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TRUST(EE) AND ABANDONMENT ISSUES: A PROPOSAL FOR NEW ACTION REGARDING ABANDONMENT OF ENVIRONMENTALLY CONTAMINATED PROPERTY

ABSTRACT

Section 554(a) of the Bankruptcy Code permits trustee abandonment of property that is “burdensome to the estate or that is of inconsequential value and benefit to the estate.” Environmentally contaminated property is certainly burdensome to the estate due to the exorbitant costs associated with Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) cleanups, and paying for these cleanups out of the estate may render the property worth less than its initial value. Thus, the question becomes: When is it proper for a chapter 7 trustee to abandon environmentally contaminated property?

The one Supreme Court case on the matter, Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot. did not give a clear answer to the question. The Court held that abandonment was proper if the contamination did not pose an immediate and identifiable threat to public health. Because this guidance is ambiguous, courts are at a loss for how to rule when these cases are presented, implementing their own rules for determining when abandonment is proper. As a result, the situation is a mess; however, there are a few possible solutions.

This Comment explores four potential solutions to this problem: 1) a bankruptcy trustee can assert the “innocent landowner defense” under CERCLA, maintaining title while not paying for the cleanup; 2) an amendment to CERCLA or the Bankruptcy Code that gives federal and state governments a “superlien” for recovery of proceeds used in environmental cleanups; 3) an amendment to § 554 of the Bankruptcy Code that establishes an “abandonment test” for determining when abandonment of environmentally contaminated property is proper; and 4) a potential balancing test courts could use to determine when abandonment of environmentally contaminated property is proper.

INTRODUCTION

Imagine a situation in which you are appointed trustee in a chapter 7 liquidation of a business. Early on, you learn that the property is not in compliance with state environmental laws. Bringing the property into compliance may be incredibly expensive, possibly resulting in a minimal payment to creditors and yourself. Conversely, you can attempt to abandon the property under § 554(a), revesting the deed to the property and the cleanup liability to the debtor.¹ Because the rules regarding abandonment are different in different circuits², it is necessary to explore other potential options.

In bankruptcy, abandonment is the process of a trustee removing property from a chapter 7 estate, effectively returning title to the bankrupt party.³ Unfortunately, statutes and courts alike have been vague regarding trustee abandonment of environmentally contaminated property for nearly three decades. While some cases have involved minor environmental contamination, others have involved cleanups under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) that cost hundreds of millions of dollars. Although the property will eventually be cleaned, the primary issue is determining who will pay for these cleanups.

Because there is no hardline rule governing trustee abandonment of environmentally contaminated property, this Comment proposes four solutions: (1) applying the “innocent landowner defense” found in CERCLA⁴ to chapter 7 trustees in bankruptcy, which no trustee has ever asserted; (2) amending the Bankruptcy Code or CERCLA to provide the government with a “superlien” for cleanup costs;⁵ (3) amending the Bankruptcy Code to provide a test similar to the means test⁶ that would aid in discerning when abandonment of environmentally contaminated property is proper; and (4) creating a

¹ 11 U.S.C. § 554(a) (2012).

² See *Nurad, Inc. v. William E. Hooper & Sons, Co.*, 966 F.2d 837, 847 (4th Cir. 1992); *In re FCX, Inc.*, 96 B.R. 49, 54–55 (Bankr. E.D.N.C. 1989); Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 368 (2004); see also *W. Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 691 (9th Cir. 2004); *Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 875–77 (9th Cir. 2001). But see *United States v. 150 Acres of Land*, 204 F.3d 698, 707 (6th Cir. 2000); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 357–58 (2d Cir. 1997); *Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750, 761 (5th Cir. 1994).

³ See 11 U.S.C. § 554.

⁴ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(b)(3) (2012).

⁵ *Id.*

⁶ 11 U.S.C. § 707(b)(2)(A).

balancing test for courts to use rather than the arbitrary and vague standard laid out by the Supreme Court in 1986.⁷

I. BACKGROUND

To argue for alternative solutions to abandonment based upon environmental grounds, it is pertinent to understand several facets of the law. This background section discusses the following: CERCLA, § 554 of the Bankruptcy Code, *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁸ subsequent inconsistent interpretations of *Midlantic*, the innocent landowner defense as an affirmative defense to CERCLA, and the secured creditors exemption under CERCLA.

A. CERCLA

CERCLA provides a mechanism for cleaning up environmentally contaminated property. The Act sets environmental laws and gives the EPA the authority to issue regulations that “protect public health and the environment by facilitating the cleanup of environmental contamination and imposing costs on the parties responsible for the pollution.”⁹ Congress wanted to establish laws that determined liability and created a system that provided funding for cleanup.¹⁰ CERCLA creates a complicated scheme¹¹ that ultimately “promotes the ‘private allocation of responsibility’ for costs incurred in responding to threatened or actual releases, spills, or discharges of hazardous substances¹² at existing or abandoned sites.”¹³ Once an agency determines that a site has been

⁷ See *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 507 n.9 (1986).

⁸ *Id.*

⁹ *CMC Heartland Partners v. Union Pac. R.R. (In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.)*, 3 F.3d 200, 201 (7th Cir. 1993); see Hillinger & Hillinger, *supra* note 2, at 369.

¹⁰ See OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROT. AGENCY, OSWER DIRECTIVE NO. 9833.0-1A, GUIDANCE ON CERCLA SECTION 106(A) UNILATERAL ADMINISTRATIVE ORDERS FOR REMEDIAL DESIGNS AND REMEDIAL ACTIONS (1990) [hereinafter EPA OSWER GUIDANCE] (“An objective of Superfund enforcement is to place ultimate responsibility for the costs of cleaning up Superfund sites on those who contributed to the problem.”).

¹¹ See Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923, 924 (1990); Jill Thompson Losch, Note, *Bankruptcy v. Environmental Obligations: Clash of the Titans*, 52 LA. L. REV. 137, 138 (1991).

¹² See 42 U.S.C. § 9601(14) (1988), which references hazardous and toxic substances in the Clean Water Act (33 U.S.C. §§ 1321(b)(2)(A), 1317(a)), Solid Waste Disposal Act (42 U.S.C. § 6921), Clean Air Act (42 U.S.C. § 7412), Toxic Substances Control Act (15 U.S.C. § 2606), and CERCLA (42 U.S.C. § 9602).

¹³ See Losch, Note, *supra* note 11, at 138–39 (citation omitted) (quoting Lewis M. Barr, *supra* note 11, at 1001).

contaminated, CERCLA “lay[s] liability at the feet of a broadly defined ‘potentially responsible party.’”¹⁴ Additionally, the Act creates a governmental response by authorizing “federal and state governments to clean up hazardous waste sites and to undertake emergency responses to releases of hazardous substances.”¹⁵ Although it is important for the polluter to pay, CERCLA’s underlying purpose is to, protect the environment and public health by cleaning up contamination.¹⁶

CERCLA developed a system to pay for cleanup for when either the responsible parties were unable to pay or an emergency situation arose that called immediate government action.¹⁷ Commonly known as the “Superfund,” CERCLA created a trust “comprising revenues from taxes . . . to be used by the federal and state governments to pay for site cleanups where the responsible parties do not.”¹⁸ If the government pays for the cleanup of hazardous materials, then it can legally sue the responsible parties for reimbursement costs.¹⁹ This method of indemnification occurs frequently even though the massive costs of cleanup may result in a lack of full compensation.²⁰

Responsible parties’ ability to indemnify the government becomes understandably more limited when bankruptcy is involved. A party may be unable to bear the brunt of such high cleanup costs.²¹ A CERCLA claim that is brought by the EPA or another governmental agency for reimbursement of cleanup costs incurred prepetition is dischargeable.²² Similarly, a cleanup order that has been converted into an obligation to pay money is also

¹⁴ *Id.* at 139.

¹⁵ 1 COLLIER REAL ESTATE TRANSACTIONS AND THE BANKRUPTCY CODE ¶ 6.07[1] (2015) (explaining the basic purpose of CERCLA); see Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012).

¹⁶ *J.V. Peters & Co. v. Adm’r, EPA*, 767 F.2d 263, 264 (6th Cir. 1985) (“[CERCLA]’s primary purpose is ‘the prompt cleanup of hazardous waste sites’ . . .” (quoting *Walls v. Waste Res. Corp.*, 761 F.2d 311, 318 (6th Cir. 1985))); *Superfund: CERCLA Overview*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/superfund-cercla-overview> (last visited Jan. 31, 2016) (stating that CERCLA authorizes the EPA to respond “to releases . . . of hazardous substances that may endanger public health or the environment”).

¹⁷ See OFFICE OF SITE REMEDIATION ENF’T, U.S. ENVTL. PROT. AGENCY, 2273G, OVERVIEW OF ABILITY TO PAY GUIDANCE AND MODELS (1995) [hereinafter EPA OVERVIEW OF ABILITY TO PAY].

¹⁸ 1 COLLIER REAL ESTATE, *supra* note 15.

¹⁹ *Id.*

²⁰ See EPA OVERVIEW OF ABILITY TO PAY, *supra* note 17.

²¹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-658, ENVIRONMENTAL LIABILITIES: EPA SHOULD DO MORE TO ENSURE THAT LIABLE PARTIES MEET THEIR CLEANUP OBLIGATIONS (2005) (stating that smaller Superfund cleanups averaged around \$12 million per cleanup in 2005).

²² 1 COLLIER REAL ESTATE, *supra* note 15, at ¶ 6.07[4].

dischargeable.²³ For example, in *Ohio v. Kovacs*, the Court held that an affirmative cleanup obligation that gives rise to a right to payment is “alternative to requiring” the debtor to undertake corrective action.²⁴ The costs associated with cleaning up the property are essentially the same as any other obligation to pay, and, as a result, are dischargeable.

Whether cleanup orders themselves are dischargeable is less clear. In *In re Torwico Electronics, Inc.*, the Third Circuit reiterated the Supreme Court’s proposition that the parties in possession of the contaminated property are the parties who “‘must comply with the environmental laws of the State’ and cannot ‘refuse to remove’ hazardous wastes.”²⁵ Furthermore, the cleanup-demanding injunction is a nondischargeable claim, and a party cannot shirk its responsibility once the government has determined liability.²⁶ The court also held that Torwico, as the producer of the hazardous waste, had an ongoing responsibility for cleaning up the hazardous waste even though it no longer possessed the property.²⁷ As the responsible party, the polluter has a duty to comply.

The Second Circuit has also found that a cleanup order does not constitute a claim.²⁸ In *In re Chateaugay Corp.*, the court held that any order to ameliorate current pollution is “not a dischargeable claim.”²⁹ Additionally, if the government bears that cost, the funds used count as administrative claims and are granted priority.³⁰ The court found “that expenses to remove the threat posed by such [hazardous] substances are necessary to preserve the estate,” and are thus awarded administrative priority in creditor payment.³¹

²³ See *Ohio v. Kovacs*, 469 U.S. 274, 283 (1985) (stating that an affirmative cleanup obligation does give rise to a right of payment, but when that right to payment is a prepetition debt, it is dischargeable).

²⁴ *Id.* at 281 (“The State was seeking no more than a money judgment as an alternative to requiring [the debtor] personally to perform the obligations imposed by the injunction.”).

²⁵ *Torwico Elecs., Inc. v. N.J., Dep’t of Env’tl. Prot. (In re Torwico Elecs., Inc.)*, 8 F.3d 146, 149 (3d Cir. 1993) (quoting *Kovacs*, 469 U.S. at 284–85).

²⁶ See *id.* at 149–50 (stating that an administrative order demanding clean up does not constitute a claim and is nondischargeable).

²⁷ *Id.* at 151.

²⁸ See *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1008 (2d Cir. 1991).

²⁹ *Id.*

³⁰ See 11 U.S.C. § 507(a)(2) (2012).

³¹ *In re Chateaugay Corp.*, 944 F.2d at 1010.

B. *Bankruptcy, Abandonment, and Midlantic*

There is an inherent tension between bankruptcy law and environmental law.³² The Bankruptcy Code provides two objectives: “1) to provide the debtor with a fresh start financially, and 2) to provide the creditor with a mechanism for the orderly distribution of the debtor’s estate.”³³ Environmental laws exist to protect public health and the environment.³⁴ Courts have had a difficult time determining how to enforce environmental laws while still providing the debtor with a fresh start.³⁵

1. *Section 554: Abandonment in the Bankruptcy Code*

One way that clean up liability is passed back and forth is through trustee abandonment.³⁶ Under § 554 of the Bankruptcy Code, a trustee is permitted to abandon nonexempt property of the estate if it “is burdensome to the estate or that is of inconsequential value and benefit to the estate.”³⁷ Environmentally contaminated property is obviously a burden to the estate to pay for cleanup,³⁸ and it could be considered of inconsequential value because of the minimal property value that immediate liquidation would yield.

Abandonment is a crucial issue because it determines who will pay for cleanup of the contaminated property: the government or the trustee and creditors. “[I]f the trustee is permitted to abandon property before complying with clean-up obligations, the burden of clean-up falls upon the government unless joint and several liability enables pursuit of a solvent [Potentially

³² See Hillinger & Hillinger, *supra* note 2, at 333.

³³ Losch, Note, *supra* note 11, at 142 (citing H.R. Rep. No. 595, 95th Cong., 2d Sess. 174, reprinted in 1978 U.S. Code Cong. & Admin. News, 5963, 6135).

³⁴ See Hillinger & Hillinger, *supra* note 2, at 334 (citing CMC Heartland Partners v. Union Pac. R.R. (*In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*), 3 F.3d 200, 201 (7th Cir. 1993)).

³⁵ Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 FLA. L. REV. 153, 155 (1992) (“Either the United States Supreme Court or the United States Congress must resolve definitively the issue of the proper status of environmental claims in bankruptcy proceedings.”); Hillinger & Hillinger, *supra* note 2, at 333 (citing Debra L. Baker, *Bankruptcy: The Last Environmental Loophole?*, 34 S. TEX. L. REV. 379, 404 (1993) (arguing Congress must set forth correct application and enforcement of environmental laws); David W. Marston, Jr., *In re Reading Co.: Cutting off Environmental Claims that Never Existed During Bankruptcy*, 43 VILL. L. REV. 637, 639 n.9 (1998) (“The United States Supreme Court has not ruled on the precise issue of when a CERCLA claim arises for bankruptcy purposes . . .”).

³⁶ See Losch, Note, *supra* note 11, at 145.

³⁷ 11 U.S.C. § 554(a) (2012); e.g., Mary J. Koks & Tim Million, *Environmental Issues in Bankruptcy*, 40 TEX. ENVTL. L.J. 43, 58–59 (2009–10).

³⁸ See *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 284 (Bankr. N.D. Ohio 1985) (finding that hazardous waste was undisputedly burdensome to the estate); Koks & Million, *supra* note 37, at 58.

Responsible Party].”³⁹ Creditors who fund environmentally irresponsible activity may constitute Potentially Responsible Parties under CERCLA.⁴⁰ If a trustee is not permitted to abandon the property, then the estate will have to cover the expenses of cleanup. “[D]enial of abandonment requires the trustee to expend estate funds on the maintenance of essentially worthless property.”⁴¹ If the trustee is required to expend these estate funds, this ultimately results in a lower payout to both the trustee and the creditors. The governing case on trustee abandonment is the *Midlantic* decision.⁴²

2. *Midlantic Decision*

Midlantic is the only Supreme Court case regarding trustee abandonment of environmentally contaminated property.⁴³ Quanta Resources Corporation stored a large amount of waste oil contaminated with a toxic carcinogen on its property in New Jersey.⁴⁴ Quanta owed Midlantic National Bank, a secured creditor, approximately \$600,000.⁴⁵ The New Jersey Department of Environmental Protection (“NJDEP”) discovered that Quanta had violated a state environmental statute by storing the large quantity of carcinogenic oil on its property, and Quanta and NJDEP began negotiating the site’s cleanup.⁴⁶ Soon after, Quanta filed for chapter 11 reorganization.⁴⁷

“NJDEP issued a [post petition] administrative order requiring Quanta to clean up the site.”⁴⁸ Quanta failed to comply with the administrative order, its financial state continued to deteriorate, and the reorganization was converted to a chapter 7 liquidation proceeding.⁴⁹ The court appointed a trustee who then moved to abandon the facility’s real property because “the estimated cost of disposing the waste oil plainly rendered the property a net burden to the estate.”⁵⁰ The bankruptcy court approved the abandonment “over NJDEP’s

³⁹ Losch, Note, *supra* note 11, at 145 (demonstrating that liability returns to an insolvent debtor who is likely unable to pay cleanup costs, resulting in the government paying unless a solvent Potentially Responsible Party can be identified).

⁴⁰ See 42 U.S.C. § 9607(a) (2012).

⁴¹ Losch, Note, *supra* note 11, at 145.

⁴² 474 U.S. 494 (1986); see Hillinger & Hillinger, *supra* note 2, at 361.

⁴³ 474 U.S. 494; see Hillinger & Hillinger, *supra* note 2, at 361.

⁴⁴ *Midlantic Nat’l Bank*, 474 U.S. at 496–97.

⁴⁵ *Id.* at 497.

⁴⁶ *Id.*

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

objection that the estate had sufficient funds to protect the public from the dangers posed by the hazardous waste.”⁵¹ NJDEP was unhappy with the outcome and appealed the decision because it would force the state government to fund the cleanup.

The Supreme Court granted certiorari. Looking to legislative history for both the Bankruptcy Code and environmental laws, the Court stated that Congress would have clearly expressed its desire “to grant the trustee an extraordinary exemption from nonbankruptcy law,” rather than allowing one to be inferred.⁵² It follows that the Court determined “that Congress did not intend for § 554(a) to pre-empt all state and local laws.”⁵³ 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 identified hazards.”⁵⁴ As a result, the trustee was not permitted to abandon the property because of the state environmental law violations.⁵⁵

Justice Rehnquist’s dissent took a definitively opposite approach to determining whether the trustee can abandon contaminate property. Justice Rehnquist stated, “Congress’ [*sic*] failure to so qualify § 554 indicates that it intended the relevant inquiry at an abandonment hearing to be limited to whether the property is burdensome and of inconsequential value to the estate.”⁵⁶ Finding that the legislative history showed that Congress did not “intend[] to limit the trustee’s authority to abandon the burdensome property,”⁵⁷ Justice Rehnquist also agreed with the bankruptcy court that “[t]he City and State are in a better position in every respect than either the Trustee or debtor’s creditors to do what needs to be done to protect the public against the dangers posed by” contaminated property.⁵⁸ Governments tend to hold more funds, potentially resulting in a quicker, safer cleanup.

However, Justice Rehnquist’s dissent criticizes the Court for failing to appreciate that “interest in these cases lies not just in protecting public health

⁵¹ *Id.* at 498–99.

⁵² *Id.* at 501 (“[T]he intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.” (quoting *Swarts v. Hammer*, 194 U.S. 441, 444 (1904))).

⁵³ *Id.* at 506.

⁵⁴ *Id.* at 507.

⁵⁵ *See id.*

⁵⁶ *Id.* at 513 (Rehnquist, J., dissenting).

⁵⁷ *Id.* at 510.

⁵⁸ *Id.* at 515.

and safety but also in protecting the public fisc.”⁵⁹ Abandonment would ultimately result in the government footing the bill. As a conservative Justice, Justice Rehnquist was interested in limiting the burden placed on taxpayers and government resources. Other courts have listed the dissent’s factors in their reasons for determining whether abandonment is proper.

Following *Midlantic*, courts seem to be at a loss for determining when abandonment should be considered proper.⁶⁰ It seems as if each court has its own rules for what constitutes proper conditions for abandoning environmentally contaminated property.⁶¹

C. *The Innocent Landowner Defense*

“The 1986 amendments to CERCLA added a new defense for innocent landowners,” who had no knowledge or control over property contamination.⁶² Section 101(35) provides liability protection to landowners who “acquire property without knowing of any contamination at the site and without reason to know of any contamination at the site.”⁶³ The provision transfers landowners’ liability by not holding them responsible for cleaning up the site.⁶⁴ Congress’s goal was “to protect purchasers that make ‘all appropriate inquiry’ into environmental conditions during the transaction to purchase the subject real property,”⁶⁵ as well as “those who acquire property by inheritance or bequest.”⁶⁶

⁵⁹ *Id.* at 516. Justice Rehnquist “lead a conservative revolution on the Supreme Court during 19 years as chief justice of the United States.” Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, N.Y. TIMES, Sept. 5, 2005, http://www.nytimes.com/2005/09/05/politics/politicsspecial1/william-h-rehnquist-architect-of-conservative-court-dies-at-80.html?_r=0.

⁶⁰ See *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118 (6th Cir. 1987); *In re Stevens*, 68 B.R. 774 (D. Me. 1987). *But see Borden, Inc. v. Wells-Fargo Bus. Credit (In re Smith-Douglass, Inc.)*, 856 F.2d 12 (4th Cir. 1988); *In re Franklin Signal Corp.*, 65 B.R. 268 (Bankr. D. Minn. 1986). See generally Hillinger & Hillinger, *supra* note 2, at 361 (calling the *Midlantic* holding “elastic” because of multiple resulting interpretations).

⁶¹ See Hillinger & Hillinger, *supra* note 2, at 363–71 (containing a non-exhaustive yet thorough list of cases concerning trustee abandonment).

⁶² ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 885 (Vicki Been et al. eds., 6th ed. 2011).

⁶³ See H.R. REP. NO. 99-962, at 186–87 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 2835, 3279–80.

⁶⁴ 42 U.S.C. § 9601(39)(D)(ii)(II)(bb)(BB) (2012).

⁶⁵ Rosemary J. Beless, *Superfund’s “Innocent Landowner” Defense: Guilty Until Proven Innocent*, 17 J. LAND RESOURCES & ENVTL. L. 247, 252 (1997) (citing H.R. REP. NO. 99-962, at 3–5 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 2835, 3276–80).

⁶⁶ Sudhir Lay Burggaard, *Landowner Defenses to CERCLA Liability*, A.B.A. YOUNG L. DIVISION 1 (2012), <http://www.mplaw.com/files/Publication/ad96f94c-8eba-45d5-ab08-09afedc96605/Presentation/>

To assert the innocent landowner defense, the landowner must show six factors:⁶⁷

- 1) The landowner acquired property after all hazardous substances were disposed of at the facility[;]
- 2) On or before the acquisition date, the landowner conducted all appropriate inquiries, as described below, into the previous ownership and uses of the facility consistent with good commercial or customary standards and practices;
- 3) The landowner did not know, and had no reason to know, of the hazardous substance contamination at the time of purchase;
- 4) The landowner exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances;
- 5) The landowner complied with all continuing obligations after acquiring the property, as described below; and
- 6) The landowner took adequate precautions, meaning it took affirmative acts, against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.⁶⁸

The innocent landowner defense matters because it determines whether the party in possession pays for the cleanup of the property. The defense “authorizes the government and innocent private parties to recover all response costs” from the responsible contaminating parties.⁶⁹ If a trustee were able to pass liability back to the debtor, the estate would no longer be liable for cleanup costs of the hazardous contamination but would maintain title to the property.

D. The Secured Creditor Exemption Under CERCLA

CERCLA includes an exemption from liability for “innocent” secured creditors. The Act excludes a “person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to

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⁶⁷ *Id.* at 1–2.

⁶⁸ *Id.* (citing 42 U.S.C. §§ 9601(35), 9607(b)(3)).

⁶⁹ *Containerport Grp., Inc. v. Am. Fin. Grp., Inc.*, 128 F. Supp. 2d 470, 474 (S.D. Ohio 2001) (“CERCLA [allows for] private parties who have incurred response costs in connection with the clean-up of a hazardous waste site [to] recover all, or some, of their costs.”).

protect his security interest” from the definition of a potentially liable “owner or operator.”⁷⁰ Primary concerns involving bankruptcy and this exemption include foreclosure and CERCLA liability as a secured creditor.⁷¹ The secured creditor exemption

suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs. The difficulty arises, of course, in determining how far a secured creditor may go in protecting its financial interests before it can be said to have acted as an owner or operator within the meaning of the statute.⁷²

Congress amended CERCLA in 1996 to clarify the provision outlining lender liability. Congress added subparagraph (F) to CERCLA § 101(20), which defined the term “participate in management.”⁷³ The new provision excluded “merely having the capacity to influence, or the unexercised right to control, vessel or facility operations,” requiring “actually participating in the management or operational affairs of a vessel or facility” in order to lose one’s exemption.⁷⁴ This addition providing for creditors who foreclose during a bankruptcy proceeding.

II. ANALYSIS

This Section discusses four potential solutions to the current trustee abandonment system. The first subsection explores the innocent landowner defense and its potential relation to trustee abandonment. The next two subsections discuss potential amendments to the Bankruptcy Code, with the first adding a superlien provision, and the second developing an “abandonment test” to be used in environmental contamination cases. The final subsection creates a potential balancing test the Court could implement using factors from other abandonment cases.

⁷⁰ 42 U.S.C. § 9601(20)(A).

⁷¹ See OFFICE OF ENF’T & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, CERCLA LENDER LIABILITY EXEMPTION: UPDATED QUESTIONS AND ANSWERS 2, 4 (2007).

⁷² *United States v. Mirabile*, [1985] 15 *Envtl. L. Rep. (Envtl. Law Inst.)* 20,994, at 20,995 (E.D. Pa. Sept. 4, 1985) (discussing what constitutes operator liability under CERCLA).

⁷³ 1 COLLIER REAL ESTATE, *supra* note 15, at ¶ 6.07[3].

⁷⁴ *Id.* at ¶ 6.07[1] (citing 42 U.S.C. § 101(2)(F)(I), (II)).

A. *The Innocent Landowner Defense*

1. *Introduction*

As previously discussed, CERCLA imposes joint and several liability upon land holders, both the initial polluters and subsequent possessors.⁷⁵ There is a very limited number of affirmative defenses a party can raise to avoid this liability. One such defense is the innocent landowner defense.

The basic concept behind the innocent landowner defense is that a party who is not responsible for environmental contamination should not bear the brunt of cleanup costs.⁷⁶ If a defendant is not the actor (or ommitter) who caused the contamination and resulting damage, then the defendant can avoid liability under CERCLA. CERCLA states “[t]here shall be no liability . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by an act or omission of a third party other than an employee or agent of the defendant.”⁷⁷

While the innocent landowner defense may seem straightforward, CERCLA lays out two factors that the defendant must prove by a preponderance of the evidence.⁷⁸ First, the defendant must show that he or she “exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances.”⁷⁹ Second, the defendant is required to show that he or she “took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.”⁸⁰

The EPA addressed the innocent landowner defense in a 1989 guidance document.⁸¹ The document lays out four threshold questions for determining whether the innocent landowner defense even applies to the situation:

⁷⁵ See John R. Jacus & Dean C. Miller, *Coming Full CERCLA: An Update on Superfund Developments*, 7 ENVTL. LIABILITY 1 (1999).

⁷⁶ See 42 U.S.C. § 9607(b)(3).

⁷⁷ *Id.*

⁷⁸ See *id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, *De Minimis* Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34,235 (June 6, 1989).

- 1) Did the Landowner acquire the property without knowledge or reason to know of the disposal of hazardous substances?
.....
- 2) Did Governmental landowners acquire the property involuntarily or through eminent domain proceedings?
.....
- 3) Did the Landowner acquire the property by inheritance or bequest without knowledge?
.....
- 4) Was the property contaminated by third parties outside the chain of title?⁸²

While a party raising the defense need not answer all four questions, courts look to these questions to determine if a party can meet the qualifying criteria necessary to raise the defense.

The actual application of the innocent landowner defense is fairly rare.⁸³ In only a few cases has a court, “found that a landowner met those innocent owner requirements.”⁸⁴ It is difficult to shirk liability, but when courts allow it, they generally permit the innocent owner to seek full cost recovery rather than a right of contribution.⁸⁵

2. *The Trustee as an Innocent Landowner*

In the event that a trustee wishes to abandon environmentally contaminated property, a court could look to either CERCLA or the Bankruptcy Code to determine whether the trustee is a responsible polluter who should bear the brunt of cleanup costs. Trustee possession and maintenance of property is seemingly analogous to the innocent landowner who takes possession of previously contaminated (or soon to be contaminated) real property.

Courts have gone so far as to compare government acquisition of land to the inheritance of contaminated property, applying the innocent landowner defense to the acting agency.⁸⁶ In *Petersen Sand & Gravel*, the Lake County

⁸² *Id.*

⁸³ See Randy J. Sutton, Annotation, *Innocent Owner Status Under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, 12 A.L.R. Fed. 2d 161 (2006).

⁸⁴ *Id.*

⁸⁵ See *id.*

⁸⁶ See *City of Emeryville v. Elementis Pigments, Inc.*, 52 Env't Rep. Cas. (BNA) 1648 (N.D. Cal. 2001); *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346 (N.D. Ill. 1992). But see *City of Toledo v. Beazer Materials & Servs., Inc.*, 923 F. Supp. 1013 (N.D. Ohio 1996) (holding that the city could not assert

Forest Preserve District (“Forest Preserve”) condemned Petersen Sand & Gravel’s property so that it could be used as a recreational lake.⁸⁷ “While working on the site, a Forest Preserve bulldozer struck a buried barrel” of hazardous waste, resulting in a release onto the property.⁸⁸ As a result, the EPA performed a remedial investigation of the site and sought recovery under CERCLA.⁸⁹ The United States sued the Petersen Sand & Gravel, who then sued Forest Preserve for recovery resulting from the CERCLA action.⁹⁰ Forest Preserve raised the innocent landowner defense, stating “that it had no direct or indirect contractual relationship with any third party who caused a release”⁹¹ The court found that CERCLA requires absence of knowledge only when “the defendant is a government entity that acquired [the property] through involuntary transfer.”⁹²

This process is analogous to a chapter 7 trustee taking control of contaminated property. When a chapter 7 case is filed or converted from a chapter 11, all of the debtor’s nonexempt property becomes its own entity as an estate.⁹³ A chapter 7 trustee in bankruptcy is an official appointed by the U.S. Trustee (or bankruptcy court in Alabama and North Carolina) whose duty is to administer the estate and liquidate the debtor’s assets so that creditors can be repaid.⁹⁴ The trustee’s acquisition of the estate in a chapter 7 conversion is similar to the Forest Preserve’s acquisition of Petersen Sand & Gravel’s property in the case described above because the acquisition took place through involuntary transfer by a government entity.⁹⁵

Additionally, the process of acquisition and liquidation under chapter 7 bankruptcy and foreclosure is similar. A trustee is like a secured lender who takes control of contaminated property. If that lender was not aware of the contamination upon acquisition, then the lender should not be liable under

itself as an innocent owner because it had not adhered to the proper eminent domain process in purchasing the property).

⁸⁷ 806 F. Supp. 1346, 1348 (N.D. Ill. 1992).

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *Id.* (citing 42 U.S.C. § 9607(b)(3) (1988)).

⁹² *Id.* at 1357 (citing 42 U.S.C. § 9601(35)(A)).

⁹³ *See Chapter 7—Bankruptcy Basics*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> (last visited Feb. 4, 2016).

⁹⁴ *Id.*

⁹⁵ *Petersen Sand & Gravel, Inc.*, 806 F. Supp. at 1357 (citing 42 U.S.C. § 9601(35)(A)).

CERCLA.⁹⁶ Similarly, a chapter 7 trustee takes control of managing contaminated property without any prior participation in the management of the property.⁹⁷ This ability to shirk liability through the innocent landowner defense should apply to the estate as a result.

Courts have commonly held that inheritance of contaminated property allows parties to raise the innocent landowner defense.⁹⁸ In *United States v. 150 Acres of Land*, the Bohaty family inherited land that had been used in a farm-equipment repair business.⁹⁹ In 1987, a “local fire department noticed numerous fifty-five gallon drums on the property and notified the Ohio Environmental Protection Agency (“OEPA”).”¹⁰⁰ The OEPA notified the federal EPA, who took soil samples and determined that the substances found inside the drums had discharged into the property’s soil.¹⁰¹ The Bohaty family was unaware of the drums’ contents’ release, much less their existence on the property.¹⁰² The court found that it could legitimately review the inherited interests under the innocent landowner defense because the interests were acquired after disposal.¹⁰³

A chapter 7 trustee’s acquisition of property is similar to an inheriting party in several ways. Just like an inheriting party, the trustee has no determination over whether he or she will take control of a contaminated parcel.¹⁰⁴ This meets the requirement of innocent landowners who have inherited contaminated property. For the defense to apply, these landowners must have not contributed to the disposal or release of pollutants onto the property.¹⁰⁵ If a

⁹⁶ See *id.* (citing 42 U.S.C. § 9601(20)(A) (1988); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556 (W.D. Pa. 1989); *United States v. Md. Bank & Tr. Co.*, 632 F. Supp. 573 (D. Md. 1986)).

⁹⁷ See U.S. DEP’T OF JUSTICE, HANDBOOK FOR CHAPTER 7 TRUSTEES 2–4 (2012) (demonstrating that a trustee in bankruptcy has no control over which case he or she has been assigned because “[t]he United States Trustee appoints panel members to chapter 7 cases on a fair and equitable basis by utilizing a blind rotation system”).

⁹⁸ See *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000); *Illinois v. Grigoleit Co.*, 104 F. Supp. 2d 967 (C.D. Ill. 2000); *Norfolk S. Ry. Co. v. Shulimson Bros. Co.*, 1 F. Supp. 2d 553 (W.D.N.C. 1998); see also *Chesapeake & Potomac Tel. Co. of Va. v. Peck Iron & Metal Co.*, 814 F. Supp. 1285 (E.D. Va. 1993) (not explicitly deciding on the innocent landowner defense, ruling that a person should be subjected to CERCLA liability merely because property had been inherited).

⁹⁹ See 204 F.3d at 700–01.

¹⁰⁰ *Id.* at 701.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.* at 706–07.

¹⁰⁴ See HANDBOOK FOR CHAPTER 7 TRUSTEES, *supra* note 97, at 2–4 (demonstrating that a trustee in bankruptcy has no control over which case he or she has been assigned because “[t]he United States Trustee appoints panel members to chapter 7 cases on a fair and equitable basis by utilizing a blind rotation system”).

¹⁰⁵ See *United States v. 150 Acres of Land*, 204 F.3d 698, 705 (6th Cir. 2000).

trustee is actively doing his or her duty to control and preserve estate property, then the trustee should “take reasonable steps to abate or prevent environmental contamination by or to estate property.”¹⁰⁶ The trustee’s position could be construed as analogous to an innocent inheritor.¹⁰⁷

While courts have held that prior knowledge of hazardous substances does not always preclude the innocent landowner defense,¹⁰⁸ courts generally preclude the innocent landowner defense when a party had prior knowledge of hazardous substances on the property at the time of acquisition.¹⁰⁹ While a chapter 7 trustee may have prior knowledge of the contamination of the property upon assuming responsibility for the estate, this is unlikely given the blind assignment process governed by the U.S. Trustee.¹¹⁰

3. *Trustee Asserting the Innocent Landowner Defense*

Given the discussion above, a chapter 7 trustee may be able to assert the innocent landowner defense. The trustee could be considered a government entity taking involuntary control of estate property, which is also similar to inheritance. It is against the trustee’s duty to contribute to contamination. Additionally, if the trustee is blindly assigned a case, then the trustee cannot conduct due diligence prior to acquisition of the property. Although no chapter

¹⁰⁶ HANDBOOK FOR CHAPTER 7 TRUSTEES, *supra* note 97, at 4–7.

¹⁰⁷ See generally *Soo Line R.R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1484 (D. Minn. 1992) (finding that inherited property is not automatically excluded from CERCLA liability; rather, the inheritor has to show “that 1) the release of hazardous substances was caused solely by a third party; 2) he exercised due care with respect to the hazardous substance; and 3) he took precautions against foreseeable acts caused by the third party and the consequences that would result from those acts”).

¹⁰⁸ See *Thomson Precision Ball Co. v. PSB Assocs. Liquidating Tr.*, 51 Env’t Rep. Cas. (BNA) 1990 (D. Conn. 2001) (citing 42 U.S.C. § 9601(35)(A)(i) (2000)) (“The defense requires not lack of knowledge or reason to know of any hazardous substance, but rather of any hazardous substance that is the subject of the release or threatened release.”).

¹⁰⁹ See *City of Wichita v. Tr. of APCO Oil Corp. Liquidating Tr.*, 306 F. Supp. 2d 1040, 1052 (D. Kan. 2003) (denying the innocent landowner defense because the city knew of contamination before purchasing the property); *United States v. Chrysler Corp.*, 157 F. Supp. 2d 849, 858 (N.D. Ohio 2001) (denying the innocent landowner defense because property was acquired knowing that it was contaminated); *United States v. Monsanto Co.*, 182 F. Supp. 2d 385, 409 (D.N.J. 2000) (“[A Landowner] cannot claim ignorance in the face of . . . evidence [of knowledge of waste materials], even if he did not know that the materials contained hazardous substances at the time.”); *New York v. DelMonte*, No. 98-CV-0649E(M), 2000 WL 432838, at *4 (W.D.N.Y. Mar. 31, 2000) (“One cannot be an ‘innocent landowner’ under CERCLA if, after learning of the contamination, he fails to take ‘precautions to prevent the ‘threat of release’ or other foreseeable consequences arising from the pollution on the site.’” (quoting *Kerr-McGee Chem. v. Lefton Iron & Metal*, 14 F.3d 321, 325 (7th Cir. 1994))).

¹¹⁰ See HANDBOOK FOR CHAPTER 7 TRUSTEES, *supra* note 97.

7 trustee has asserted the innocent landowner defense, it appears that the trustee would be a prime candidate for the innocent landowner defense.

The trustee would gain a financial advantage by asserting the innocent landowner defense rather than abandoning the contaminated property. When a trustee abandons property, the title “revests . . . retroactively to the date of commencement of the case.”¹¹¹ Because the title reverts, the debtor once again has control the property. While this is advantageous for the estate because it does not have to fund the cleanup, the estate also loses the value of the contaminated property once it has been cleaned up. Conversely, if the trustee asserts the innocent landowner defense, the estate will still not bear the brunt of the cleanup costs and would maintain title to the ameliorated property. The ability to liquidate this property adds value to the estate, resulting in greater repayment of the creditors.

4. *Potential Amendments to CERCLA and the Bankruptcy Code*

At this point in time, no trustee has asserted the innocent landowner defense in regards to environmentally contaminated property. While a trustee could raise the innocent landowner defense under the current law, modifications to either CERCLA or the Bankruptcy Code would make it easier to raise the defense. A new provision could include several important factors.

Obviously, the new provision would have to include an allowance of the use of the innocent landowner defense by a chapter 7 trustee in bankruptcy. For example, an amendment to CERCLA could either redefine “government entity” to include the term “which acquired the facility by escheat, or through any other involuntary transfer or acquisition,” including acquisition of an estate in bankruptcy by a chapter 7 trustee.¹¹² This would allow the trustee to raise the innocent landowner defense¹¹³ in a situation involving a contaminated estate that may not be eligible for abandonment.

An amendment to the Bankruptcy Code could be placed in either the trustee abandonment section¹¹⁴ or the defenses of the estate section.¹¹⁵ As an addition

¹¹¹ *In re Peerless Plating Co.*, 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (citing *LaRoche v. Tarpley* (*In re Tarpley*), 4 B.R. 145, 146 (Bankr. M.D. Tenn. 1980)).

¹¹² 42 U.S.C. § 9601(35)(A)(ii) (2012).

¹¹³ 42 U.S.C. § 9601(35)(A)(iii) (“In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section [9607](b)(3)(a) and (b) . . .”).

¹¹⁴ 11 U.S.C. § 554 (2012).

¹¹⁵ 11 U.S.C. § 558.

to “[a]bandonment of property of the estate,”¹¹⁶ the Code could provide for the ability of the estate to retain title to the property but remove liability for costs of cleanup of environmentally contaminated property. As an addition to “[d]efenses of the estate,”¹¹⁷ the amendment could provide that “[t]he estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, . . . other personal defenses[, and affirmative defenses under CERCLA].”¹¹⁸ This would guarantee the estate’s ability to raise the innocent landowner defense, granted that all requirements of 11 U.S.C. §§ 9601(35)(A) and 9607(b)(3) are met.

Amendments to the statutes would need to discuss from whom state and federal governments could collect cleanup costs. CERCLA’s objective “is to place ultimate responsibility for the costs of cleaning up Superfund sites on those who contributed to the problem.”¹¹⁹ If the estate is no longer liable for the contamination, then the parties who would be liable are the debtor and creditors who constitute “potentially responsible parties” (“PRPs”).¹²⁰ Secured creditors can already be held liable under a CERCLA cleanup action for “participation in the management of the [borrower’s] facility.”¹²¹ If a creditor becomes overly involved in the processes of the facility, then that creditor can be slapped with a reimbursement charge or administrative order from the government.¹²² Because bankruptcy is involved in this instance, the amended provision could provide that the government’s reimbursement come directly from the creditor’s share of the liquidated estate. This would guarantee that the estate’s cleanup is directly tied to the ability to decontaminate and sell the site.

¹¹⁶ 11 U.S.C. § 554.

¹¹⁷ 11 U.S.C. § 558.

¹¹⁸ *Id.*

¹¹⁹ See EPA OSWER GUIDANCE, *supra* note 10.

¹²⁰ See 42 U.S.C. § 9607(a) (2012) (laying out the criteria for potentially responsible parties).

¹²¹ 1 COLLIER REAL ESTATE, *supra* note 15, at ¶ 6.07[2] (quoting *Z & Z Leasing v. Graying Reel, Inc.*, 873 F. Supp. 51, 55 (E.D. Mich. 1995)).

¹²² See Matthew H. Ahrens & David S. Langer, *Lender Liability Under CERCLA: Environmental Risks for Lenders Under Superfund: A Refresher for the Economic Downturn*, 3 BLOOMBERG CORP. L.J. 482, 487–89 (2008); Bruce C. Smith, *The EPA’s New Lender Liability Rule: Quelling the Fear Spawned by Fleet Factors*, MORRIS, MANNING, & MARTIN, LLP, <http://www.mmmlaw.com/media/the-epas-new-lender-liability-rule-quelling-the-fear-spawned-by-fleet-factors/> (last visited Feb. 5, 2016); Robert W. Whetzel & Todd A. Coomes, *Commercial Real Estate Loans: Lender’s Environmental Liability*, PRACTICAL LAW (2013), [http://www.rlf.com/files/6992-Commercial%20Real%20Estate%20Loans%20Lenders%20Environmental%20Liability%20\(3-520-7824\).pdf](http://www.rlf.com/files/6992-Commercial%20Real%20Estate%20Loans%20Lenders%20Environmental%20Liability%20(3-520-7824).pdf).

While collection from the debtor may seem worthless because the debtor is in the middle of a bankruptcy proceeding, there are actually several mechanisms for recovery. The EPA has long identified the inability to pay as a “‘compelling public concern’ based on which an enforcement case may be settled for less than the economic benefit of noncompliance.”¹²³ Federal and state governments do not have to receive full reimbursement from the debtor as a result of noncompliance.¹²⁴ Contamination cleanup recovery costs are generally nondischargeable,¹²⁵ but the amount can be negotiated based upon the debtor’s ability to pay.¹²⁶ Although there is current disagreement over the time that CERCLA cleanup costs are actually incurred,¹²⁷ this would be an opportunity for Congress to add a uniform rule that determines whether these cleanup costs are old debts, new debts, or administrative expenses for preserving the estate.¹²⁸ If a trustee asserted the innocent landowner defense, he or she would want to argue that these costs are debts stemming from the debtor’s and PRP creditors’ liability rather than administrative expenses so that the government seeks reimbursement from the debtor and PRP creditors rather than the estate. In this scenario, this is the best way a trustee could maximize the value of estate property.¹²⁹

¹²³ EPA OVERVIEW OF ABILITY TO PAY, *supra* note 17.

¹²⁴ *But see id.* (“EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business . . .”).

¹²⁵ *See* United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1008 (2d Cir. 1991); *see also In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 974 F.2d 775 (7th Cir. 1992) (“[J]ust as we were reluctant to hold that WSDOT had a claim at the time of a release or threatened release of a hazardous substance, we are likewise reluctant to hold that a party becomes a known creditor upon the mere release or threatened release of a hazardous substance.”); United States v. Union Scrap Iron & Metal, 123 B.R. 831 (Bankr. 9th Cir. 1991) (“The mere release of a hazardous substance prior to the confirmation of bankruptcy reorganization plan does not give rise to a CERCLA claim which is discharged by that confirmation.”). *But see In re* Nat’l Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992).

¹²⁶ *See* EPA OVERVIEW OF ABILITY TO PAY, *supra* note 17, at 2.

¹²⁷ *See* Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1316 (9th Cir. 1986) (stating that a CERCLA claim arises when response costs are incurred); Schweitzer v. Consol. Rail Corp. (Conrail), 758 F.2d 936 (3d Cir. 1985) (ruling that asbestos exposure does not give rise to cause of action until injury is discovered). *But see* Jensen v. Cal. Dep’t of Health Servs. (*In re* Jensen), 127 B.R. 27, 32 (B.A.P. 9th Cir. 1991) (“The claim arises based upon the debtor’s conduct.”).

¹²⁸ *See* Borden, Inc., v. Wells-Fargo Bus. Credit (*In re* Smith-Douglass, Inc.), 856 F.2d 12, 17 (4th Cir. 1988) (administrative expense); Lancaster v. Tennessee (*In re* Wall Tube & Metal Prods.), 831 F.2d 118, 123 (6th Cir. 1987) (administrative expense); *In re* Stevens, 68 B.R. 774, 783 (D. Me. 1987) (administrative expense). *But see* S. Ry. Co. v. Johnson Bronze Co., 758 F.2d 137, 143 (3d Cir. 1985) (finding that cleanup costs were not allowable as an administrative expense).

¹²⁹ *See* 11 U.S.C. § 704 (2012); HANDBOOK FOR CHAPTER 7 TRUSTEES, *supra* note 97, at 4–6.

5. Conclusion

Again, the innocent landowner defense is a potential alternative solution to trustee abandonment. Rather than reverting title to the debtor, the estate would maintain title. Liability would shift to the debtor and PRP creditors who could then be sued by the government for reimbursement for cleanup charges. The estate and creditors would benefit far more from this defense than abandonment because the estate retains title, does not pay cleanup costs, and liquidates the property once cleanup is complete. Conversely, under abandonment, the title to the property reverts to the debtor, and the estate no longer gains any value from ownership. The innocent landowner defense results in a bigger payout to the trustee and creditors, and the potentially responsible parties end up paying, just as Congress intended when it passed CERCLA.¹³⁰ The primary concern one may have with the innocent landowner defense is that the government ends up paying cleanup; that was the whole reason *Midlantic* went to the Supreme Court—the state of New Jersey did not want to pay for cleanup costs on its own.

B. Section 554 Abandonment

1. Introduction

The main concern arising from trustee abandonment of environmentally contaminated property is that there is no hardline rule describing when abandonment is proper. The Bankruptcy Code provides that “the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”¹³¹ As previously discussed, courts have failed to agree on what constitutes “burdensome” and “inconsequential value” when it comes to environmental contamination.¹³² There are two straightforward solutions that could solve the inconsistencies: a statutory proposal, or a court-created balancing test.

¹³⁰ See 42 U.S.C. §§ 9601–9657 (2012); 1 COLLIER REAL ESTATE, *supra* note 15, at ¶ 6.07[1] (explaining the basic purpose of CERCLA).

¹³¹ 11 U.S.C. § 554(a).

¹³² See N.J. Dep’t of Env’tl. Prot. v. N. Am. Prods. Acquisition Corp., 137 B.R. 8, 12 (D.N.J. 1992) (stating abandonment is permissible if it “will not aggravate the threat of harm to the health and safety of the public or create some additional harm”); *In re Franklin Signal Corp.*, 65 B.R. 268, 272 (Bankr. D. Minn. 1986) (imposing a five-part inquiry for abandonment); *In re Okla. Ref. Co.*, 63 B.R. 562, 565 (Bankr. W.D. Okla. 1986) (“[A]bandonment will not aggravate the existing situation . . .”); Hillinger & Hillinger, *supra* note 2, at 366.

2. Subsequent Case Law Highlighting Inconsistencies

Because *Midlantic* is the only Supreme Court case on this issue, and because the opinion does not leave a straightforward analysis to determine when abandonment is proper, courts are split on how to interpret when a trustee can abandon property.¹³³ Different courts have given weight to different parts of the *Midlantic* opinion.

The majority of courts have given *Midlantic* a narrow interpretation. “Several courts have interpreted *Midlantic* to prohibit abandonment only when the property poses an imminent and identifiable harm to the public health or safety.”¹³⁴ The majority takes this interpretation from footnote nine of the opinion.¹³⁵ Other courts have allowed abandonment of contaminated property despite imminent and identifiable public harm if there are no unencumbered assets.¹³⁶ Still, other courts have established conditions and multi-part tests for determining whether abandonment is proper.¹³⁷

¹³³ Hillinger & Hillinger, *supra* note 2, at 363.

¹³⁴ *Id.* at 364 (citing N.M. Env’t Dep’t v. Foulston (*In re* L.F. Jennings Oil Co.), 4 F.3d 887, 890 (10th Cir. 1993) (despite oil contamination, there was no immediate threat to public health or safety because (1) site was not listed on state contaminated site list and (2) state’s expert could not state positively if threat existed); *In re* Anthony Ferrante & Sons, Inc., 119 B.R. 45, 50 (D.N.J. 1990) (despite bacterial contamination of public water supply system, no imminent danger existed because public knew of danger and had means to protect itself); *In re* Brio Ref., Inc., 86 B.R. 487, 489 (N.D. Tex. 1988) (holding trustee could abandon site listed on National Priority List because no evidence showed imminent and identifiable risk to public); *Huennekens v. Walker (In re* S. Int’l Co.), 165 B.R. 815, 823 (Bankr. E.D. Va. 1994) (stating that the “very fact” it took six weeks for spill to occur proves the threat was not imminent); *In re* Sheffield Oil Co., 162 B.R. 339, 341 (Bankr. M.D. Ala. 1993) (holding that the trustee was not required to spend estate funds to assess underground petroleum tanks when no evidence of contamination existed); *In re* H.F. Radandt, Inc., 160 B.R. 323, 328 (Bankr. W.D. Wis. 1993) (inaction by the Wisconsin Department of Natural Resources was proof that problem was not imminent); *In re* Doyle Lumber, Inc., 137 B.R. 197, 203 (Bankr. W.D. Va. 1992) (finding lumber treatment plant contaminated by chromium and arsenic to not be an imminent threat when (1) the plant complied with state waste management regulations and (2) the only ground for objection was that the plant had not been closed down); *White v. Coon (In re* Purco, Inc.), 76 B.R. 523, 533 (Bankr. W.D. Pa. 1987) (finding no evidence that drums of cut-back asphalt and thinners were hazardous, and even if they were, no evidence that they presented risk of harm or threat to public safety)).

¹³⁵ *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 507 n.9 (1986).

¹³⁶ *See* *Borden, Inc. v. Wells-Fargo Bus. Credit (In re* Smith-Douglass, Inc.), 856 F.2d 12, 17 (4th Cir. 1988) (permitting abandonment when estate had no unencumbered assets and site did not pose serious public health or safety risk); *In re* Better-Brite Plating, Inc., 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989) (permitting abandonment because (1) the estate did not possess enough unencumbered assets to fund cleanup and (2) there was no evidence of imminent harm or danger to public); Hillinger & Hillinger, *supra* note 2, at 365.

¹³⁷ *See N. Am. Prods. Acquisition Corp.*, 137 B.R. at 12 (finding abandonment permissible if it “will not aggravate the threat of harm to the health and safety of the public or create some additional harm”); *In re Franklin Signal Corp.*, 65 B.R. at 272 (imposing a five-part inquiry for abandonment); *In re Okla. Ref. Co.*, 63 B.R. at 565 (“[A]bandonment will not aggravate the existing situation”); Hillinger & Hillinger, *supra* note 2, at 366–69.

A minority of courts “have interpreted *Midlantic* to prohibit abandonment if abandonment would violate a state statute or regulation designed to protect public health or safety.”¹³⁸ These courts rarely permit trustee abandonment, which can leave trustees in a bind to liquidate the property and pay creditors.

3. *Statutory Proposals to CERCLA and the Bankruptcy Code*

Statutory amendments aimed at solving the contravening goals of bankruptcy and environmental law have been proposed for years, but they have not gained a great deal of traction with the legislature.¹³⁹ One of the most promising of these statutory proposals is a “superlien.”¹⁴⁰ The idea of a superlien is that the government would pay for the contaminated property’s cleanup and would be first in line for repayment upon liquidation of the estate.¹⁴¹ A superlien would be given “priority as to other liens against the contaminated property *even if such other liens predate the state’s lien.*”¹⁴² The hope is that the superlien would “increase[] the chances that a state will recoup its cleanup expenditures.”¹⁴³

Multiple states have legislated environmental superliens for contamination cleanups.¹⁴⁴ When tested in court, these liens have generally been upheld and

¹³⁸ Hillinger & Hillinger, *supra* note 2, at 363 (citing *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 122 (6th Cir. 1987) (discussing how trustee cannot abandon property when it would result in economic health hazard); *In re Unidigital, Inc.*, 262 B.R. 283, 286–90 (Bankr. D. Del. 2001) (finding debtor’s landlord was not entitled to administrative expense for cleanup costs to remove a printer because (1) the printer did not pose imminent identifiable harm and (2) the landlord did not specify any particular law that abandonment would violate); *In re Mahoney-Troast Constr. Co.*, 189 B.R. 57, 59 (Bankr. D.N.J. 1995) (holding that the landlord’s cleanup costs were not entitled to administrative expense priority because landlord could not specify any state law requiring remediation of the contaminated property); *In re Peerless Plating Co.*, 70 B.R. 943, 946 (Bankr. W.D. Mich. 1987) (“[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 identified hazards.”); *In re Stevens*, 68 B.R. 774, 780–81 (D. Me. 1987) (denying abandonment because the contaminated waste oil threatened public safety and abandonment would contravene state law)). See *In re ATP Oil & Gas Corp.*, No. 12-36187, 2013 Bankr. LEXIS 2608 (Bankr. S.D. Tex. June 19, 2013) (denying abandonment because it would result in a “derogation of public health and safety”).

¹³⁹ See Dolly Hoffman & Jeffrey R. Seaman, *A Pragmatic Solution to a Complex Dilemma: A Fundamental Approach to Resolving the Conflict Between CERCLA and the Bankruptcy Code*, 4 AM. BANKR. INST. L. REV. 243, 243 (1996); Losch, Note, *supra* note 11, at 137.

¹⁴⁰ See Jonathan Remy Nash, *Environmental Superliens and the Problem of Mortgage-Backed Securitization*, 59 WASH. & LEE L. REV. 127, 128 (2002); Losch, Note, *supra* note 11, at 167.

¹⁴¹ Losch, Note, *supra* note 11, at 167.

¹⁴² Nash, *supra* note 140.

¹⁴³ See *id.* at 148–49, nn.80–81 (discussing the problem of large environmental cleanup costs, the state’s inability to recoup its expenditures, and the economics surrounding the concept and practice of superliens).

¹⁴⁴ See, e.g., CONN. GEN. STAT. § 22a-452 (2015); MASS. GEN. LAWS ch. 21E, § 13 (2016); N.H. REV. STAT. ANN. § 147-B:10-b (2015); N.J. STAT. ANN. § 58:10-23.11 (2015).

have allowed states to recoup their expenses.¹⁴⁵ However, because courts are not permitted to *write* the law,¹⁴⁶ some courts have recognized their inability to create constructive superliens.¹⁴⁷ A superlien must come through congressional legislation to be enacted federal law.

A bill that would have amended CERCLA § 107(1) to “give priority claims of governmental units pursuant to CERCLA . . . for costs incurred to respond to hazards created by release of hazardous substances” failed in the House of Representatives in 1983.¹⁴⁸ Congress could again look to amending CERCLA to provide a superlien on governmental cleanup in the case of chapter 7 bankruptcy.

The Bankruptcy Code is no stranger to prioritized lien repayment. For example, § 507 lays out the order of priority claims, giving administrative expense claims second priority.¹⁴⁹ Similarly, when a trustee is authorized to operate the debtor’s business, the trustee may be authorized to obtain unsecured credit or incur unsecured debt for such operation.¹⁵⁰ If that credit is obtained in the “ordinary course of business,” then it is allowed as a § 503(b)(1) administrative expense.¹⁵¹ However, if the trustee is unable to obtain unsecured credit as an administrative expense, the court can authorize credit by giving the creditor’s claim “priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b).”¹⁵² While most proposals regarding superliens have been directed towards CERCLA amendments, amending the Bankruptcy Code is another possible solution.

¹⁴⁵ See *229 Main St. Ltd. P’ship v. Massachusetts* (*In re 229 Main St. Ltd. P’ship*), 251 B.R. 186, 190–91 (D. Mass. 2000) (“While the United States Supreme Court has never addressed the issue of the validity of environmental superliens, two justices have indicated that superliens are a viable method for states to ensure financing of cleanups.” (citing *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 515 (1986) (Rehnquist, J., dissenting); *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985) (O’Connor, J., concurring))).

¹⁴⁶ See generally Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185 (2007).

¹⁴⁷ See *In re Paris Indus. Corp.*, 80 B.R. 2, 5 (Bankr. D. Me. 1987) (“[C]reation [of a superlien] would push us far beyond the existing frontier established by reported cases and existing legislation.”); *In re Stevens*, 53 B.R. 783, 787 (D. Me. 1985) (finding that, even with the urging of the State of Maine, there was no legal theory to find a “constructive statutory lien” regarding cleanup costs).

¹⁴⁸ See H.R. 2767, 98th Cong., 1st Sess. (1983).

¹⁴⁹ 11 U.S.C. § 507 (2012).

¹⁵⁰ 11 U.S.C. § 364(a).

¹⁵¹ *Id.*

¹⁵² 11 U.S.C. § 364(c)(1).

Generally, cleanup by a state or federal agency is allowable as an administrative expense under § 503(b)(1)(A).¹⁵³ However, even with administrative priority, the state may still be lower on the figurative recovery totem pole than several parties.¹⁵⁴ A potential alternative to awarding administrative priority to these contamination cleanup claims is altering the Bankruptcy Code to provide super-priority to these governmental bodies. Such an amendment could fall within 11 U.S.C. § 507(a)(2) as an additional provision providing for governmental entities to collect contamination cleanup claims first before any other administrative expenses.¹⁵⁵ This language could potentially be modeled off of existing state provisions. For example, Connecticut's superlien statute states that any amount paid to "contain and remove or mitigate the effects of a spill or to remove any hazardous waste shall be a lien against the real estate," upon which the spill or hazardous waste was located.¹⁵⁶ The superlien takes precedence over all transfers and encumbrances on the real property.¹⁵⁷

The current language in the Bankruptcy Code granting priority in adequate protection claims gives a creditor's claim "priority over every other claim allowable under such subsection."¹⁵⁸ An added provision could provide that *a lien resulting from a state or federal cleanup under CERCLA will be given precedence over all other liens*. Similarly, the language could be based upon the House bill that failed in 1983.¹⁵⁹ An added provision could provide that *claims of governmental units pursuant to CERCLA are given priority above all other administrative expenses*. These provisions would assist in repaying the government.¹⁶⁰

¹⁵³ 11 U.S.C. § 503(b)(1)(A) ("necessary costs and expenses of preserving the estate" are allowed administrative expense claims); see *In re Paris Indus. Corp.*, 80 B.R. 2, 3 (Bankr. D. Me. 1987) (citing *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494 (1986); *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118 (6th Cir. 1987); *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *In re Stevens*, 68 B.R. 774 (D. Me. 1987)).

¹⁵⁴ See 11 U.S.C. §§ 503(b)(1)(A), 507(a)(2).

¹⁵⁵ 11 U.S.C. § 507(a)(2).

¹⁵⁶ CONN. GEN. STAT. § 22a-452(a) (2015).

¹⁵⁷ *Id.*

¹⁵⁸ 11 U.S.C. § 507(b).

¹⁵⁹ See H.R. 2767, 98th Cong., 1st Sess. (1983).

¹⁶⁰ See Nash, *supra* note 140, at 158.

A superlien could provide several benefits. A superlien would result in greater repayment to the government for environmental cleanups.¹⁶¹ In bankruptcy, this is similar to creating a senior lien under 11 U.S.C. § 364(d).¹⁶² Additionally, a superlien statute may “increase the likelihood that lenders themselves undertake cleanups,” to prevent a loss of value in the property and to prevent a senior lien from reducing creditors’ payment in bankruptcy.¹⁶³

While there are benefits, there are certainly negative factors regarding superliens. Courts have sometimes ruled against the idea of a superlien because it takes away repayment from innocent creditors.¹⁶⁴ Courts have also worried about the retroactive effects of superliens.¹⁶⁵ However, a secured creditor knowingly “assume[s] a financial risk when it takes a security interest in collateral.”¹⁶⁶

Additionally, another statutory proposal could amend § 554 of the Bankruptcy Code to account for environmentally contaminated property.¹⁶⁷ The proposal would be similar to the means test¹⁶⁸ in that it would establish a series of determining factors. These factors could look to the amount of liability held by the debtor, the amount of liability held by potentially responsible creditors, the estimated amount of expenditure by the government for cleanup costs, and the identifiable public health hazard resulting from a slow cleanup. This Comment’s proposed amendment provides as § 554(a)(2): *In considering whether the granting abandonment is proper in regard to environmentally contaminated property, the court shall look to the following factors*, followed by those listed above after careful consideration of how to

¹⁶¹ See David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unasked Questions*, 13 VA. ENVTL. L.J. 185, 226 (1994) (superliens allow the government to displace secured creditors and “collect significantly more money”).

¹⁶² 11 U.S.C. § 364(d) (creating a senior or equal lien on property of the estate when a trustee obtains credit for operating the debtor’s business).

¹⁶³ Nash, *supra* note 140, at 158.

¹⁶⁴ See *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 289–90 (Bankr. N.D. Ohio 1985) (“E.P.A. holds administrative expense claims against the estate. . . [but other creditors] should not be expected to bear the costs of these administrative expenses merely because the estate has insufficient assets.” (citing *Gen. Elec. Credit Corp. v. Levin & Weintraub (In re Flagstaff Foodserv. Corp.)*, 739 F.2d 73 (2d Cir. 1984); *Brookfield Prod. Credit Ass’n v. Borron*, 738 F.2d 951 (8th Cir. 1984); *In re Korupp Assocs., Inc.*, 30 B.R. 659 (Bankr. D. Me. 1983); *In re Codesco, Inc.*, 18 B.R. 225 (Bankr. S.D.N.Y. 1982))).

¹⁶⁵ See *In re Paris Indus. Corp.*, 80 B.R. 2, 4 (Bankr. D. Me. 1987) (discussing the potential retroactive effects of New York’s failed superlien bill).

¹⁶⁶ *In re T.P. Long Chem., Inc.*, 45 B.R. at 288.

¹⁶⁷ 11 U.S.C. § 554.

¹⁶⁸ 11 U.S.C. § 707(b)(2)(A).

weigh them. Rather than having fixed numbers like the means test,¹⁶⁹ the “abandonment test” could be more fluid. While this could still result in some ambiguity, providing a list of dispositive enumerated factors would lead to much firmer positions than the words “imminent and identifiable harm” alone.¹⁷⁰

4. Proposed Balancing Test

In contrast to amending CERCLA and the Bankruptcy Code, the Supreme Court could establish a balancing test to determine whether abandoning environmentally contaminated property is proper. Courts have applied their own standards to trustee abandonment cases. In *In re St. Lawrence Corp.*, the court articulated a four-part test to analyze the abandonment petition.¹⁷¹ The court found that abandonment would be improper unless all four of the following conditions are met:

- 1) an identified hazard exists that poses a risk of imminent and identifiable harm to the public health and safety;
- 2) abandonment of the property will violate a state statute or regulation;
- 3) the statute or regulation being violated is reasonably designed to protect the public health and safety from imminent and identifiable harm caused by identified hazards; and
- 4) compliance with the statute or regulation would not be so onerous as to interfere with the bankruptcy administration itself.¹⁷²

In *In re Franklin Signal Corp.*, the court laid out a five-part inquiry for abandonment: “(1) the imminence of danger to the public health and safety, (2) the extent of probable harm, (3) the amount and type of hazardous waste, (4) the cost to bring the property into compliance with environmental laws, and (5) the amount and type of funds available for cleanup.”¹⁷³ Similarly, in *In re Peerless Plating Co.*, the court developed a three-step presumption against abandonment except when:

¹⁶⁹ 11 U.S.C. § 707(b)(2)(A).

¹⁷⁰ See *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 507 n.9 (1986).

¹⁷¹ See 248 B.R. 734, 739 (D.N.J. 2000) (citing *Midlantic Nat'l Bank*, 474 U.S. at 506–07).

¹⁷² *Id.* (citing *Midlantic Nat'l Bank*, 474 U.S. at 506–07).

¹⁷³ 65 B.R. 268, 272 (Bankr. D. Minn. 1986).

1. the environmental law in question is so onerous as to interfere with the bankruptcy adjudication itself; or
2. the environmental law in question is not reasonably designed to protect the public health or safety from identified hazards; or
3. the violation caused by abandonment would merely be speculative or indeterminate.¹⁷⁴

Some significant overlap exists in the factors these courts use. Initially, they all use the language quoted from footnote nine in *Midlantic*, stating that the abandonment power should not be limited by regulations that are “not reasonably calculated to protect the public health or safety from imminent and identifiable harm.”¹⁷⁵ If the Court were to fashion a balancing test, it seems natural to start with the language included in the last decision concerning this issue.¹⁷⁶

The courts with multi-factor tests all look to the laws and regulations of which the contaminated property is in violation to determine their stringency.¹⁷⁷ The underlying goal is to posit how serious violation of these laws and regulations is.¹⁷⁸ Should the Court fashion a balancing test, it would be crucial to consider the seriousness of environmental laws and regulations the debtor is violating.¹⁷⁹ Courts have repeatedly held that abandonment is proper when the debtor is in violation of environmental laws that are not primarily driven by public health and safety.¹⁸⁰

¹⁷⁴ 70 B.R. 943, 947 (Bankr. W.D. Mich. 1987). The court also suggested that a potential fourth factor could be “the environmental law in question is not reasonably calculated to protect the public health or safety from imminent and identifiable harm.” *Id.* at 947 n.2.

¹⁷⁵ 474 U.S. at 507 n.9; see *In re St. Lawrence Corp.*, 248 B.R. at 739; *In re Peerless Plating Co.*, 70 B.R. at 947, 947 n.2; *In re Franklin Signal Corp.*, 65 B.R. at 272.

¹⁷⁶ See *Midlantic Nat’l Bank*, 474 U.S. at 507 n.9.

¹⁷⁷ *In re St. Lawrence Corp.* 248 B.R. at 739; *In re Peerless Plating Co.*, 70 B.R. at 947; *In re Franklin Signal Corp.*, 65 B.R. at 272.

¹⁷⁸ *In re St. Lawrence Corp.* 248 B.R. at 739; *In re Peerless Plating Co.*, 70 B.R. at 947; *In re Franklin Signal Corp.*, 65 B.R. at 272.

¹⁷⁹ See *In re Franklin Signal Corp.*, 65 B.R. at 273 (“*Midlantic* requires that the trustee . . . conduct an investigation to determine what hazardous substances, if any, burden the property.”).

¹⁸⁰ See *Borden, Inc. v. Wells-Fargo Bus. Credit (In re Smith-Douglass, Inc.)*, 856 F.2d 12 (4th Cir. 1988); *Huennekens v. Walker (In re S. Int’l Co.)*, 165 B.R. 815 (Bankr. E.D. Va. 1994); *In re Sheffield Oil Co.*, 162 B.R. 339 (Bankr. M.D. Ala. 1993); *In re H.F. Radandt, Inc.*, 160 B.R. 323 (Bankr. W.D. Wis. 1993); *In re Doyle Lumber, Inc.*, 137 B.R. 197 (Bankr. W.D. Va. 1992); *In re Better-Brite Plating, Inc.*, 105 B.R. 912 (Bankr. E.D. Wis. 1989); *In re FCX, Inc.*, 96 B.R. 49 (Bankr. E.D.N.C. 1989). *But see Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118 (6th Cir. 1987) (denying abandonment because it was in

Each multi-factor test determines how much the cost of coming into compliance would affect the rest of the bankruptcy proceeding.¹⁸¹ This would be an excellent opportunity to “give . . . an example of what condition would be so onerous as to interfere with the bankruptcy adjudication itself.”¹⁸² At this time, it is important to note that depletion of the estate does not constitute such an “onerous” condition.¹⁸³

The most debatable factor the Court could consider in a multi-factor test is taking cost into account to determine if abandonment is proper.¹⁸⁴ On one hand, cost should not be a factor when public health is at stake.¹⁸⁵ On the other hand, the state arguably has more resources to deal with a major environmental hazard.¹⁸⁶ CERCLA’s secured creditor exemption exists to protect creditors who did not “participate in management” of the contaminated property,¹⁸⁷ and as a result, these secured creditors should not have to pay for the cost of cleanup through a reduced payment.¹⁸⁸ However, one could also argue that § 506(c) of the Bankruptcy Code¹⁸⁹ exists to preserve the estate, no matter the cost that results to the secured creditors.¹⁹⁰

If the Court agreed to hear another case regarding trustee abandonment of environmentally contaminated property, it should use these factors to create a balancing test. The Court could also create a hardline, single-factor rule regarding abandonment. If the cost of compliance would result in minimal or

contravention of a state statute reasonably designed to protect public health); *In re Stevens*, 68 B.R. 774 (D. Me. 1987) (denying abandonment because contaminated waste oil threatened public safety).

¹⁸¹ See *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 507 n.9 (1986); *In re St. Lawrence Corp.*, 248 B.R. at 739; *In re Peerless Plating Co.*, 70 B.R. at 947; *In re Franklin Signal Corp.*, 65 B.R. at 272.

¹⁸² *In re Peerless Plating Co.*, 70 B.R. at 947.

¹⁸³ See *id.*

¹⁸⁴ See *In re Franklin Signal Corp.*, 65 B.R. at 274.

¹⁸⁵ See *Juniper Dev. Grp. v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 921 (1st Cir. 1993) (finding “the expeditious cleanup of sites contaminated or threatened by hazardous substance releases which jeopardize public health and safety” more important than response costs).

¹⁸⁶ See *Midlantic Nat’l Bank*, 474 U.S. at 515 (Rehnquist, J., dissenting).

¹⁸⁷ 42 U.S.C. § 9601 (2012).

¹⁸⁸ See *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 289 (Bankr. N.D. Ohio 1985) (“E.P.A. holds administrative expense claims against the estate. . . [but other creditors] should not be expected to bear the costs of these administrative expenses merely because the estate has insufficient assets.”).

¹⁸⁹ 11 U.S.C. § 506(c) (2012).

¹⁹⁰ See *In re Peerless Plating Co.*, 70 B.R. 943, 947 (Bankr. W.D. Mich. 1987) (“The normal course of affairs in any [c]hapter 7 is to deplete the estate by liquidating it and distributing it to creditors as required by law. The fact that one claimant or creditor receives the lion’s share does not render that claim onerous.”). *But see In re Franklin Signal Corp.*, 65 B.R. 268, 274 (Bankr. D. Minn. 1986) (finding abandonment appropriate because the approximate cost of cleanup would be twice as expensive as the estate’s unencumbered cash).

no repayment to creditors other than the government, then abandonment is proper for the purpose of repaying creditors.¹⁹¹ After all, that is one purpose of bankruptcy.¹⁹²

5. Conclusion

To create a more direct approach to abandonment, there are several statutory proposals: amending CERCLA to include a “superlien” so that the government can frontload contamination cleanup, and amending the Bankruptcy Code to provide an abandonment test similar to the means test for determining when abandonment is proper in cases of environmentally contaminated property. Alternatively, the Court could revisit the issue and clear up the confusion created by the *Midlantic* decision by fashioning a balancing test or a hardline rule governing abandonment of environmentally contaminated property.

CONCLUSION

Trustee abandonment of environmentally contaminated property matters for several reasons. CERCLA cleanups are incredibly expensive, and contaminated property poses a risk to public safety and health. Unfortunately, neither the Supreme Court nor Congress has addressed this issue in quite some time. This has led to a great deal of confusion, ambiguity, and a lack of definitive rules in case law.¹⁹³

CERCLA cleanups are incredibly expensive.¹⁹⁴ Because these Superfund cleanups are paid for out of tax revenue, the public has a vested interest in minimizing the harm done to the public fisc, just as Justice Rehnquist pointed

¹⁹¹ See *In re Franklin Signal Corp.*, 65 B.R. at 274.

¹⁹² See Jonathan M. Hiltz, Note, *Killing Two Birds with One Stone—The Proper (Non)Application of Judicial Estoppel: Parker v. Wendy’s International, Inc.*, 365 F.3d 1268 (11th Cir. 2004), 30 DAYTON L. REV. 401, 411 (2005).

¹⁹³ See N.J. Dep’t of Env’tl. Prot. v. N. Am. Prods. Acquisition Corp., 137 B.R. 8, 12 (D.N.J. 1992) (“[A]bandonment [that] will not aggravate the threat of harm to the health and safety of the public or create some additional harm should be permitted.”); *In re Franklin Signal Corp.*, 65 B.R. at 277 (imposing a five-part inquiry for abandonment); *In re Okla. Ref. Co.*, 63 B.R. 562, 565 (Bankr. W.D. Okla. 1986) (“[A]bandonment will not aggravate the existing situation . . .”).

¹⁹⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-287R, SUPERFUND: INFORMATION ON THE NATURE AND COSTS OF CLEANUP ACTIVITIES AT THREE LANDFILLS IN THE GULF COAST REGION 2 (2011) (the EPA’s expenditures at 511 different Superfund sites was \$3.6 billion through the 2007 fiscal year); see also GAO: EPA SHOULD DO MORE, *supra* note 21, at 8–9 (the largest 142 Superfund sites would average \$140 million each in cleanup costs and smaller Superfund sites would average \$12 million each in cleanup costs).

out in his dissent in *Midlantic*.¹⁹⁵ Some see allowing the government to pay for numerous Superfund cleanups as irresponsible and harmful to the national and state economies.¹⁹⁶ After all, the primary reason NJDEP litigated in *Midlantic* was to avoid paying out of pocket. Additionally, not requiring responsible parties to ameliorate their messes seems to encourage noncompliance with environmental laws. Rather than rewarding poor behavior, the Court should prevent noncompliance or discourage such action. If a party is forced to pay for its own cleanup, it follows that the party is less likely to engage in behavior that would create that liability.

Many argue that the primary purpose of environmental laws is to protect health rather than the property which those laws govern.¹⁹⁷ Even though these cleanups are expensive, they are necessary for protecting public health and safety. While reaching compliance may be expensive, it warrants the question of which outcome matters more: a healthy public and environment, or preventing millions of dollars from being spent on contamination cleanup. Additionally, we must figure out who must pay for cleanups: should we hold individual parties responsible, or should deeper pockets pay when things go awry?

Perhaps the most troubling problems resulting from this are the Supreme Court's failure to clarify its position in *Midlantic* and Congress's failure to amend either CERCLA or the Bankruptcy Code to account for this scenario. Nearly three decades past the initial "punting" decision, the Supreme Court has yet to grant certiorari over another § 554 environmental contamination case. As a result, courts have implemented their own, unique rules for interpreting *Midlantic* and determining when a trustee can abandon contaminated property.¹⁹⁸ The Supreme Court should clarify its last muddled quandary. Since *Midlantic*, Congress has had multiple chances to amend or add provisions that account for this, either under the Bankruptcy Code or

¹⁹⁵ See 474 U.S. 494, 516 (1986) (Rehnquist, J., dissenting).

¹⁹⁶ See Timothy G. Wheeler, *Toxic Waste Cleanup Sluggish Critics See Overhaul of 'Superfund' Law as Expensive, Inefficient*, BALT. SUN (May 19, 1996), http://articles.baltimoresun.com/1996-05-19/news/1996140003_1_uperfund-law-toxic-waste-federal-superfund-program, (discussing the length of time of cleanups, the cost of cleanups, and their unpopularity).

¹⁹⁷ See William Onzivu, *International Environmental Law, the Public's Health, and Domestic Environmental Governance in Developing Countries*, 21 AM. U. INT'L L. REV. 597, 600 (2006) (stating that environmental protection and protection of public health are "mutually reinforcing" (citing Kevin R. Gray, *World Summit on Sustainable Development: Accomplishments and New Directions?*, 52 INT'L & COMP. L.Q. 256, 256-57 (2003))).

¹⁹⁸ Hillinger & Hillinger, *supra* note 2, at 365.

CERCLA. Congress has done neither, which discounts the importance of the issue. Until one of these bodies acts, it will never be certain who will end up paying cleanup costs: creditors or federal and state governments.

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