptcy under Chapter 11 and never performed the agreement. \textit{Id.} The debtor then expended all its liquid assets in litigation concerning the site and subsequently filed for bankruptcy under Chapter 7. \textit{Id.}

\textsuperscript{95} \textit{Id.} Section 305(a) of the Code states in part: “The court, after notice and hearing, may dismiss a case under this title . . . at any time if - (1) the interests of creditors and the debtor would be better served by such dismissal.” 11 U.S.C. § 305(a). The Environmental Protection Agency (EPA) concurred in the trustee’s motion to dismiss the case. \textit{Milbar}, 91 Bankr. at 214. The debtor, however, did not. \textit{Id.}
fund his performance of that duty. This decision, evaluated in conjunction with (i) the trustee's capacity to "sue and be sued," and (ii) federal, state and local environmental regulations which do not limit the liability of a trustee in bankruptcy, threatens to undermine the integrity of the system heretofore developed for the administration of bankruptcy cases.96

The Milbar court was concerned that this potential personal liability would discourage people from becoming bankruptcy trustees.97 In what was apparently an attempt to provide some protection for a trustee, the court held that the existence of polluted assets in the bankruptcy estate which "present a reasonable risk of liability to the trustee pursuant to environmental legislation may constitute acceptable cause for resignation of a trustee."98 Taking an approach deemed novel by the court, possessory interest in the polluted property was transferred to the EPA while legal title to the property remained in the bankruptcy estate.99 Transference of the possessory interest accomplished two goals in the court's mind: "(i) the EPA will be in a position to carry out its mandate under . . . CERCLA and (ii) the successor trustee is distanced (but, it is arguable, not insulated entirely) from potential liability under applicable environmental legislation."100 The court stated that it would effect such a transfer by

96. Milbar, 91 Bankr. at 218.

97. Id. at 219. So concerned was the Milbar court that it would become difficult to find trustees that it held that the mere presence of a polluted asset was not sufficient cause to dismiss the case under section 707 of the Code. Id. The inability to find a person willing to act as trustee, however, would be cause for such dismissal. Id. Under section 707 of the Code, the court is empowered to dismiss a Chapter 7 proceeding only "for cause." 11 U.S.C. § 707. The Milbar court held that should the trustee in that case resign, the failure to find an interim or successor trustee within thirty days of the court's opinion would constitute "cause" for dismissal under section 707. Milbar, 91 Bankr. at 214.

98. Milbar, 91 Bankr. at 222.

99. Id. at 214. Title to the polluted property was ordered to be kept in the bankruptcy estate with the intention that after cleanup the property would be sold and the proceeds distributed to the creditors of the estate. Id. at 220. The Milbar court also felt that its order would not favor the EPA over other creditors of the estate, which would ensure that the cleaned up property would be "sold for the highest possible price." Id.

100. Id. (footnote omitted). Abandonment, reasoned the court, would not accomplish anything since title to the property would revert to the debtor, who did not have sufficient funds to cleanup the site. Id. In the end the Milbar court issued an order which did the following: (1) transferred possessory interest to the EPA subject to three conditions: first that the EPA accept such possessory interest; second that a successor trustee is found; and third that an agreement is reached between the EPA, the successor trustee and the debtor as to when and
issuing an order “pursuant to 11 U.S.C. § 725.”101 Although the court refused to dismiss the case outright, it treated the trustee’s motion to dismiss as a motion for resignation and allowed the trustee to resign.102

Similarly, in the case of In re Microfab, Inc.,103 the bankruptcy court interpreted the Midlantic decision as imposing the potential for personal liability on a trustee.104 In Microfab, the State of Massachusetts sought an injunction to force the Chapter 7 trustee to cleanup polluted property of the estate.105 The estate had insufficient funds, however, to cleanup the site.106 The Microfab court addressed two issues: (1) whether Midlantic required the trustee to cleanup the site; and (2) whether the trustee would have an administrative claim against the estate if required to spend his or her own money in cleaning up any of its contaminated assets.107

under what circumstances possessory interest in the property would re-vest in the estate; (2) allowed the present trustee to resign; and (3) provided for dismissal of the case under section 707 should a successor trustee not be found. Id. at 214.

101. Id. The court’s use of section 725 was tenuous at best, since section 725 states in part: “[A]fter the commencement of a case under this chapter . . . the trustee, after notice and hearing, shall dispose of any property in which an entity other than the estate has an interest . . . and that has not been disposed of under another section of this title.” 11 U.S.C. § 725 (emphasis added). The court acknowledged that its use of section 725 in this manner was “novel,” but opined that it was within Congress’ intent to give bankruptcy courts flexible powers with which to “meet special circumstances.” Milbar, 91 Bankr. at 220.

102. Milbar, 91 Bankr. at 214. The Milbar court refused to dismiss the case outright under section 305 of the Code. Id. The court did provide that the failure to find a successor trustee within 30 days of the court’s decision would be grounds for dismissal of the bankruptcy petition under section 707(a) of the Code. Id.

104. Id. at 168.
105. Id. at 162.
106. Id. at 164. Although the estate had $750,000 of unencumbered cash, the estimated cost of cleaning up the property was between $1.6 and $1.9 million. Id. The Microfab court saw this situation as a “stalemate,” since the State refused to cleanup the site and the estate had insufficient funds to do so. Id. Further, the court saw the State as complicating matters since the State also refused to say that should the trustee exhaust the $750,000 in cleaning up the property, it would provide the funds to finish the job. Id.

107. Microfab, 105 Bankr. at 165. The Microfab court framed the first issue as being whether section 959(b) of the Judiciary Code, 28 U.S.C. § 959(b), or the Midlantic decision required the trustee to cleanup the site. Microfab, 105 Bankr. at 165. The second issue the court saw was whether, if the trustee expended funds to cleanup the estate, he would be entitled to an administrative expense claim. Id.

Traditionally, courts have provided administrative expense claims for the EPA or states which cleanup the polluted property of a bankruptcy debtor. E.g., In re Better-Brite Plating, Inc., 105 Bankr. 912 (Bankr. E.D. Wis. 1989); In re Hemingway Transp., Inc., 73 Bankr. 494 (Bankr. D. Mass. 1987); In re Stevens,
The court held that the *Midlantic* decision precluded a trustee from abandoning polluted assets of the estate without first meeting certain federal and state environmental law conditions. In ruling that a trustee would have an administrative claim for amounts personally expended for the cleanup of contaminated assets, the court stated that "*Midlantic* does not clearly define those conditions, but the cases agree that if the Trustee cannot abandon property without satisfying certain conditions, *neither can he maintain or possess it without satisfying them*, and the cost of satisfying the conditions are administrative expenses of the estate."\(^{108}\)

The *Microfab* court, however, avoided imposing liability on the trustee by reading an exception into the *Midlantic* decision. The court stated that a trustee need not expend assets of the estate to cleanup a site where the estate "does not have sufficient resources to achieve appreciable results."\(^{109}\) In essence, the exception delineated by the court relieved the trustee of the responsibility of blindly expending all personal and estate assets in a futile cleanup effort.\(^{110}\)

Another line of cases, represented by *In re Smith-Douglass, Inc.*,\(^{111}\) has refused to impose the *Midlantic* duty to cleanup polluted assets before abandonment where the estate does not have

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\(^{68}\) Bankr. 774 (Bankr. D. Me. 1987). The clear implication of this is that the *Microfab* court was considering whether the trustee personally should have to cleanup the estate, since it was the trustee, under the second issue, who would receive the administrative expense claim. *Microfab*, 105 Bankr. at 165. Clearly, the court was not considering whether the estate should have to clean up the site, since it is foolish to consider whether the estate could have an administrative expense claim against itself.

\(^{108}\) *Microfab*, 105 Bankr. at 168 (emphasis added). This is in essence the quandary created by the *Midlantic* decision, a duty to cleanup with no means to do so. *See In re Paris Indus. Corp.*, 106 Bankr. 339, 342 (Bankr. D. Me. 1989) (referring to paradox that *Midlantic* requires cleanup but fails to identify viable funding source). In light of the issues framed, the court in *Microfab* clearly considered that the trustee was in a position to be personally liable for the *Midlantic* conditions—that is cleanup of the polluted property. *Microfab*, 105 Bankr. at 168-69.

\(^{109}\) *Microfab*, 105 Bankr. at 166. In essence, the court here was abrogating not only the trustee's liability under *Midlantic*, but the estate's liability as well. *Id.* at 169. "I cannot order the Trustee to spend the estate's funds without some assurance that by doing so, he would significantly improve the condition of the site." *Id.* But *see In re Peerless Plating Co.*, 70 Bankr. 943, 948-49 (Bankr. W.D. Mich. 1987) ("As the estate could not avoid the consequent liability by abandonment in this case, the Trustee had a duty to expend all unencumbered assets of the estate in remedying the situation, as required by *Midlantic*”). In keeping with the *Milbar* tradition, the exception which the *Microfab* court read into *Midlantic* is best described as “novel.”

\(^{110}\) *Microfab*, 105 Bankr. at 166.

\(^{111}\) 856 F.2d 12 (4th Cir. 1988).
any unencumbered assets. In *Smith-Douglass*, the Fourth Circuit approved the abandonment of polluted assets based on the fact that the estate had no unencumbered assets with which to effect a cleanup of the property. The financial condition of the debtor, the *Smith-Douglass* court held, is relevant to the *Midlantic* analysis.

Another way of dealing with the problem of a trustee’s potential for personal liability is to deny that the potential exists, as evidenced by the ongoing bankruptcy case of *In re Hemingway Transport, Inc.* Starting in 1987, there have been three separate hearings, and in all three subsequent opinions, the *Hemingway* court dealt with the subject of potential liability of a trustee by squarely ignoring it. In the *Hemingway* case, contaminated property was sold while the case was under Chapter 11, and the case was subsequently converted to Chapter 7. In the first *Hemingway* case, the trustee was personally sued by the purchaser as a potentially liable party under CERCLA for past and future cleanup costs. The *Hemingway* court ruled that while it was proper to bring suit against the trustee in his capacity as representative of the estate, the purchaser’s claim was against the estate.


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

114. *Id.* at 17. Another consideration for the *Smith-Douglass* court was that the polluted property did not pose a serious health risk: “We affirm the finding that unconditional abandonment was appropriate in light of the estate’s lack of unencumbered assets, coupled with the absence of serious public health risks posed by the conditions in this case.” *Id.* To the extent that *Smith-Douglass* did not deal with a situation in which there was a serious threat to the public health and safety, its application in these types of bankruptcy cases is limited.


117. *Hemingway I*, 73 Bankr. at 496. The *Hemingway I* court somewhat cryptically noted that the trustee was not involved in the sale of the property while the case was in Chapter 11, leading to the question of how the Court’s ruling would have been affected if the trustee had sold the property originally. *Id.* at 499; see *In re Sterling Steel Treating, Inc.*, 94 Bankr. 924 (Bankr. E.D. Mich. 1989).

118. *Hemingway I*, 73 Bankr. at 496. The Code, with certain exceptions and when certain conditions are met, allows for the conversion of a case under one chapter into a case under another chapter. 11 U.S.C. §§ 348, 706, 1112, 1208, 1307. Under Chapter 11 of the Code, a debtor in possession or a party in interest may request that the petition be converted into another chapter. 11 U.S.C. § 1112.

119. *Hemingway I*, 73 Bankr. at 496.
since a bankruptcy trustee never has actual ownership of estate property. In the two subsequent cases, the Hemingway court used the term “trustee” to refer to the bankruptcy estate, and treated any suit naming the trustee as a defendant as a suit against the estate, not a suit against the trustee personally. B. The Midlantic Duty to Maintain

Some courts have read the Midlantic decision to require, at the very least, that a trustee take certain measures to maintain the polluted property of an estate in order to protect the public health and safety.

In the case of In re Franklin Signal Corp., a Chapter 7 trustee sought to abandon drums containing hazardous waste. In its interpretation of the Midlantic decision, the Franklin Signal court held that a trustee was precluded from abandoning polluted property unless the trustee took steps to protect the public health and safety. The Franklin Signal court asserted that the Midlantic

120. Id. at 499. The Hemingway I court based its ruling in large part on the pre-Midlantic decision of In re T.P. Long Chem., Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985). To the extent that T.P. Long was decided before Midlantic, its use with regards to the potential liability of a trustee is suspect. In fact, the T.P. Long court saw the issue in that case as whether “the trustee's authority to abandon burdensome property of the estate may be used in any way to avoid the estate's liability under CERCLA.” T.P. Long, 45 Bankr. at 284. Since there is no doubt that the Midlantic decision changed the law with regards to the trustee's ability to abandon, the Long decision's application to environmental liability cases is necessarily limited.

121. Hemingway III, 108 Bankr. 378; Hemingway II, 105 Bankr. 171; Hemingway I, 73 Bankr. 494. In Hemingway III, the court stated that in order to win its CERCLA cause of action against the trustee, Juniper must have shown that the trustee owned or operated the property under the CERCLA section 17(a)(2). Hemingway III, 108 Bankr. at 381. Shortly thereafter, the court held that “the Trustee's liability to Juniper turns on whether Hemingway owned or operated the property at the time of disposal of 'hazardous substances.'” Id. The Hemingway III court thus dealt with the problem of personal trustee liability by refusing to distinguish between the term “trustee” and the term “bankruptcy estate.” Id.; see also Hemingway II, 105 Bankr. 171; Hemingway I, 73 Bankr. 494. While this is a technically correct way of treating suits against the trustee of a bankruptcy estate, in light of the Midlantic decision and the recognition by other courts of a potential for personal liability of a trustee, simply ignoring the problem will not make it go away.

122. 65 Bankr. 268 (Bankr. D. Minn. 1986).

123. Id. In Franklin Signal, the debtor had generated fourteen drums of chemical waste, at least one of which was considered “hazardous” under Wisconsin environmental laws. Id. at 269. The bankruptcy estate had $10,000 in unencumbered cash, but was saddled with at least $17,000 worth of administrative expenses. Id. at 270. The estimated cost of properly disposing of the drums, which were reported to be in fair to poor condition, was $20,000. Id.

124. Id. at 271. The court in Franklin Signal noted the Supreme Court's emphasis in Midlantic on the extremely hazardous situation created by the
decision "imposes a duty on the trustee to take at least minimal steps to protect the public until abandonment is authorized."  

While the Franklin Signal decision lessened the trustee's potential liability, it did not solve the dilemma faced by the trustee of an estate with no unencumbered assets, who has no other option but to use his personal assets to take the "minimal steps" required to protect the public from any asset in the bankruptcy estate contaminated by hazardous waste.  

The Milbar court also read the Midlantic decision as requiring, at the very least, that a trustee take steps to protect the public.  

The court found, however, that the Midlantic decision did not provide a trustee with the means necessary for complying with applicable environmental legislation, "or at a minimum, take precautions to safeguard the public absent funds in the estate to do so."  

While reading Midlantic as imposing a duty on a trustee only to maintain polluted property lessens the potential for personal liability of that trustee, the amount of money required to maintain a waste site is often beyond a trustee's means.

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trustee's abandonment of the polluted property. Id.; see Midlantic, 474 U.S. at 499 n.3. The Franklin Signal court stated that "this total disregard for potential hazards is the concern the majority [in Midlantic] seemed to be addressing." Franklin Signal, 65 Bankr. at 271.  

125. Franklin Signal, 65 Bankr. at 273; see In re 82 Milbar Blvd., Inc., 91 Bankr. 213, 218 (Bankr. E.D.N.Y. 1988) (abandonment order permitted only when public health, safety, and welfare have been provided for); In re Oklahoma Refining Co., 63 Bankr. 562, 565 (Bankr. W.D. Okla. 1985) (trustee could be required to comply with state environmental laws' strict reading of Midlantic). But see In re Microfab, Inc., 105 Bankr. 161, 169 (Bankr. D. Mass. 1989) ("[T]he trustee cannot be ordered to comply with a cleanup obligation that he does not have the financial resources to satisfy").  

126. See In re Franklin Signal Corp., 65 Bankr. 268 (Bankr. D. Minn. 1986); In re Oklahoma Refining Co., 63 Bankr. 562 (Bankr. W.D. Okla. 1986). In Franklin Signal, the court held that the trustee had complied with the "minimum conditions for abandonment" under Midlantic by hiring an environmental specialist to determine what was in the drums and how much it would cost to cleanup. Franklin Signal, 65 Bankr. at 273. Adding to these "minimal steps" the fact that the drums were not a serious threat to the public health and safety, the Franklin Signal court found that abandonment of the drums was allowable. Id. at 273.  

127. Milbar, 91 Bankr. at 218.  

128. Id. Although the primary emphasis of the Milbar decision was on the potential liability of the trustee for the total costs of cleanup, the court recognized in this instance that a minimum duty to protect the public is due under Midlantic. Id.  

129. In Midlantic, the trustee prior to abandonment personally borrowed and spent $20,000 on the maintenance of the polluted property. Cosetti & Friedman, supra note 51, at 70. In In re Stevens, the Maine Department of Environmental Protection, in a letter to the Chapter 7 trustee, said that twenty-nine drums of toxic waste were improperly stored and had to be placed in a storage
C. Trustee Liability Under State Environmental Law

Trustee liability under state environmental laws may differ from state to state, depending on the nature of the law involved. But since *Midlantic* now prevents trustees from abandoning contaminated property of an estate, bankruptcy trustees must now be aware of potential state liability as well as potential CERCLA liability.

The plight of the Better-Brite Plating, Inc., which involved both the Bankruptcy Court and the state courts in Wisconsin on both the trial and appellate levels, is indicative of the trouble a bankruptcy trustee can face under state environmental statutes. Better-Brite had been operating chrome and zinc plating shops in DePere, Wisconsin, since 1963. The chrome plating shop had been in violation of Wisconsin environmental law since 1978, and the zinc plating shop was discharging untreated waste water into the city sewer system. In September 1985, Better-Brite—which had been losing money for at least two years, was the subject of a replevin action by its bank, and owed priority state and federal tax liabilities amounting to $269,756—filed for bankruptcy under Chapter 11. An examiner was subsequently appointed to manage Better-Brite Plating, Inc., 105 Bankr. 912 (Bankr. E.D. Wis. 1989); Wisconsin v. Better-Brite Plating, Inc., 466 N.W.2d 239 (Wis. Ct. App. 1991).

Further, Better-Brite Plating had previously operated a chrome plating shop on leased property in Kaukauna, Wisconsin. The lease for this property had run out some time before September, 1985. The chrome plating shop used chromic acid in its operation, while the zinc plating shop used a zinc/cyanide bath solution in its operation. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276 (Cir. Ct. Brown County June 1, 1990).

Better-Brite filed for bankruptcy on September 5, 1985. John Zenners was familiar with the debtor’s plating business, and was appointed by the bankruptcy court to manage Better-Brite as an examiner with the powers of a trustee. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276 (Cir. Ct. Brown County June 1, 1990). In early September, 1985, Better-Brite shut down its chrome plating shop in DePere, and moved it to Kaukauna, Wisconsin, which is not in the same county as DePere. Because this shop was in a different county, its operation during the
appointed. While the case was in Chapter 11, the debtor, under the management of the examiner, continued to operate its zinc and chrome plating businesses, generating additional post-bankruptcy petition toxic wastes. On August 27, 1986, the Chapter 11 proceeding was converted to a Chapter 7 liquidation and a new trustee was appointed. During numerous bankruptcy court proceedings the Chapter 7 estate continued to operate the zinc shop and to generate and accumulate additional toxic waste. Eventually the trustee petitioned the bankruptcy court

Chapter 11 proceeding was not called into question in the case concerning the shops operated in DePere. The examiner operated the debtor's zinc plating shop between September 16, 1985, and July 14, 1986. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276, slip op. at 3 (Cir. Ct. Brown County June 1, 1990). Between May, 1986 and July, 1986, the zinc shop generated and accumulated "approximately twenty full or partially filled fifty-five gallon barrels of sludge waste . . . " Id. at 4. The wastes generated were toxic wastes under Wisconsin statutes. Although the Wisconsin Department of Natural Resources (DNR) had filed a suit in state court in 1980 seeking forfeitures and cease and desist orders against the DePere chrome shop, that suit was still pending at the time of the filing of the Chapter 11 proceeding. In re Better-Brite Plating, Inc., 105 Bankr. at 915. Shortly after the filing of the Chapter 11 proceeding, the DNR instituted another state court suit concerning the zinc shop. Id. Cease and desist orders in that suit were issued in May, 1986. The Chapter 11 examiner continued to operate and generate hazardous wastes after these orders, and contempt orders were issued in July, 1986. Id.

The trustee’s position was not good: “The trustee had only a few hundred dollars, with all other assets subject to valid encumbrances. His options were an abandonment, or a sale with the agreement of the bank, but the real estate at the chrome and zinc shops was unsalable. " Id. The trustee was David J. Matyas. Id.

The bankruptcy court stated the following: “It was the trustee’s understanding that the business was being operated in compliance with restrictions placed on the debtor concerning the discharge of hazardous waste and that it was producing sufficient revenue to pay the expenses of such operation.” Id. According to the Wisconsin state trial court, the Chapter 7 trustee Matyas authorized Zenner to operate the zinc shop and generate and accumulate toxic waste until December 18, 1986, when a sale of the debtor’s business occurred. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276, slip op. at 5 (Cir. Ct. Brown County June 1, 1990). Eventually a sale of the debtor’s estate was agreed on. Id. at 6. According to the terms of the sale, a corporation set up by Zenner would purchase the personal property of the estate with funding from the bank which held mortgages or security interests on all estate property. In re Better-Brite Plating, Inc., Ch. 7 Case No. 85-03325, slip op. at 20 (E.D. Wis. Sept. 22, 1989). The polluted
for the authority to abandon the contaminated property of the estate.\textsuperscript{138} After the bankruptcy court allowed the trustee to abandon the contaminated property of the estate,\textsuperscript{139} an action was brought in the Wisconsin state court to impose personal liability on the bankruptcy trustee under state environmental laws.\textsuperscript{140} The trial court subsequently found in Wisconsin v. Better-Brite Plating Inc.\textsuperscript{141} that both Zenner, as the Chapter 11 examiner, and Matyas as the Chapter 7 bankruptcy trustee, violated Wisconsin law and accordingly granted summary judgment for the state on the issue of their personal liability for the waste generated and stored during the bankruptcy period.\textsuperscript{142}

real estate was not included in this sale. \textit{id.} The chrome and zinc shop property was then leased to another corporation set up by Zenner for a nominal sum. \textit{id.} The basic idea was that Zenner would use the two newly formed corporations to effect a cleanup of the contaminated real estate. \textit{id.}

\textsuperscript{138} In re Better-Brite Plating, Inc., 105 Bankr. at 915. The trustee filed the notice of his intent to abandon the contaminated property on March 19, 1987. In re Better-Brite Plating, Inc., Ch. 7 Case No. 85-03325, slip op. at 21 (E.D. Wis. Sept. 22, 1989). Various hearings and objections by the parties involved (including the DNR and the Environmental Protection Agency) consumed another two and a half years, and it was not until September, 1989 that the bankruptcy court approved abandonment of the contaminated property. In re Better-Brite Plating, Inc., 105 Bankr. at 919. Zenner’s attempts at cleanup had been largely unsuccessful to that point. \textit{id.} at 915. Further, Zenner and the corporation he set up to run the zinc shop apparently discharged hazardous liquids from the zinc shop property sometime prior to July 26, 1988. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276, slip op. at 8 (Cir. Ct. Brown County June 1, 1990). No one notified the DNR of the discharge, which was ”to the lands and/or waters of the State,” until the spill was discovered by DNR employees during an inspection of the zinc shop property. \textit{id.} Although the property was leased to Zenner’s corporation, the spill occurred before the abandonment of the contaminated property; therefore, the zinc shop property was still the property of the bankruptcy estate.

\textsuperscript{139} In re Better-Brite Plating, Inc., 105 Bankr. at 919. The bankruptcy court allowed abandonment of the contaminated property, but ordered that such abandonment was subject to super-priority liens held by the state of Wisconsin and the EPA. \textit{id.} Such super-priority liens were “superior to any other lien or interest,” entitling the EPA and the state of Wisconsin to the proceeds of any future sale of the property in question. \textit{id.}

\textsuperscript{140} Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276 (Cir. Ct. Brown County June 1, 1990). For a discussion of the Wisconsin statutes involved, see infra note 141.

\textsuperscript{141} No. 88-CV-2276 (Cir. Ct. Brown County June 1, 1990).

\textsuperscript{142} Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276, slip op. at 14 (Cir. Ct. Brown County June 1, 1990). There seems to be little doubt that both Zenner and Matyas violated Wisconsin environmental statutes in their handling of the hazardous wastes on the estate property. Under Wisconsin law, hazardous waste was generated at the site. Wis. Stat. Ann. §§ 144.43(2), 144.62(2)(b) (West 1989 & Supp. 1990). Further, section 144.63 states in part:

\textit{Any person generating solid waste shall determine if the solid waste is a hazardous waste. Any person generating hazardous waste shall:}

(1) Be responsible for testing programs needed to determine whether
In a recent decision by the Wisconsin Court of Appeals, the trial court's grant of summary judgment against the bankruptcy trustee was reversed and remanded on the grounds that questions of fact still existed with regards to the trustee's personal liability.143 The Wisconsin Appeals Court, adopting the Tenth Cir-

any material generated by them is a hazardous waste for purposes of ss. 144.60 to 144.74.

(2) Keep records that accurately identify:
(a) The quantities of hazardous waste generated;
(b) The hazardous constituents of hazardous wastes which are significant because of quantity or potential harmfulness to human health or the environment; and
(c) The disposition of hazardous wastes.

(3) Label any container used for the storage, transport or disposal of hazardous waste to accurately identify its contents and associated hazards.

(9) Arrange that all wastes generated by them are transported, treated, stored or disposed of at facilities holding a license issued under ss. 144.60 to 144.74 or issued under the resource conservation and recovery act.

*Id.* § 144.63.

Apparently neither Zenner nor Matyas had complied with any of the provisions of this statute, including the period after the December 1986 sale of most of the debtor's property. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276 (Cir. Ct. Brown County June 1, 1990). Zenner and Matyas apparently also violated section 144.64(2)(am), which prohibits the operation of unlicensed hazardous waste facilities, although generators of hazardous waste who store the waste at the generation site for less than 90 days are exempted from this section. Wis. Stat. Ann. § 144.64(2)(am). Clearly, the waste generated by Zenner in 1986 was stored at the zinc shop site much longer than 90 days, as was the waste generated during the Chapter 7 proceeding in 1986 and beyond. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276 (Cir. Ct. Brown County June 1, 1990). Further, Wisconsin statutes require that persons who possess or control hazardous wastes notify the DNR of any discharge of those wastes, and "take the actions necessary to restore the environment ... and minimize the harmful effects of the discharge ...." Wis. Stat. Ann. §§ 144.76(2)(a), (3). As previously noted, no one notified the DNR of the 1988 spill of hazardous wastes, nor took any action to clean it up. Wisconsin v. Better-Brite Plating, Inc., No. 88-CV-2276, slip op. at 8 (Cir. Ct. Brown County June 1, 1990).

In its order the trial court granted summary judgment for Wisconsin on the liability of the following parties: Better-Brite, Matyas, Zenner, and the two corporations set up by Zenner through the December 1986 sale of most of the debtor's assets (the corporations were "The Zinc Shop, Inc.", and "The Platers, Inc."). *Id.* at 14. One of the trial court's findings of fact was that Zenner and Matyas, in their capacity as bankruptcy trustees "may be held personally liable for willful, intentional or negligent violations of the State's laws and regulations during their operation of Better-Brite's zinc plating facility. *Id.* at 12. As support for this assertion the trial court cited *Mosser v. Darrow* and *In re Cochise College Park, Inc.* , adopting the Ninth Circuit test for bankruptcy trustee liability. For a discussion of the personal liability of a bankruptcy trustee generally, see *supra* notes 64-70 and accompanying text.

circuit's test from *Sherr*,¹⁴⁴ which precludes liability for negligence,¹⁴⁵ ruled that the bankruptcy trustee could be liable under the applicable Wisconsin statutes only if it was determined that the trustee "knowingly and intentionally failed" to get a state license to operate a hazardous waste facility.¹⁴⁶ Since the trial court failed to make any determination on the intent of the bankruptcy trustee in this respect, the court remanded the case for such a determination.¹⁴⁷

The clear import of the Wisconsin Appeals Court's decision in *Wisconsin v. Better-Brite Plating, Inc.*¹⁴⁸ is that both a Chapter 11

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¹⁴⁴. See supra notes 66-67 and accompanying text.

¹⁴⁵. The Wisconsin Court of Appeals adopted the Tenth Circuit test because "*Sherr* has been cited with approval in dictum in the Seventh Circuit." *Wisconsin v. Better-Brite Plating*, 466 N.W.2d at 246 (citing *In re Chicago Pacific Corp.*, 773 F.2d 909, 915 (7th Cir. 1985)). However the appeals court in referring to the *Sherr* decision stated that "*Sherr* probably errs when it says a bankruptcy trustee is never personally liable for acts of negligence toward the estate or third persons." *Id.* at 247.

¹⁴⁶. *Id.*

¹⁴⁷. *Id.* The appeals court rejected a number of arguments by Zenner which had to do with the nature of the hazardous waste generated and the relationship of the zinc shop property to Wisconsin environmental law. *Id.* at 244-45. It further rejected Zenner's claim that the bankruptcy court in its September, 1989 decision decided the issue of trustee liability and thus the issue of his liability was subject to res judicata. *Id.* at 245. Finally, the appeals court's decision dealt with the personal liability of a bankruptcy trustee. *Id.* at 247. Noting the equitable nature of bankruptcy and the greater protection afforded bankruptcy trustees by the courts, the appeals court opined that the state must prove intentional conduct on the part of the trustee. *Id.* at 246-47. "If we add to the equitable equation the potential devastating impact personal liability would have upon the pool of persons willing to serve as trustees in toxic waste cases, fairness demands that the government prove deliberate conduct as an element of personal liability." *Id.* at 247. See *In re 82 Milbar Blvd.*, Inc., 91 Bankr. 213 (Bankr. E.D.N.Y. 1988)(bankruptcy court concerned that potential personal liability would discourage people from becoming trustees). The appeals court further ruled that section 959(b) of Title 28 "has no bearing" on the personal liability of Matyas or Zenner. *Wisconsin v. Better-Brite Plating, Inc.*, 466 N.W.2d at 247 n.3. Opined the appeals court: "Neither the statute itself nor the cases dealing with it suggest a Congressional intent to impose personal liability." *Id.* at 247. The court of appeals also had a problem with the interplay between section 959(b) and the strict liability imposed by the relevant Wisconsin environmental statutes:

[T]here is an inherent inconsistency between the state's concession that negligence must be proven as an element of liability and its interpretation of sec. 959(b). If that statute is meant to impose personal liability for violation of state law, then it follows that the strict liability statute involved here . . . is enforceable without proof of either negligence or intent.

*Id.*

Thus, the court's decision came down to a single issue, whether Zenner and Matyas "knowingly or intentionally failed to obtain" a license to operate a hazardous waste facility. *Id.*

and a Chapter 7 trustee will be personally liable if it can be shown that one "knowingly and intentionally failed to obtain a license" to generate toxic waste.\textsuperscript{149} Since the Appeals Court did not seem to think that section 959(b) of the Judiciary Code, which requires federal trustees to manage the property under their control in compliance with applicable state law,\textsuperscript{150} was necessary to impose personal liability on a bankruptcy trustee, such personal liability would potentially be imposed based solely on violations of state environmental law.\textsuperscript{151} To the extent a state can bypass federal law concerning personal liability of a bankruptcy trustee, such trustees could find themselves liable under state environmental statutes for actions that would be valid under federal law. This presents additional problems for bankruptcy trustees in hazardous waste cases, who are not afforded the protection provided by a developed body of federal law. As is shown by the facts of the \textit{Wisconsin v. Better-Brite Plating, Inc.} case much state law liability could be avoided if the bankruptcy trustee was able to abandon contaminated property of the estate.\textsuperscript{152}

\section*{VI. CONCLUSION}

The effect of the \textit{Midlantic} decision on both the environmental and bankruptcy laws has been extensive. It has created, as a practical matter, numerous areas of conflict between these two areas of the law and has provided few, if any, viable solutions. Courts across the nation are struggling to resolve many of these issues, but as yet many remain unanswered.

The \textit{Midlantic} decision has created the potential for a bank-

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} For a discussion of section 959(b) of the Judiciary Code, see supra note 51 and accompanying text.

\textsuperscript{151} There is of course a question of whether a state could impose personal liability on a bankruptcy trustee without section 959(b), since such an imposition would have potential supremacy clause problems. In \textit{Wisconsin v. Better-Brite Plating}, it seems obvious that both Zenner and Matyas exceeded their authority as bankruptcy trustees in generating and accumulating hazardous waste in violation of Wisconsin law. Thus, they violated section 959(b) of the Judiciary Code.

\textsuperscript{152} In a case where the bankruptcy trustee has some funds available, it is certainly not fair to allow a toxic polluter to dump his contaminated property on the state and federal government for cleanup. But where the bankruptcy estate is incapable of cleaning up the polluted property, it makes little sense to waste court time, generate legal fees, and impose personal liability on bankruptcy trustees just for the sake of the well meant, but misplaced, policy that toxic polluters should not be able to abandon contaminated property in bankruptcy. Eventually, the state and/or federal governments will have to cleanup the property anyway, so it makes sense to skip the futile legal machinations and abandon the property to the proper authorities.
ruptcy trustee to be held personally liable based solely on his status as a trustee.\textsuperscript{153} This potential for liability affects Chapter 7 trustees the most due to the fact that Chapter 7 debtors generally do not have sufficient funds to cleanup contaminated property.\textsuperscript{154} Moreover, the costs involved in cleaning up a waste site, coupled with the already weakened financial state of a Chapter 11 debtor, combine to increase the chances that a Chapter 11 debtor with a polluted asset will eventually have to resort to Chapter 7.\textsuperscript{155} The simple fact that a bankruptcy trustee could be personally liable for the costs of a hazardous waste cleanup just because of his or her status as a trustee is disturbing and ludicrous. To the extent that such potential personal liability will discourage people from becoming bankruptcy trustees, the \textit{Midlantic} decision has potentially dealt a serious blow to the operation of the bankruptcy system.\textsuperscript{156}

The inability to abandon contaminated property of the estate under \textit{Midlantic} has caused other problems as well. In the case of \textit{In re Smith-Douglass},\textsuperscript{157} the Fourth Circuit held that the cost of cleaning up a waste site was an administrative expense under section 507(a)(1) of the Code.\textsuperscript{158} Because administrative expenses have priority over all but secured creditors, any unencumbered assets of the estate would go first to the cleanup of the hazardous waste site and then to the unsecured creditors.\textsuperscript{159} In this scenario, the unsecured creditors would end up paying for the cleanup, a public cost which, if not borne by the debtor or other responsi-

\begin{itemize}
\item \textsuperscript{154} For a discussion of how potential liability affects a Chapter 7 trustee, see supra notes 71-80.
\item \textsuperscript{156} \textit{In re} Milbar Blvd., Inc., 91 Bankr. 213 (Bankr. E.D.N.Y. 1988) (court expresses concern that trustee liability would deter qualified individuals from becoming trustees.) At this time, the full affects of the \textit{Midlantic} decision on the bankruptcy trustee system are difficult to approximate. With courts approaching the problem in so many different fashions, the exact impact of \textit{Midlantic} on the trustee system will not become evident until a superior appeals court deals directly with the issue.
\item \textsuperscript{157} 856 F.2d 12 (4th Cir. 1988).
\item \textsuperscript{158} \textit{Id.} at 17; \textit{In re} Wall Tube & Metal Products Co., 831 F.2d 118, 123 (6th Cir. 1987) ("We think it proper that the response costs incurred by Tennessee and recoverable under CERCLA be deemed an administrative expense"). Under the Code administrative expenses take priority over everything except the claims of secured creditors. 11 U.S.C. §§ 507, 726.
\item \textsuperscript{159} 11 U.S.C. §§ 507, 726.
\end{itemize}
ble party, should be borne by the state or federal governments.\(^\text{160}\)

Imposing cleanup costs on the unsecured creditors would amount to penalizing them for conducting business with the debtor. While the federal and state governments are not responsible for the contamination of the debtor's property, the contamination itself is a public problem and thus the cost of cleanup should be borne by the public, not private businesses.\(^\text{161}\)

In a Chapter 11 setting, the inability to abandon polluted property forces the trustee or debtor in possession to expend estate assets to cleanup the site. Since there would be fewer available funds in the bankruptcy estate, the amount of debt which the estate would be able to pay before discharge\(^\text{162}\) would be smaller. This would limit the amount secured creditors would eventually receive and would result in the imposition of at least part of the cost of cleanup on secured as well as unsecured creditors.\(^\text{163}\)

In a larger sense, there are important public policy concerns involved in a *Midlantic* type situation. The inability of the trustee to abandon a toxic waste site will force the trustee, who in most instances does not have the expertise necessary to effect the

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161. See Comment, *Toxic Wastes Under the Bankruptcy Code*, supra note 17, at 365. Inasmuch as the public will be ultimately hurt by the dumping of toxic waste, the clean up of that waste is a public cost. *CERCLA* itself was enacted to protect the public health, safety and welfare. *See Dedham Water Co. v. Cumber-land Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("*CERCLA* is essentially a remedial statute designed by Congress to protect and preserve public health and the environment"). It is not equitable to hold secured and unsecured creditors, whose only crime was to do business with a toxic polluter, liable for the public cost of cleanup.

The converse of this argument is that those secured and unsecured creditors who did transact business with a toxic polluter derived a benefit from doing such business, and thus should be at least partially responsible for the cleanup costs.

162. Under Chapter 11, a plan of reorganization is formulated, in which it is determined how much of each kind of debt must be repaid by the debtor before the remainder of such debts are discharged. 11 U.S.C. § 1123. The Chapter 11 plan, however, must be approved by a certain percentage of the creditors of the estate. *Id.* § 1126. Thus the creditors do have some control over the disposition of the estate.

163. Cosetti & Friedman, supra note 51, at 70. "The unstated implications of *Midlantic* and *Quanta Resources* are that creditors both secured and unsecured can be made to pay for these cleanup expenses. This constitutes a fundamental change in the priority schedule of the bankruptcy law." *Id.*
cleanup of the site, to solve complex environmental and scientific questions.\textsuperscript{164} Certainly, it makes more sense to remove the contaminated property from the bankruptcy estate so that state and federal environmental agencies, who do have the necessary expertise, can cleanup the site.\textsuperscript{165} Allowing the state and federal agencies to have a "super-priority" lien on the contaminated property would give such agencies the opportunity to recover some clean up costs before other creditors.\textsuperscript{166}

Presently, courts are dealing with the problem of trustee personal liability in various ways.\textsuperscript{167} Some courts have chosen to ignore trustee liability completely,\textsuperscript{168} while other courts have used creative interpretations of the both the Code and federal and state environmental laws to resolve this issue.\textsuperscript{169} Whatever may be said about the cause of the problem, a permanent solution must come from either Congress or the Supreme Court, since these are the only bodies with the power to overrule or amend the \textit{Midlantic} decision.

One solution would be to amend the Code to limit the personal liability of a bankruptcy trustee. If trustees were protected against personal liability under the Code, the application of the \textit{Midlantic} decision—prevent the abandonment of contaminated property that fails to comply with state environmental statutes—would be made that much easier. Another solution would be to create a Code section which not only establishes definite standards for the abandonment of polluted properties, but also provides who will pay for cleanup if the property is not abandoned.\textsuperscript{170} By delineating who is responsible for cleanup costs any liability of a trustee would be foreseeable, and thus

\textsuperscript{164} Cosetti & Friedman, \textit{supra} note 51, at 85.
\textsuperscript{165} See, e.g. \textit{In re} 82 Milbar Blvd., Inc., 91 Bankr. 213, 214 (Bankr. E.D.N.Y. 1988).
\textsuperscript{170} See Comment, \textit{Toxic Wastes Under the Bankruptcy Code}, \textit{supra} note 17, at 372-74.
could be accommodated. Congress could also solve this problem
by amending the Code to prevent the acceptance of a reorganiza-
tion plan under Chapter 11 or the discharge of debts under Chap-
ter 7 until a way of cleaning up the contaminated property is
found. 171

The best solution would be for Congress to bring into har-
mony the conflicting policy concerns of the Code, protection
of the public health, and protection of public funds. 172 Clearly, it
makes sense to put the protection of public health and safety
above the purposes of the Code, but when there is a conflict be-
tween protection of public funds and the Code, the Code should
prevail. 173

Until a solution is found, the problem of the personal liability
of a bankruptcy trustee for environmental cleanup costs, along
with the rest of the problems spawned by the Supreme Court’s
decision in Midlantic, will continue to generate needless litigation
for the courts.

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171. See 11 U.S.C. §§ 727, 1126. However, this solution could not only
greatly prolong bankruptcy proceedings, but also would place the public burden
of clean up on the creditors of the estate. See supra note 161 and accompanying
text.

172. In one sense, the Midlantic decision was as much about money as it was
about protection of the public health. “Justice Rehnquist recognized the harsh
reality of the majority decision—that the decision was based not just on protect-
ing the public health and safety, but also on protecting the public fisc.” Note,
Hazardous Wastes and the Bankrupt Firm, supra note 3, at 709.

173. In this sense, all that is happening is that money is being shuffled from
one place to another. The public should bear the costs of cleaning up hazardous
waste sites since they will be most benefitted, but to the extent that private busi-
nesses are forced to do so they will pass these costs onto the public anyway.
Substantial amounts of money, in court and legal fees if nothing else, could be
saved by having state or federal agencies cleanup these contaminated properties
in the first place.