BURDENSOME PROPERTY, ONEROUS LAWS, AND ABANDONMENT: REVISITING MIDLANTIC NATIONAL BANK V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Leonard J. Long*

I. INTRODUCTION

"Federal bankruptcy law" empowers the bankruptcy trustee to abandon property of the debtor's estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." The trustee abandons the property in an effort to achieve a primary goal of bankruptcy—serving the best interest of the creditors by satisfying, within certain statutory constraints, the aggregate claims of prepetition creditors. The retention of either property burdensome to the estate or, though perhaps to a lesser extent, property of inconsequential value and benefit to the estate, tends to reduce the overall value of the estate. Consequently, the creditors, as a whole, would benefit by the removal of such properties from the estate. This removal is

* Assistant Professor of Law, The University of Southern California Law Center; B.S. 1973, Illinois Institute of Technology; M.A. 1975, Ph.D. 1980, University of Illinois at Chicago; J.D. 1988, University of Chicago. For helpful comments, I am indebted to Scott A. Altman, David W. Carroll, Richard Craswell, Ruth C. Gavison, George Lefcoe, Elyn R. Saks, Matthew L. Spitzer, James F. "Jeff" Strand, and Catharine Wells.

2. "Abandon," as it is used to denote bankruptcy abandonment, is a term of art within the Bankruptcy Code. It is not the same legal concept as common law abandonment. One striking difference between bankruptcy abandonment and common law abandonment is that at common law, land cannot be abandoned. Land can be abandoned by the trustee in bankruptcy. This distinction will have significant application later in this Article.
3. This power of the trustee to abandon property of the debtor's estate in bankruptcy will be referred to here as "bankruptcy abandonment."
5. Accomplishing this goal requires more than maximizing the size of the pie from which the various creditors take their individual slices. This is so because nonbankruptcy contract security and statutory rights of the creditors are, for the most part, respected in bankruptcy. This gives rise to priority rankings among the creditors in the size and the order of taking their respective individual slices of the pie.
accomplished through the trustee's exercise of the abandonment powers.

Take as a given that the creditors, as a whole, are better off when the trustee abandons property which is burdensome to the estate. However, suppose the trustee's abandoning property of the debtor's estate causes the property to somehow revert back to the debtor and, consequently, to become burdensome to the debtor. More specifically, what if this reversion to the debtor threatens the debtor's fresh-start? Is it nonetheless appropriate for the trustee to abandon the property? If the debtor's fresh-start or rehabilitation is another primary goal of bankruptcy, the abandoned property becoming burdensome to the debtors seems problematic, if not unacceptable. Perhaps not all otherwise burdensome property of the estate should be abandoned by the trustee? Perhaps, if some instances of bankruptcy abandonment result in the abandoned property becoming burdensome to the debtor, such a result should throw into question the proper interpretation and application of the abandonment provision.

The existence of such a class of property of the bankruptcy estate which, upon abandonment by the trustee, is burdensome to the debtor is not a mere theoretical possibility. One obvious member of this class is any real property of the estate containing toxic or hazardous wastes for which the owner (or person with the possessory interests in the property) is responsible for cleanup and removal of such toxic or hazardous wastes. The trustee, as the administrator of the bankruptcy estate for the benefit of the creditors, would want to abandon such real property of the estate when abandoning the property would minimize the bankruptcy estate's exposure to liability or responsibility for the cleanup or removal of the toxic or hazardous wastes. Yet, in minimizing the bankruptcy estate's exposure, the act of abandoning the property may simply shift the responsibility and place same upon the debtor and debtor's nonbankruptcy or post-petition estate.

6. The debtor and the debtor's estate are not the same entity. The debtor is simply the person (or municipality) concerning whom a bankruptcy case has been commenced. See 11 U.S.C. § 101(13). The estate is the aggregate of certain properties in which the debtor had an interest at the time the bankruptcy case was commenced. See id. § 541.

7. Another member of this class is personal property which is the toxic or hazardous waste itself when it is stored in a manner that does not affix it to the land; for example, the toxic waste in steel drums in the debtor's warehouse.

tion assets. Placing such liability upon the debtor could undermine the debtor's fresh-start.

The Bankruptcy Code left unchanged the two principal objectives of bankruptcy legislation: (1) to give the debtor a fresh-start, and (2) to provide for an equitable distribution of the assets of the debtor's estate to the creditors. Consequently, the bankruptcy court, which ultimately decides whether to authorize the trustee abandoning the property, appears to be faced with a dilemma. On the one hand, if the court authorizes the trustee's abandoning the property pursuant to § 554, the debtor may be denied complete bankruptcy relief—its fresh-start. That is, the bankruptcy process designed to lessen the burdens on the "honest but unfortunate" debtor, compounds the burden instead. Yet, on the other hand, preventing the trustee from abandoning the property is not in the best interest of the creditors, if retention of the property by the estate reduces the value or amount of any distribution to creditors from the bankruptcy estate.

It is beyond this Article's scope to resolve this dilemma if "resolving" the dilemma means explaining away the dilemma—that is, demonstrating that what appears to be a dilemma is not one after all. Rather, one objective of this Article is to provide a framework, within which, if the conflict between these competing policy aims of bankruptcy is real, such conflict is perhaps best eased, though not necessarily eliminated, in a manner favoring the debtor's relief over the interests of the creditors. That is, in balancing the distribution of benefits and harms of bankruptcy abandonment, we may want a presumptive rule favoring the debtor's fresh-start over some competing interests of creditors. Thus, on the narrow issue of bankruptcy abandonment and in deciding whether the trustee should act to abandon burdensome property, added weight should be given to ensuring the debtor's relief from pre-petition debts and obligations.

II. THE BASIC PROBLEM

Consider the following scenario. Mendel, a microbiologist, purchases land to build his own, independent, research laboratory. The nature of the research is developing microorganisms that replenish otherwise depleted and useless farmland. Due to the nature of his

10. I leave open the moral issue of to what extent a debtor, who has not adequately provided for the cleanup and removal of the toxic and hazardous waste, is honest and merely unfortunate.
research, the land being uncontaminated was extremely important. So, before the purchase, Mendel invites the various federal, state, and local agencies to inspect the land. Each agency certifies the land to be uncontaminated; the purchase closes, and Mendel takes possession.

As Mendel’s research progresses and shows some initial promise, he obtains financing from friends, banks, trade creditors, and various agricultural and chemical concerns. However, after years of effort, Mendel’s research came to naught. Mendel acknowledges that his microorganic soil research is a failure, decides to close the laboratory, and immediately ceases operations. When the decision is made to discontinue operating, Mendel has $1 million of outstanding unsecured debt. The good news for the creditors is that his assets are considered to have a fair market value of $1.1 million, the principal asset being the land with a fair market value of $0.8 million. That is, if Mendel liquidates his asset in an orderly manner, all the creditors could get fully paid and, after allowing for the cost of liquidating his assets, there may be proceeds remaining for Mendel. It all seems a matter now of simply going through with, and completing, the disposition of the assets.

Since Mendel’s purchase of the land, however, the state enacted a law requiring environmental inspection of all real property before ownership can be transferred (the state came up with the idea shortly after inspecting Mendel’s property). Upon inspection, if the property is in violation of the state’s environmental protection statutes, the ownership of the property is responsible for bringing the property into compliance with the statutes. The state’s agency inspects Mendel’s land, finds its soil to be seriously contaminated with strange microorganisms, and determines that there exits an immediate threat to the public health and safety. A cleanup is duly ordered.

The cost of the cleanup, let us assume, is fixed at $0.95 million and exceeds the market value of the land, in its uncontaminated condition, by $0.15 million. Now, in addition to owing $1 million to the creditor who financed his research, there is also the $0.95 million cost of the environmental cleanup. Mendel’s total debt and liabilities now stand at $1.95 million, with $1.1 million in assets, and negative net worth of $0.85 million.11 All prospective buyers of the land van-

---

11. Or, one might reduce the value of Mendel’s assets by the $0.95 million cost of the cleanup to $0.15 million, the estimated fair market value of all of Mendel’s assets to a purchaser who would take on the cost of the environmental cleanup. In that case, Mendel’s balance sheet would still reflect total debt and liabilities of $1 million, but only $0.15 million
ish. Unable to sell his principal asset, or to perform the cleanup, Mendel does nothing. His creditors, however, commence an involuntary bankruptcy proceeding under Chapter 7, ostensibly so as to provide for an orderly liquidation of his assets.

A trustee is appointed, who realizes that (1) the contaminated land is burdensome to the estate because the cost of the cleanup exceeds the value of the land; (2) removing the hazard and selling the property would leave $0.15 million for distribution to the creditor (or fifteen cents on the dollar);\(^\text{12}\) but that (3) abandoning the land could leave $0.3 million for potential distribution to the creditors (or thirty cents on the dollar). Consequently, the trustee seeks court approval to abandon the land on two grounds. First, the land is burdensome to the estate in that retaining it would require the trustee’s remediing the environmental hazard. Second, given the cost of the cleanup, the land is of inconsequential value and benefit to the estate.\(^\text{13}\) The only objection to the trustee’s abandoning the property comes from the state, because under our fact pattern, there are no prior owners or lenders with potential responsibility for the cleanup.\(^\text{14}\)

If the land is abandoned by the bankruptcy trustee, who gets possession of the land and, more importantly, who is responsible for the cleanup? Mendel? The state (that is, the taxpayers)? Or does the land simply remain a hazard? If the land is not abandoned, what happens to the land? Does the hazard get removed? If so, who now bears the cost of the cleanup? Mendel? The creditors? The state (taxpayers)?\(^\text{15}\)

Alter the debtor, change the hazard, expand the cast of creditors and those potentially liable for the cleanup or removal—these are the same basic questions raised, though not fully answered, in the 1986

---

\(^\text{12}\) All other administrative expenses, including the trustee’s fees, are assumed to be negligible.

\(^\text{13}\) See 11 U.S.C. § 554.


\(^\text{15}\) Lynn Tadlock Manolopoulos, Comment, A Congressional Choice: The Question of Environmental Priority in Bankrupt Estates, 9 J. ENVTL. L. 73, 79 (1990) ("There are four possible alternatives for state environmental cleanups in the bankruptcy priority scheme: 1) environmental superlien, 2) administrative claim, 3) unsecured claim or 4) no claim."); see also Kathryn R. Heidt, Cleaning Up Your Act: Efficiency Considerations in the Battle for the Debtor’s Assets in Toxic Waste Bankruptcies, 40 RUTGERS L. REV. 819, 833 (1988) (discussing the “cost internalization” of environmental hazards into price and its allocation both "prospectively" and to "retroactive costs").
Supreme Court case Midlantic National Bank v. New Jersey Department of Environmental Protection. The majority held “that a trustee

16. 474 U.S. 494 (1986). The basic facts and procedural posture of Midlantic, as stated in the majority’s opinion, were these:

Quanta Resources Corporation (Quanta) processed waste oil . . . . At the Edgewater facility, Quanta handled the oil pursuant to a temporary operating permit issued by the New Jersey Department of Environmental Protection (NJDEP) . . . . NJDEP discovered that Quanta had violated a specific prohibition in its operating permit by accepting more than 400,000 gallons of oil contaminated with PCB, a highly toxic carcinogen. NJDEP ordered Quanta to cease operations at Edgewater, and the two began negotiations concerning the cleanup of the Edgewater site. But . . . before the conclusion of the negotiations, Quanta filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. The next day, NJDEP issued an administrative order requiring Quanta to clean up the site. Quanta’s financial condition remained perilous, however, and . . . it converted the action to a liquidation proceeding under Chapter 7 . . . .

After Quanta filed for bankruptcy, an investigation of the Long Island City facility revealed that Quanta had accepted and stored there over 70,000 gallons of toxic, PCB-contaminated oil in deteriorating and leaking containers. Since the mortgages on the facility’s real property exceeded the property’s value, the estimated cost of disposing of the waste oil plainly rendered the property a net burden to the estate. After trying without success to sell the Long Island City property for the benefit of Quanta’s creditors, the trustee notified the creditors and the Bankruptcy Court . . . that he intended to abandon the property pursuant to § 554(a). No party to the bankruptcy proceeding disputed the trustee’s allegation that the site was “burdensome” and of “inconsequential value to the estate” within the meaning of § 554.

The City and the State of New York . . . nevertheless objected, contending that abandonment would threaten the public’s health and safety, and would violate state and federal environmental law. New York rested its objection on “public policy” considerations reflected in applicable local laws, and on the requirement of 28 U.S.C. § 959(b) that a trustee “manage and operate” the property of the estate “according to the requirements of the valid laws of the State in which such property is situated.” New York asked the Bankruptcy Court to order that the assets of the estate be used to bring the facility into compliance with applicable law. [T]he court approved the abandonment . . . . The District Court . . . affirmed, and New York appealed to the Court of Appeals for the Third Circuit.

. . . .

Shortly after the District Court had approved abandonment of the New York site, the trustee gave notice of his intention to abandon the personal property at the Edgewater site, consisting principally of the contaminated oil. The Bankruptcy Court approved the abandonment . . . over NJDEP’s objection that the estate had sufficient funds to protect the public from the dangers posed by the hazardous waste.

Because the abandonments of the New Jersey and New York facilities presented identical issues, the parties in the New Jersey litigation consented to NJDEP’s taking a direct appeal from the Bankruptcy Court to the Court of Appeals . . . .

[T]he Third Circuit reversed. [I]t concluded that Congress had intended to codify the judge-made abandonment practice developed under the previous Bankruptcy Act. Under that law, where state law or general equitable principles pro-
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.” 17 Thus, Midlantic provides a judicial gloss of the reading of § 554 which, when read literally, would seem to permit the trustee to abandon property of the estate when either the property is burdensome to the estate or the property is both of inconsequential value and inconsequential benefit to the estate. 18 There was no question in Midlantic that the property was both burdensome to the estate and of inconsequential benefit and value to the estate. 19 Thus, Midlantic provides a narrow exception to the literal reading of the trustee’s abandonment powers under § 554. 20

The issue ostensibly decided by the Court in Midlantic pertained to the scope of the trustee’s abandonment powers. However, the underlying real controversy was, and remains, who pays for the environmental cleanup. If there had been assets of sufficient value in the estate to both fund the cleanup and fully satisfy the claims of the creditors, the bankruptcy court’s authorizing abandonment of the property would have been less likely. If there had been no assets of value in the estate from which to potentially fund a cleanup, the issue of abandonment would have been moot. 21

17. Id. at 509 (Rehnquist, J., dissenting) (emphasis added).
18. Referring to § 554(a), Justice Rehnquist observed that “[t]his language, absolute in its terms, suggests that a trustee’s power to abandon is limited only by consideration of the property’s value to the estate.” Id. at 509 (Rehnquist, J., dissenting) (emphasis added).
19. The Court stated that “[t]he sole issue presented by these petitions is whether a trustee may abandon property under § 554 in contravention of local laws designed to protect the public’s health and safety.” Id. at 498 n.2.
20. See id. at 507 (Rehnquist, J., dissenting) (“In something of a surprise ending, the Court limits the class of laws that can prevent an otherwise authorized abandonment by a trustee to those ‘reasonably designed to protect the public health or safety from identified hazards.’”); Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.), 856 F.2d 12, 16 (4th Cir. 1988) (“But this narrow exception applies where there is a serious health risk, not where the hazards are speculative or may await appropriate action by an environmental agency.”); see also In re Heldon Industries, Inc., 131 B.R. 578, 588 (Bankr. D.N.J. 1991); In re Anthony Ferrante & Sons, Inc., 119 B.R. 45, 49. (Bankr. D.N.J. 1990); In re Peerless Plating Co., 70 B.R. 943, 946-47 (Bankr. W.D. Mich. 1987).
Thus, the aforementioned dilemma surrounding bankruptcy abandonment is present in *Midlantic*. However, given the way the *Midlantic* majority characterized the question before the Court, the Court did not confront the dilemma. The Court addressed itself to "the question whether § 554(a) of the Bankruptcy Code . . . authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety." And the *Midlantic* majority decided the case "without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself . . . ." It is just that unreached question of whether certain state laws (or, for that matter, federal nonbankruptcy law) imposing conditions upon abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, which gives rise to the dilemma. One aspect of certain state laws which could render them "so onerous as to interfere with the bankruptcy adjudication" is their imposing, as a consequence of the trustee's abandoning property of the estate, some burden on the debtor in connection with the abandoned property (e.g., imposing upon the debtor responsibility for the removal or the cleanup of toxic or hazardous waste on land abandoned by the trustee).

The *Midlantic* majority reached its holding, first, by appeal to what it termed "well-recognized restrictions on a trustee's abandonment power." Before the 1978 revisions of the Bankruptcy Code, the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests. This was made clear by the few relevant cases . . . .

---

Chapter 11 case where the debtor-in-possession maintained a hazardous waste site in violation of the state environmental regulatory laws and had inadequate funds to financially implement the plan requiring cleanup of the site; converting the case to Chapter 7 was deemed inappropriate in that a trustee would be unable to comply with state law and manage the debtor's site with the estate's limited resources).

23. Id. at 507.
24. Id. at 501.
25. The majority opinion references three principal cases in support of the existence of this judicially developed doctrine protecting legitimate state and federal interests: Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952); Chicago Junction R.R. v. Sprague (*In re Chicago Rapid Transit Co.*), 129 F.2d 1 (7th Cir.), cert. denied, 317 U.S. 683 (1942); *In re Lewis Jones, Inc.*, 1 B.C.D 277 (Bankr. E.D. Pa. 1974).
Thus, when Congress enacted § 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.26

But the dissent, in an opinion written by then Associate Justice Rehnquist, remained unconvinced by the Court’s arguments supporting state power to bar abandonment. The principal and only independent ground offered—that Congress codified “well-recognized restrictions of a trustee’s abandonment power”—is particularly unpersuasive. It 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 (or something like it). These specific shortcomings in the Court’s analysis . . . stem at least in part from the Court’s failure to discuss even in passing either the nature of abandonment or its role in federal bankruptcy.27

A thesis of this Article is that, though the Midlantic Court majority’s holding was probably correct to the extent that it denied the trustee the power to abandon the hazardous waste sites under the facts of Midlantic, the holding’s particular rationale may have been unnecessary, if not misguided. Thus, a second objective of this Article is to provide an argument in support of that thesis.

III. Nexus Between Liability and the Abandonment Issue

The interconnectedness of the “abandonment” issue and the “who pays” question is brought to the foreground in the cases interpreting and trying to apply Midlantic, as it pertains to the question of the extent to which the trustee may use other estate assets to bring the burdensome property into compliance with the pertinent state law. For the most part the question has focused upon whether, after the abandonment has been denied, the costs of the cleanup are to be given administrative priority under § 503(b)28 and § 507(a)(1),29

27. Id. at 507-08.
28. 11 U.S.C. § 503(b). This section provides that “there shall be allowed, administrative expenses . . . including—(1)(A) the actual, necessary costs and expenses of preserving the estate . . . .” Id.
29. 11 U.S.C. § 507. This section provides, “(a) The following expenses and claims
thereby financing the cleanup at the expense of the unsecured creditors. 30

But, is not the question, Who should bear the costs of the cleanup in bankruptcy when abandonment is not authorized? intimately related to the other questions? One, who would or should bear the costs outside bankruptcy? And, two, who would or should bear the costs in bankruptcy, post-abandonment—that is, under (the counterfactual) conditions where the abandonment is authorized? For instance, persons who, under applicable nonbankruptcy law, are directly liable for the costs of the cleanup or who are responsible for the contribution or reimbursement of the debtor for the cleanup, should not escape liability due to the debtor's bankruptcy. The holding in Midlantic was motivated by the importance of protecting the public health and safety from an immediate threat. The Midlantic majority did not reach its holding with the intent to alter, shift, or restructure the liabilities of various parties for the cost of the cleanup. There is nothing in Midlantic which modifies the rule of Butner v. United States: 31

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within in a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." ... The justifications for application of state law are not limited to ownership interests 32

Thus, Midlantic, though no doubt of significant impact, 33 did

have priority in the following order: (1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28. "Id.


32. Id. at 55 (citing Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 609 (1961)).

33. See LTV Corp., 944 F.2d at 1009; Borden, 856 F.2d at 15; Burlington, 853 F.2d at 708; Saravia v. 17th St. N.W., Ltd. Partnership, 844 F.2d 823, 827 (D.C. Cir. 1988); Lancaster v. Tennessee (In re Wall Tube & Metal Products Co.), 831 F.2d 118, 121 (6th
not address what is the central problem. That problem, put simply, is this: There is property (here land) that carries obligations (here the cleanup of hazardous and toxic materials) greater than its value. If retained in the bankruptcy estate, the creditors, the state, or the public pays for the cleanup (or the cleanup does not get performed). If abandoned, someone has the possessory interest in the land and, consequently, the potential liability for the cleanup. Such person may be the debtor. Thus, the real questions is: Who ought to pay?

There are, as previously noted, a host of possible candidates: the debtor; the debtor’s general unsecured creditors (trade, bank, employees, nonjudicial lien tort claimants, etc.); secured creditors (those whose collateral is not the part of the hazard and those, such as the real estate mortgagee, whose collateral is more intimately connected with the hazard); judicial and statutory lien creditors; federal, state and local governmental claimants; etc., plus those quasi-creditors, equity shareholders. If assets of the bankruptcy estate are employed to cleanup or remove an environmental hazard, then each of these categories of creditors could be adversely affected, in that the use of estate assets for any one purpose (e.g., environmental cleanup) tends to reduce the amount of assets available for other uses (e.g., satisfying creditors’ claims in bankruptcy).

There are, of course, also numerous and varied political and policy reasons for placing the liability for cleanup on particular parties. Placing primary liability on the debtor-polluter or, if the debtor is a corporation, on the directors, officers, and even equity shareholders, may provide incentives for the (potential) debtor to comply with the relevant environmental statutes in the first place. But, as we know, some polluting will nevertheless occur; and a financially distressed or insolvent polluter may be in no position to fund a cleanup even if so inclined. Placing the secondary liability on specific creditors (e.g., the real estate mortgagee), or on the creditors generally, would tend to cause some additional monitoring of the debtor’s compliance with appropriate environmental statutes. Yet, there are potential costs associated with such monitoring mechanisms. Cautious, conservative, by-the-statute corporate officers and directors will be less willing to serve as officers or directors of businesses which engage in enterprises where there is a greater risk of officer and direc-
tor liability; or they will require increased compensation, indemnification or insurance for serving. Investors are less likely to invest in businesses where there is a significant risk of liability beyond the loss of the initial capital invested; or they will require greater and more immediate returns for investing. Informed creditors are less likely to extend credit to debtors engaged in activities which might give rise to such secondary liability; or do so only at a higher interest rate or with additional collateral. Some of the debtor's other creditors may not be consensual creditors (for example, tort victims); and, in general, such nonconsensual creditors would not have had reason to monitor the debtor's compliance with environmental protection laws. Furthermore, all such policy debates must answer the question of whether environmental cleanup costs are special, requiring priority over certain other claims. What would be the rationale for preferring environmental cleanup against compensation to, say, a Dalkon Shield or an asbestos tort victim if funds are inadequate to fully satisfy both classes of claims? These are interesting questions, with not-so-easy solutions. They are, however, questions which are beyond the scope of this Article.

IV. LIMITED FOCUS OF THE DISCUSSION

The present Article has a much more modest concern. It addresses the narrow issue, as between the debtor and debtor's creditors in bankruptcy, who should pay for the cleanup. The conclusion is that, in general, as between the debtor and debtor's creditors, the bankruptcy fresh-start policy should prevail over the policy of administering the bankruptcy estate for the best interest of the creditors. Consequently, the debtor's creditors should bear, to varying degrees and limits, the risk of being responsible for the cleanup of hazardous waste on the debtor's property in bankruptcy.

The vehicle for discussion is a revisit to, and review of, the Midlantic case on the issue of whether the trustee should be able to abandon certain property, such as property imposing a threat to the public health and safety under § 554. This Article suggests an interpretation of § 554 that would, I believe, lead to the conclusion that

---

34. Even a nonconsensual creditor, once it realizes that it has rights against the debtor, will have some incentives to monitor the debtor to the extent that the costs of the compliance with environmental laws threaten the debtor's ability to satisfy its creditors.

35. Or, in Chapter 11, bankruptcy's policy of preferring rehabilitation to liquidation should prevail over a strict, wooden application of a best-interest-of-the-creditors policy.
the *Midlantic* trustee should not have been permitted to abandon the property, even if the *Midlantic* dissent is correct that the majority misread the three cases on which it based its holding and misemployed § 959(b) of Title 28 to the case.37

That is, the argument put forth is that the essence of the *Midlantic* holding—i.e., the restriction on the trustee’s power to abandon, in contravention of nonbankruptcy law reasonably designed to protect the public health and safety, property imposing an immediate threat to the public health and safety—is reachable on grounds contained within the four-corners of the Bankruptcy Code. A specific technical amendment of § 554 is proposed; not to alter or expand its scope, but only to make more explicit an already implicit—and, perhaps for that reason, overlooked—constraint of the trustee’s abandonment powers.

Although the arguments presented here primarily focus upon *Midlantic* and the abandonment of property imposing an environmental threat to public health and safety, the scope of the argument is broader. The *Midlantic* case was decided, as discussed in greater detail below,38 “without reaching the question whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself . . .”39 This Article outlines a notion of “onerous interference with bankruptcy adjudication” as it relates to the trustee’s abandonment powers, and argues that the proposed technical amendment to the trustee’s abandonment powers should apply to a broader range of “onerous” nonbankruptcy laws. Whether a nonbankruptcy law is onerous, in the context of an abandonment question, is a function of the extent to which the property of the estate would become burdensome to the debtor post-abandonment. For example, the trustee’s abandoning the property threatens the debtor’s fresh-start or, in the case of corporate debtors, the debtor’s rehabilitation.

V. ADDED WEIGHT FOR THE DEBTOR’S INTEREST

Now the suggestion that, in weighing the debtor’s interest against those of the creditors, we recognize that a presumption in favor of the debtor’s interest is based on two considerations. First, there is

37. *Id.* at 513-14 (Rehnquist, J., dissenting).
38. See infra notes 96-100 and accompanying text.
some likelihood that, post-bankruptcy, the debtor will simply be unable to address the burden imposed by the revestment of the abandoned property. In the case of the Chapter 7 individual debtor, the debtor emerges from bankruptcy with no assets at all, or with only those few exempt properties which Congress, by provisions within the Bankruptcy Code or by deference to state nonbankruptcy law, specified as generally unavailable to satisfy debtor’s pre-petition debts.\textsuperscript{40} If the debtor is, subsequently, burdened by the property abandoned by the trustee and, yet, the debtor retains no pre-petition assets, then only the debtor’s post-petition earnings are available to address the burden imposed by the abandoned property.\textsuperscript{41} Immediately after bankruptcy, then, the debtor’s fresh-start is already a bit stale. Similarly, though to a lesser degree, the individual debtor who survives bankruptcy with some exempt prepetition assets, receives a not so fresh fresh-start.\textsuperscript{42} Even in Chapter 11 cases, where there is a policy favoring rehabilitation over liquidation, a corporate debtor’s rehabilitation is threatened by the necessity of using prepetition resources (i.e., prepetition assets) to address the burdens imposed by the abandoned property,\textsuperscript{43} resources it would otherwise use to facilitate its reorganization. In fact, the presence of the burdensome property may prove too much for the debtor’s reorganization, resulting in a failure of the planned reorganization and ultimately liquidation anyway.\textsuperscript{44} These would be odd results, not to mention harsh.

The second consideration favoring a presumption of protecting the debtor’s interest has to do with when the burden arose or became present in the specific property of the estate. There are several preliminary points to note here. One, there must exist some attribute, or condition, of the property which renders it burdensome to the estate.

---

\textsuperscript{40} 11 U.S.C. § 522.

\textsuperscript{41} One should note that, although the Bankruptcy Code generally provides for the individual debtor’s future earnings to be unencumbered by pre-petition debt, there is no provision within the Bankruptcy Code for the debtor’s having any future earnings.

\textsuperscript{42} The Chapter 13 debtor, generally, gets to retain even nonexempt property, but does so as a price of including in the bankruptcy estate (and consequently, potentially available to satisfy pre-petition claims), property acquired and earnings earned after the commencement of the case. See 11 U.S.C. § 1306. For family farmer cases, see id. § 1207.

\textsuperscript{43} I leave open, for the moment, the question of who has the possessory interest in \textit{corporate} debtor assets abandoned by a trustee in bankruptcy, as well as the related question of successor liability of the reorganized corporate debtor.

\textsuperscript{44} If this is the ultimate result of the trustee abandoning some burdensome property of the estate, then it is somewhat questionable whether the creditors’ best interests were served by the abandonment in the first instance.
The attribute or condition of the property which renders it a burden to the estate is not necessarily something in the property. For example, certain property may be a burden to the estate simply because it requires special expertise to maintain, etc., an expertise beyond the abilities of the trustee and too expensive to justify the trustee’s hiring of the appropriate professionals. Similarly, property of the estate could be burdensome simply due to its location being, for instance, in a foreign country—making it difficult for the trustee to administer such property for the benefit of the creditors.

Two, the burdensome attribute or condition had to arise or first become present in the property at some specific point in time.\(^45\) The attribute or condition which renders a particular property burdensome to the estate either (a) was present in the property prior to the debtor’s bankruptcy (and perhaps even imposed a burden on the debtor or prepetition); (b) happened upon the commencement of the case (i.e., the bankruptcy itself, or some event surrounding the commencement of the case, triggered the burden);\(^46\) or (c) was triggered by something that occurred during (if not as a direct result of) the administration of the bankruptcy estate. (We’ll return to the timing patterns shortly.)

And, three, the type of burdensome attributes or conditions of concern here is limited to those whose burden on the estate could, upon abandonment of the property by the trustee, shift to the debtor.

---

45. The question, When did the burdensome attribute or condition arise or first become present in the property? is separate from the question, When was the burdensome attribute first realized as being present in the property? Consequently, whether a burdensome attribute or condition is latent or unknown is not, for our purpose, significant to our analysis.

46. Though it is possible that an event, not intimately connected to commencement of the bankruptcy case, could occur at the exact moment the case was commenced and have the effect of rendering certain property burdensome to the estate, it is highly improbable. Whatever attribute or condition warrants classifying the property as a burden to the estate at the commencement of the case, that attribute or condition (if not caused by the initiation of the bankruptcy process itself) was probably present in the property prepetition. However, if the nonbankruptcy triggering event did somehow occur at the precise moment that the case commenced, the court would be forced to make a determination as to whether, as a rule of the case or as a general rule, such an event is treated as a prepetition or postpetition event. For example, in the toxic spill situation discussed below, see infra text accompanying notes 47-55, if the toxic spill occurs just as the debtor files for bankruptcy relief and the bankruptcy commences, then the court would simply be forced to make the “hard” determination of whether or not the contaminated state of the land existed at the time the bankruptcy commenced. Which way the court decides, however, turns out to have no significant impact on the issue of abandoning burdensome property. For, either way, the property is burdensome to the estate and the decision has to be made as to whether the trustee may abandon such property.
Furthermore, the concern is not with property abandoned by the trustee, based either on its being a burden to the estate or of inconsequential value or benefit to the estate, which subsequently becomes a burden to the debtor due to something unrelated to the bankruptcy the debtor does postabandonment. For example, if the trustee abandons land because it was of inconsequential value and benefit to the estate, the land reverts in the debtor, and the debtor pollutes it with toxic or hazardous waste postabandonment, the burden of the cleanup is not a “burden” as that notion is used within the Bankruptcy Code.

Consider the aforementioned three timing patterns, (a), (b), and (c), briefly, but in reverse order.

Were the burdensome attribute or condition to first become present during the trustee’s administering the estate, then it is a burden which, if the choice is between the estate’s shouldering the burden or the debtor’s shouldering the burden, should be laid upon the estate. This is not to suggest that the estate (or the trustee) engaged in malfeasance while administering the property, for the property’s becoming burdensome to the estate during the bankruptcy may be separate from anything the trustee (or other parties to the bankruptcy proceeding) did. Consider, for example, a postpetition chemical spill on property belonging to the estate, where the spill was caused, not by any activity of the trustee or the debtor’s estate postpetition (that is, it was not the result of the trustee’s administering the estate), but by some third-party (e.g., a truck containing toxic wastes overrocks while passing through land belonging to the estate). Generally, one would look to the third-party to bear the cost of any necessary cleanup. But assume that the responsible third-party is insolvent and the toxic waste poses an immediate threat to the public health and safety. Then the bankruptcy estate may be liable for the cleanup (presumably with a right to contribution from the third-party). The presence of the toxic waste, the need to remove the threat to public safety, and the cost of the cleanup could not only adversely affect the land’s economic value (e.g., cause a decline in the market value of the land) and its benefit to the estate, but could also render the land burdensome to the estate. The trustee acts to abandon the property due to its being burdensome to the estate and of inconsequential benefit and value to the estate. The abandonment, however, would merely shift the burden of the cleanup to the debtor.47

47. It is assumed here that the property would revest in the debtor, that the debtor would become responsible for the cleanup (with the possible right to contribution from the
Yet, should not the costs associated with the cleanup be borne by the estate? Why? First, because such costs may have been avoided by the estate if, for example, the trustee had acted more quickly in administering the estate in the first place. Secondly, and of greater note, there is absolutely nothing the debtor could have done to avoid the risk of the postpetition toxic spill. And, as the debtor was no longer in possession of the land, what the debtor might have done, as a whole, is besides the point anyway. The trustee, not the debtor, was in possession and control of the property; and the trustee, not the debtor, had responsibility for the property. And, between the immediately two affected parties—the debtor and the estate, it is the estate (through the trustee) who is, at least in theory, positioned to avoid whatever burdens potential toxic spills would impose on the estate. Therefore, it is unreasonable to permit the estate to avoid, by abandonment, a burden incurred by the estate, especially when a consequence of incurring the burden and, then, later abandoning the property is that the burden is shifted to a debtor not in a position to have avoided the burden.

Now, if the mere commencement of the case is what triggers the presence of whatever attribute or condition renders the property burdensome to the estate, the triggering event must in some manner be intimately connected with the bankruptcy process. And, as a practical matter, all such triggering events are probably captured within the scope of, and policy concerns behind, the automatic stay provisions of § 362 of the Bankruptcy Code. If this is correct, then the triggering event can itself be stayed and the property’s becoming burdensome to the estate is at least, technically, postponed. So these situations may not be of real significance on the abandonment question. Yet, if the triggering event is the bankruptcy, is it an event within the debtor’s control to avoid (and avoid in some manner other than not filing for bankruptcy protection)? If it is not an event which the

third-party and, perhaps, even from the bankruptcy estate) and, consequently, the abandoned land would be a burden to the revested debtor as well.

48. In a Chapter 11 reorganization case, the debtor may be in possession as debtor-in-possession. However, although “debtor in possession” means debtor, 11 U.S.C. § 1101(1), the debtor and the debtor in possession are not the same entity functionally. The “debtor” is the “person or municipality concerning which a case under [Title 11] has been filed.” Id. § 101(13). The “debtor in possession” is the representative of the estate, “except when a person . . . is serving as trustee in the case.” Id. § 1101(1).


50. If the bankruptcy is an involuntary proceeding, the debtor did not have control over whether the bankruptcy was commenced.
debtor controls, then, from the debtor's perspective, it is a postpetition event and should be treated as such.

Finally, were the attribute or condition which renders a particular property burdensome to the estate present in the property prior to the debtor's bankruptcy, the burdensome nature of the property should be viewed as just another one of the debts, liabilities, responsibilities, etc., the debtor sought to be released from through the bankruptcy process. Returning again to our example concerning the toxic spill by a third-party on land belonging to the debtor, now assume that the toxic spill occurs prior to the debtor's bankruptcy. Consequently, among the debtor's many other prepetition debts, there is the cost of the cleanup. Thus, the property was, in a sense, burdensome to the debtor even prepetition. That burden may not have been the proverbial straw that broke the debtor's financial back, forcing the debtor into bankruptcy. Still, it makes sense to view the burden of the cleanup as a straw, and one which the debtor would want to get out from under through bankruptcy.51 This is precisely the general kind of prepetition financial liability of which society wants to relieve the honest but unfortunate debtor;52 and of which fundamental bankruptcy policies—the policy of providing individual debtors a fresh-start, and the policy of favoring rehabilitation over liquidation—are concerned.53 And, it would be a poor and wanting consequence of the abandonment provisions of § 554 were the debtor's fresh-start or rehabilitation frustrated by the trustee's abandoning such property and revesting the property and the burden with the debtor.

Obviously, were the trustee prevented from abandoning property that was burdensome to the estate, the creditors would risk a potential reduction in the eventual satisfaction of their claims. If, for example, the trustee in Midlantic was required to comply with the state's environmental protection statutes and engage in the removal or cleanup of

51. The debtor's creditors also may want to institute an involuntary bankruptcy proceeding as an effective means of stopping debtor's (wasteful?) use of assets on the cleanup.
52. See 11 U.S.C. § 101(5) (the Bankruptcy Code's definition of "claim"); id. § 101(12) (definition of "debt"); id. § 101(10) (definition of "creditor"); Baird & Jackson, supra note 8.
53. As a matter of public policy, Congress could decide that obligations associated with environmental cleanups are not a category of obligations from which the debtor may obtain relief through the bankruptcy process. Presently, Congress has not acted to treat "environmental" debt as special and of a kind from which the debtor cannot be released in bankruptcy. It is not clear if such a policy would mean anything in the context of a corporate bankruptcy proceeding. Such a policy would have significance in the case of individuals, as the Bankruptcy Code now explicitly provides for, excepting certain debts from the discharge. See 11 U.S.C. § 523.
the hazardous and toxic waste, the cost of the cleanup would have been financed from the potential distribution to the debtor's creditors. How the state's claim against the bankruptcy estate for the cleanup would be handled within the normal administration of the estate (e.g., whether the cost of the cleanup is treated as an administrative priority claim, a superpriority secured claim against specific or all the estate's assets, a priority unsecured claim, or as a general unsecured claim) is a question of the nature and priority of the right under applicable state law or under § 503 of the Code as an "actual, necessary cost and expense of preserving the estate." But such question is not an issue of the nature of, or limits on, the trustee's abandonment powers, and is not a subject addressed here.

Now the Midlantic case is different, and different in a notable way, from cases involving an individual debtor or a corporate debtor in Chapter 11 reorganization. In those cases, there is a debtor who, hopefully, survives the bankruptcy process. In individual bankruptcy cases, usually a flesh and blood person exists postbankruptcy. In Chapter 11 corporate reorganizations, the debtor survives restructured, recapitalized and, generally, with new ownership—the prepetition creditors. Midlantic, however, was a corporate liquidation. At the time the bankruptcy court authorized the trustee to abandon the property in question, the debtor's bankruptcy had been converted from a Chapter 11 reorganization proceeding to a Chapter 7 liquidation. As a practical matter, the abandonment of the burdensome property, if the liquidating corporate debtor has the immediate possessory interest, does seem less burdensome to such liquidating debtor, since the debtor would have no other postpetition assets at risk. The debtor appears as the ultimate judgment-proof debtor. After liquidation: (a) it has no assets of any material value; (b) the one asset it does have requires a substantial infusion of money to fund a cleanup and give it value; and (c) it has no future income stream potentially attached by creditors.

55. 11 U.S.C. § 503(b)(1)(A); see United States v. The LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1009-10 (2d Cir. 1991); Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.), 856 F.2d 12, 17 (4th Cir. 1988); Lancaster v. Tennessee (In re Wall Tube & Metal Products Co.), 831 F.2d 118, 123 (6th Cir. 1987).
56. There are, of course, bankruptcies in which the debtor is the estate of a deceased individual.
57. Midlantic, 474 U.S. at 497.
But, to say that such a liquidated corporate debtor is judgment-proof does not diminish the fact that the burdensome property abandoned by the trustee is now burdensome to this skeleton of a corporation. Conceptually, after the abandonment, one has a corporate debtor with only one asset (a burdensome asset in the form of a hazardous and toxic waste site), with the corporate debtor being owned by a group of equity shareholders. If you assume that the property has negative market value (that is, the owner would literally have to pay someone to take the property off its hands or subsidize the cleanup before someone would take the property), the equity shareholders hold certificates of shares worth less than nothing. Shareholders generally have limited liability under applicable nonbankruptcy state law; so without some special provision for taxing shareholders for the cleanup,\(^5^8\) the shareholders simply walk away having lost no more than their initial investment. Each shareholder could simply abandon (in a nonbankruptcy sense of “abandon”) whatever residual interest the shareholder has in the debtor’s burdensome assets. If all the shareholders abandon their residual interest in the debtor’s assets, an interesting question is raised—who has the possessory interest in the asset? But why would state law permit the shareholders to abandon the burdensome asset? Consequently, the shareholders may have an interest which they cannot utilize themselves, transfer by sale, or abandon.\(^5^9\)

\(^5^8\). The possibility of a special tax levy on shareholders was suggested above in this Article, with the proceeds being applied to the cleanup of the hazardous and toxic waste. This would obviously reflect an assault on the current limited liability enjoyed by equity shareholders. Yet, it does represent a reasonable solution to both (a) the financing of the cleanup of hazardous and toxic waste when there are insufficient assets available from the debtor, and (b) the predicament of shareholders holding shares in such a debtor. That shareholders will find the solution distasteful and harsh is a certainty. Still, the solution is a reasonable one, especially if one entertains the following slight legal fiction. The corporate debtor’s board repurchases all outstanding shares and, in turn, pays each shareholder not cash, but with a pro rata distribution of the debtor’s assets (the hazardous toxic wasteland). That the debtor’s board would not in fact authorize the repurchase is obvious. The repurchase is not in the shareholders’ interest (and only the shareholders’ interest matters to the board as the debtor itself no longer has any interests to protect). If under applicable nonbankruptcy law the owner of the land would be responsible for the cleanup and removal of the hazardous and toxic waste, then once the fictional repurchase and distribution of the land is completed, the former shareholders, now owners, would be responsible for the cleanup. The former shareholders (with their residual interest in the corporate debtor’s hazardous and toxic wasteland), now as owners (with their immediate possessory interest in that wasteland), would be responsible for paying for the cleanup. The imposition of a special tax on the shareholders is simply a more efficient mechanism for achieving this same result.

\(^5^9\). One may not reach that question when the subject property is real property. At
VI. COMPETING AIMS OF BANKRUPTCY

Historically, the principal rationale for bankruptcy abandonment has been the notion that the creditors of the debtor would be better off if the individual (e.g., the bankruptcy trustee) charged with administering the bankruptcy estate for the creditors’ benefit did not have to administer those properties which tended either to decrease the aggregate value of the estate or add no real value to the estate. For example, if the cost to the estate of monitoring, maintaining, selling or otherwise disposing of asset “A” would not be recaptured, then “A” would be viewed as burdensome to the estate as it reduced the overall value of the bankruptcy estate. The “asset” is actually a drain on the estate. The administrator of the bankruptcy estate, charged with maintaining the overall value of the assets of the estate for eventual distribution to the creditors, and the creditors themselves, would want to rid the estate of “A” because its presence only diminishes the value of the estate to the creditors. Retaining “A” in the bankruptcy estate only reduces the expected value of any distribution to creditors in satisfaction of their claims against the debtor or the debtor’s estate.

Similarly, when asset “B” has no value, or inconsequential value to the estate, such that its retention would not have a material effect on the overall value of the estate, why should the administrator of the estate waste time, energy, effort, and estate resources to manage the asset? The creditors, whose interests were to be served through the proper disposition of the estate’s assets, are better served by that assets removal from the estate. In that way, the value to the creditors of remaining assets are less at risk. Assets of inconsequential value and benefit, or burdensome assets, were to be abandoned by the es-

common law, an ownership interest in real property cannot be abandoned. See Picken v. Richardson, 77 A.2d 191, 193 (Me. 1950); Waldron v. Whittington, 57 So. 2d 298, 300 (Miss. 1952); In re Indiana County, 62 A.2d 3, 5 (Pa. 1948). While the corporate debtor still legally exists, the shareholders are not the owners of the corporate assets; but they must be the residual owners when the debtor liquidates.

60. See Midlantic, 474 U.S. at 508, (Rehnquist J., dissenting).

By analogy to the trustee’s statutory power to reject executory contracts, courts had developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of the encumbrances to offset the cost of administration . . . . This judge-made rule served the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor’s property to money, for equitable distribution to creditors . . . . Forcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets.

Id. (citations omitted).
tate because, simply, otherwise retaining such property did not serve the best interest of the creditors. The debtor's interests were not part of the calculus determinate of whether the property should be abandoned. In the historical context of American bankruptcy law, this makes sense as bankruptcy's general aim had primarily been that of addressing and protecting the rights of creditors. Moreover, since in the usual case, property can be disposed of without imposing costs on third-parties, bankruptcy abandonment likewise usually imposes no cost on third-parties.

The present federal bankruptcy law, however, somewhat schizophrenically recognizes two competing aims. One aim of bankruptcy remains that of providing a forum for the ordering and equitable distribution of the debtor's assets to creditors. The best interest of the creditors is thought to be served by the trustee administering the estate so as to maintain (if not maximize) the value of the estate for the benefit of the creditors. Yet bankruptcy's other general aim is to provide the debtor relief from prebankruptcy debts and, to the extent that the debtor "survives" bankruptcy, to provide the debtor with the opportunity to move forward unencumbered by its prepetition debts. In the case of the individual debtors and corporate debtors, this second aim manifests itself in the "fresh-start" and "rehabilitation" policy of bankruptcy, respectively.

The "fresh-start" is a policy aim of the Bankruptcy Code. It is helpful, perhaps, to think of the fresh-start as having two faces. One face looks backward at the debtor's prepetition debt; the other looks forward towards the debtor's postpetition (or postbankruptcy) ability to function financially. With the former, the attention is focused upon the dischargeability or impairability of prepetition debt, and whether any (and to what extent) allowed debt will survive the bankruptcy process and be enforceable against the debtor. This dischargeability or impairability aspect appears to be a moot point if the debtor is a corporation to be liquidated. The liquidated corporate debtor is not subject to the risk that prepetition debts will be enforced against it postpetition. Its liability is limited to the value of its assets; and, once those assets have been liquidated, the liability ceases. Individual debtor-

62. In this context, when the debtor is a corporation, "fresh-start" means rehabilitation or rehabilitation policy.
ors, nonliquidating corporate debtors, etc., are affected by the dischargeability or impairability of prepetition debt since that debt, to the extent that it is not discharged or not impaired, is enforceable against the debtor postbankruptcy.

The second face looks to the condition the debtor will be in postbankruptcy, not simply in terms of what, if any, prepetition debt carries forward to some degree nondischarged and unimpaired. This second face looks also to what prepetition assets the debtor will take with it postbankruptcy. This can be clearly seen in Chapter 7 cases involving individuals by the Bankruptcy Code’s allowance of exempt property. For example, two otherwise similarly situated individual debtors both receive their respective discharges of prepetition debts. The debtor who was fortunate enough to have had exempt property at the time the case was commenced, however, gets to enjoy that property postbankruptcy; while the debtor with no exempt property—perhaps only because the debtor was unable to engage in prepetition planning—has no property to enjoy postbankruptcy. All fresh-starts are not equal.

In the case of Chapter 11 corporate reorganization, there is no provision for exempt property. However, the Chapter 11 corporate debtor also gets to retain some prepetition assets; after all, that is what distinguishes a reorganization proceeding from a liquidation proceeding—the debtor gets to keep assets because the value (to the creditors) of the debtor surviving bankruptcy as an on-going entity is greater than the liquidation value of the debtor. The assets that the debtor gets to keep are not “exempt” properties, but rather properties which, for example, are “necessary to an effective reorganization.”

The range of properties include both tangible assets (e.g., real estate, equipment and inventory) and intangible assets (e.g., leases, executory contracts, collective bargaining agreements, patents, and trademarks). Two otherwise similarly situated corporate debtors may not have the same rehabilitative fresh-start if there is a significant difference in the composition of their assets. Again, all fresh-starts or rehabilitations are not equal.

If a debtor’s fresh-start is, in a sense, a function of the value of both prepetition debt and prepetition assets which pass through bankruptcy (plus future earnings in the case of individuals), then, to the

---

64. See 11 U.S.C. § 362(d)(2)(B) (the provision for granting relief from the automatic stay).
extent the trustee’s abandonment of a property deemed a burden to the estate shifts that burden to the debtor, the debtor’s fresh-start is at risk. Of course, the debtor’s risk here may turn on whether any such burden itself survives postbankruptcy. If it does not pass through bankruptcy, the debtor’s fresh-start is not impacted, unless it has somehow either (1) caused an increase in the value of the debt nondischarged or unimpaired in bankruptcy, or (2) caused a decrease in the value of the assets held by the debtor postbankruptcy.

Thus, bankruptcy is a process\(^{65}\) for satisfying (to the extent possible) all the debtor’s prepetition indebtedness. At the end of the bankruptcy process, for each prepetition debt, there should have transpired a determination of whether the debt constituted an allowed claim.\(^{66}\) Further, for every\(^{67}\) allowed claim, either the claim was (i) *satisfied in full* from prepetition assets of the estate; (ii) partially satisfied from the prepetition assets, with the unsatisfied portion being viewed as no longer collectible or enforceable against the debtor; or (iii) totally unsatisfied and no longer collectible or enforceable against the debtor. Creditors, whose allowed claims are partially satisfied or not satisfied at all, cannot look to the debtor’s postpetition assets for satisfaction of their claims. This should be obvious in instances involving Chapter 7 *corporate* liquidations because at the end of the bankruptcy process there is no corporation and no assets. Therefore, there is nothing to look to for further satisfaction of a claim. This may be less obvious in instances involving Chapter 11 *corporate* reorganizations, as the debtor (in some sense) *survives*, but it is nevertheless true that prepetition claims should be effectively administered in the aforementioned manners of (i), (ii), or (iii). Also, the Chapter 11 creditors, if they find their claims only partially satisfied or not satisfied at all, cannot look to the debtor’s postpetition assets for satisfaction of their prepetition claims.

In respecting the satisfaction of allowed claims, the only *real* difference between the Chapter 7 corporate liquidation and the Chapter 11 corporate reorganization is that, while the Chapter 7 creditors (to the extent that their claims get paid) have their claims paid off presently from the proceeds of the liquidation of the estate’s assets,

\(^{65}\) See generally Baird & Jackson, *supra* note 61.


\(^{67}\) Except for those debts of individual debtors excepted from discharge, see 11 U.S.C. § 523, or in those instances where the individual debtor is denied a discharge, see id. § 727(a).
some Chapter 11 creditors have their claims paid some time in the future from the future earnings of the reorganized debtor. But these future earnings of the Chapter 11 debtor can be discounted to their present value equivalent, and are themselves actually a prepetition asset. Regardless of whether the corporate debtor is in liquidation or reorganization, its creditors only get paid from petition assets. There are no "postpetition" assets per se for creditors to look to for satisfaction of their claims. There are only present and future values of those prepetition assets.

Things are different when the debtor is an individual. The Bankruptcy Code has as one of its aims the fresh-start of debtors. A distinction is made between the individual debtor’s prepetition and postpetition assets. Except to the extent that a claim is nondischargeable, all allowed claims against the individual debtor are satisfied only from the prepetition assets of the individual debtor. Postpetition assets (e.g., debtor’s postpetition earnings) are generally not available to satisfy the allowed claims. Bankruptcy’s fresh-start policy for the individual debtor, implemented through the discharge provisions of the Bankruptcy Code, shelters the individual debtor’s postpetition assets from reach by prepetition creditors. For the most part, if the prepetition claims cannot be satisfied from the individual debtor’s prepetition assets, the claims are discharged and rendered unenforceable and uncollectible against the debtor.

Is there not, however, a sense in which even corporate debtors in Chapter 11 reorganization also receive what is akin to a fresh-start? Though the corporate debtor in reorganization is ineligible for a discharge of its prepetition debts, the corporate debtor can “impair”

---

70. Section 1141(d)(3) of the Bankruptcy Code provides that “[t]he confirmation of a plan does not discharge a debtor if . . . (C) the debtor would be denied a discharge under section 727(a) of this title . . . if the case were a case under chapter 7 of this title . . . .” 11 U.S.C. § 1141(d)(3). Section 727(a) states that “[t]he court shall grant the debtor a discharge, unless—(1) the debtor is not an individual . . . .” Id. § 727(a).
71. Section 1124 of the Bankruptcy Code defines when a claim is "impaired":

Except as provided in section 1123(a)(4) of this title . . . , a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—
(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;
(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—
certain prepetition debts (i.e., claims and interests) against the debtor's estate. A claim against the debtor's estate based on a prepetition debt of the corporate debtor would be impaired if, for instance, the plan of reorganization did not provide the creditor with "cash equal to . . . the allowed amount of such claim."72 For example, assume that at the time of entry of the order for relief, the debtor purportedly owed the creditor $100, and the bankruptcy court subsequently valued the allowed claim at $100. If the plan of reorganization provided that the creditor would receive $100 upon confirmation of the plan, and in fact the creditor received $100, then the creditor's claim has not been impaired under the plan. However, if the plan provided that the creditor would be paid less than $100 (e.g., $90), then the creditor's claim was impaired under the plan. But, while the confirmation of a plan generally "vests all the property of the estate in the debtor,"73 prepetition creditors whose claims have been impaired cannot look beyond the plan of reorganization and to the debtor's other prepetition assets or postpetition assets for payment of the unsatisfied portion of their impaired claims:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor,

---

73. 11 U.S.C. § 1141(b).
equity security holder, or general partner is impaired under the plan
and whether or not such creditor, equity security holder, or general
partner has accepted the plan.\textsuperscript{74}

If nothing else, confirmation of a plan of reorganization cuts off any
right of the impaired creditor to enforce or collect its prepetition
claims against the debtor. And, since the Chapter 11 corporate debtor,
though reorganized, survives with the impaired creditors no longer
being able to reach its assets post-confirmation, the successful Chapter
11 corporate debtor experiences the equivalent of a fresh-start. And,
although the cutting off of the impaired creditor’s right to enforce its
prepetition claim is not a “discharge” of the prepetition debt, the con-
firmation of a plan which impairs a creditor’s claim is the Chapter 11
debtor’s equivalent of an individual debtor’s discharge. The discharge
and the confirmation of a plan impairing a claim both serve as an
affirmative defense to any legal action of the prepetition creditor to
enforce its nonbankruptcy rights against the debtor and permit the
debtor to move forward unencumbered or less encumbered by
prepetition debts.

Though the rationale(s) supporting a fresh-start policy (via a
discharge mechanism for individual debtors, and via confirmation of a
plan impairing claims for corporate debtors) may differ for individual
debtors and corporate debtors, it is not critical to this discussion what
the different underlying rationales are for the fresh-start for individual
and the rehabilitation-start for corporations. The fresh-start policy for
individual debtors may be in part grounded, for example, in society’s
concern for the ills of indentured servitude. Such concern would not
explain a fresh-start policy for corporate debtors. And, while a corpo-
rate debtor’s rehabilitation may serve the interests of creditors by
retaining for (their collective benefit) value in an on-going enterprise
that would be lost in a liquidation, the fresh-start for individuals is
clearly the antithesis of creditors’ best interest. However, were the
policy based on an effort to force creditors to monitor their lending
practices ex ante, that rationale could find application for both classes
of debtors.

What is important to note, however, is that the fresh-start policy
for individuals does represent a balancing of the rights of the debtor
against the rights of creditors generally (although it is usually the
unsecured creditors whose interests get compromised). And, the fresh-

\textsuperscript{74} 11 U.S.C. § 1141(a) (emphasis added).
start or rehabilitation policy for Chapter 11 corporate debtors represents a balancing of the rights of one set of creditors against the right of another set of creditors. On the one hand, there are those creditors who (for whatever reason) would prefer that the debtor be liquidated; and on the other hand, there are those who prefer that the debtor survive in some reorganized form. For example, employees, mass tort victims, state agencies charged with enforcing the cleanup of toxic waste sites, etc., may want the debtor to survive so as to generate additional funds to pay wages and benefits for employees, to pay off tort claims as these mature, or to finance the cleanup of the toxic waste site. Thus, a fresh-start policy nonetheless exists as an aim of bankruptcy more or less competing with the best interests of the creditors. And, the tension between these competing aims is pointedly felt in controversy surrounding the scope of the trustee’s bankruptcy abandonment powers.

VII. ESTATE PROPERTY ABANDONED TO THE DEBTOR

“The commencement of a case under section 301, 302, 303 of this title creates an estate.” That is, a new legal entity comes into existence—the debtor’s estate—and this new entity is wholly separate and distinct from the debtor. The estate consists of all property (less certain specifically excepted property), wherever located, in which the debtor had any interest at the commencement of the case. Thus, the moment the debtor’s estate is created through the commencement of the bankruptcy proceeding (that is, at the filing of the bankruptcy petition and the entry of an order of relief), the debtor is summarily legally stripped of its interests in all property which became part of the estate. And, upon appointment of a bankruptcy trustee, the trustee becomes the representative not of the debtor, but rather of the estate.

Suppose the case is subsequently dismissed. Who, then, is vested with the property of the estate? The property was revested in

75. As there is no bankruptcy requirement that the debtor be insolvent—sum of entity’s debts greater than all of such entity’s property, at a fair valuation—even in a Chapter 7 liquidation, all creditors could technically get paid 100 cents on the dollar. Nevertheless, there might be a preference for reorganization over liquidation because, for example, reorganizing would save jobs.

76. 11 U.S.C. § 541(a) (emphasis added).


78. 11 U.S.C. § 323(a).

the debtor.\textsuperscript{80} The debtor will be vested with whatever interest the debtor had at the beginning of the bankruptcy day. Other than the filing of the petition, meetings taking place, and a court hearing, after the dismissal of a case the relative positions of both the debtor and the debtor's creditors are unchanged from their prepetition positions. The debtor's interest in the property is the same; the debtor's indebtedness, duties, obligations, and liabilities to the creditors remain unchanged and unaffected. And, if someone had been appointed trustee of the estate between the time the petition was filed and subsequently dismissed, that person's position would be unchanged at the end of the day.

The bankruptcy trustee's abandonment of property of the estate has, though only with respect to the particular property abandoned, essentially the same effect as a dismissal of the case.\textsuperscript{81} "The property is abandoned to the [d]ebtors, not to the creditors."\textsuperscript{82} That is to say, the property abandoned by the trustee normally revests in the debtor.\textsuperscript{83}

\textsuperscript{80} See 11 U.S.C. § 349(b)(3). Section 349(b) provides that "[u]nless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title . . . (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." \textit{Id}.

\textsuperscript{81} The parallel is not precise. Dismissal of a case terminates the automatic stay against the debtor and the debtor's property, and the creditors are again at liberty to pursue whatever nonbankruptcy remedies they might have. Abandonment itself does not completely terminate the automatic stay; abandonment only terminates the stay with respect to the trustee's or the estate's interest in the property. Consequently, although the debtor is revested with the property, the creditors may not pursue their nonbankruptcy remedies without first obtaining leave from the court through relief from the automatic stay. "It should be noted that an effective abandonment alone, without a prayer and showing for termination of the debtor stay, will terminate only the stay as to the Title 11 U.S.C. estate's interest in the property." First Carolina Fin. Corp. v. Estate of Caron (\textit{In re Caron}), 50 B.R. 27, 29 n.2 (Bankr. N.D. Ga. 1984). Whether it is proper for the bankruptcy court to authorize the trustee's abandoning the estate's interest in the property, but not grant a request for relief from the automatic stay to a creditor or other party with an interest in the property to at least protect its interests in the property, is an issue beyond the scope of this article.

\textsuperscript{82} \textit{In re Murphy}, 22 B.R. 663, 665 (Bankr. D. Colo. 1982).

\textsuperscript{83} Under the former Bankruptcy Act, "[a]bandonment by the trustee of an asset immediately revests title to that asset in the bankrupt." \textit{In re Polumbo}, 271 F. Supp. 640, 643 (W.D. Va. 1967); see also \textit{In re Thomas}, 204 F.2d 788, 792 (7th Cir. 1953). However, the courts engaged in a legal fiction concerning this revesting of the property of the bankruptcy estate back to the bankrupt. The courts fictionalized that the transfer or assignment of the bankrupt's interest in the property "related back" to the point in time immediately prior to the trustee's being vested with title to the property. "Upon abandonment of an asset by a trustee in bankruptcy whatever inchoate title or interest passed to him is extinguished by relation back to the filing of the bankruptcy petition, leaving title as it stood just prior to the filing of the bankruptcy petition." Schram v. Tobias, 40 F. Supp. 470, 472 (E.D. Mich. 1941); see also \textit{In re S.F. Bros. Co.}, 151 F. Supp. 153, 156 (E.D. Mich. 1956). Or, the
The state of the law under the former Act appears to be that
the title to all property abandoned by the trustee stood as if no
bankruptcy had been filed, which in most cases meant it revested in
the debtor.

This analysis appears to be equally appropriate to the present
law. Section 554 deals with the abandonment of property. Both the
House and the Senate reports, in explanation of the effect of the
section state:

Abandonment may be to any party with a possessory interest
in the property abandoned. In order to aid administration of
the case, subsection (b) [now 554(c)] deems the court to have
courts used the fiction that the transfer of the bankrupt's interest in the property to
the trustee simply never occurred in the first place. "The ordinary rule is that, when a trustee
abandons property of the bankrupt, title revests to the bankrupt, nunc pro tunc, so that he is
treated as having owned it continuously." Wallace v. Lawrence Warehouse Co., 338 F.2d
392, 394 n.1 (9th Cir. 1964) (citing Brown v. O'Keefe, 300 U.S. 598 (1937); Sessions v.
Romadka, 143 U.S. 29 (1892); Sparhawk v. Yerkes, 142 U.S. 1 (1891)). But, as observed by
two courts under the old Bankruptcy Act, the choice of fictions is not critical:

Abandonment completely divests the trustee of all rights in the property.
The title is thenceforth regarded as the bankrupt's just as if he had never been in
bankruptcy. Whether the title passes to the trustee and revests in the bankrupt, or
never passes from the bankrupt, since the trustee rejects the title, is of no impor-
tance here.
In re Malcom, 48 F. Supp. 675, 679 (E.D. Ill. 1943) (citations omitted).

[W]hen the trustee in bankruptcy abandons an asset, he is to be treated as having
never had title to it; the abandonment is said to relate back, so that "the title
stands as if no assignment had been made." ... Relation back may be considered
in the nature of a fiction . . . , but after all, it is only a convenient way of de-
scribing a situation where the trustee never had occasion to proceed and the right
is viewed . . . as remaining in the bankrupt.
Rosenblum v. Dingfelder, 111 F.2d 406, 409 (2d Cir. 1940) (citations omitted); see also

There is reluctance by some of today's courts to use the same language to articu-
late the fiction involved in abandonment under the Bankruptcy Code. Rather than describing
the abandonment as a divesting and revesting of title to property, it is now viewed as a divesting
and revesting of control over the property. "The Court does not believe that abandonment
can be used, as a means of effecting a transfer of title . . . . Under section 554, upon
abandonment, the trustee or debtor-in-possession is simply divested of control of the property
because it is no longer property of the estate." In re R-B-Co., Inc. of Bossier, 59 B.R. 43,
45 (Bankr. W.D. La. 1986). Instead of viewing the trustee as holding a real interest in the
property of the estate, that interest is described as merely a "constructive" interest in the
property. "Upon abandonment, the interest held constructively by the chapter 7 trustee
reverted to the [debtor]." Jim Walter Homes, Inc. v. Saylor (In re Saylor), 869 F.2d 1434, 1437
n.2 (11th Cir. 1989). Nevertheless, despite the change in how the fiction is articulated, the
fiction of trustee abandonment appears to be intact and employed under the present Bank-
ruptcy Code.
authorized abandonment of any property that is scheduled under Section 521(1) and that is not administered before the case is closed. That property is deemed abandoned to the debtor.

Subsection (b), enacted as Section 554(c) was changed in the final draft by deleting references originally made which stated that abandonment under this section would be made specifically to the debtor. Thus, it appears that abandonment under any subsection of 554 will be to a party with a “possessor interest.” Generally, a “possessor interest” is defined as a “right to exert control over” or a “right to possess” property “to the exclusion of others.” This legislative reference and attendant definition are in keeping with cases under the former law which hold that title and right to the property reverts to its pre-bankruptcy status. Thus, whoever had the possessor right to the property at the filing of bankruptcy again reacquires that right. Normally this party is the debtor, but it is conceivable that a creditor may be entitled to possession instead if, by the exercise of its contractual or other rights, it held a possessory interest prior to the filing of the bankruptcy.

Thus, when the trustee abandons property, the property stands as if no bankruptcy had been filed and the debtor enjoys the same claim to it and interest in it as he held previous to the filing of the bankruptcy. Abandoned property, therefore, normally reverts in the debtor such as to become “property of the debtor” and subject to the protection of Section 362(a)(5) . . . .

Yet, if the rule is that property of the estate abandoned by the trustee usually reverts in the debtor (or the debtor was never really divested of the property), the legal relationship between the debtor and the property should also stand just as that relationship stood immediately before the bankruptcy was commenced, including the specific right to take possession of the property (or to alienate debtor’s rights in the property). Likewise, when the trustee abandons property of the estate, any encumbrances against the property (security interests, mortgage liens, tax liens, judgment liens, etc.) continue to encumber the property. That is to say, the trustee’s abandonment of the property of the estate does not itself function to extinguish any

nonbankruptcy rights or obligations the debtor has with respect to abandoned property. If, subsequent to the trustee's abandonment of the debtor's property, the debtor sells the property, then the lienholder will share in the proceed from the sale.

What happens if, after the trustee abandons property, the abandoned property significantly increases in value? Abandonment of property by the trustee is final. As noted above, the abandoned property is still available to satisfy the claims of those creditors holding liens against the property. But, once the trustee abandons property of the estate, the property is no longer available to satisfy the claims of general unsecured creditors or those creditors holding undersecured claims against other property of the estate. This is precisely why the Bankruptcy Code requires both notice and a hearing before the trustee is authorized to abandon property.

Would the state be entitled to share in the proceeds from the sale of the land to meet the cost of an environmental cleanup? The answer depends, in part, upon the nature of the state's interest in the land—that is, whether the applicable state statute treats the state's "interest as either a lien on the property itself, a perfected security


86. The property is still available to satisfy, what seemed at the time of the valuation for the court's consideration of the motion to abandon property of the estate, the undersecured portion of a creditors' with security interest in the specific property abandoned. In those situations where the property of the estate is abandoned because the property was viewed as being of inconsequential value and benefit to the estate, the trustee was required to submit evidence of this fact. And this evidence would be comprised, for example, of (a) an appraisal of the market value of the property, (b) the value of the outstanding valid liens and security interests in the property, and (c) the cost of disposing of the property. If the market value of the property was less than the total liens and security interests, then some portion of those liens and security interests would be undetermined. Section 506(a) of the Bankruptcy Code defines "secured" and "undersecured" claims in bankruptcy in terms of the value of the creditor's interest in specific property relative to the value of the estate's interest in that property at the time of the valuation and for the purposes of the valuation. "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property [e.g., the trustee's abandoning the property], and in conjunction with any hearing on such disposition or use on a plan affecting such creditor's interest." 11 U.S.C. § 506(a). At the time the property was abandoned, a particular creditor whose security interest in the property exceeds the value of the property to the estate would have had a secured claim and an unsecured claim. But, assuming that the creditor's claim was an allowed secured claim, see id. § 506(d), the creditor's lien would remain intact and pass through the bankruptcy unaffected.

87. 11 U.S.C § 554.
interest, or merely an unsecured claim." 88 If, prior to the commencement of the debtor's bankruptcy, the state had ordered the debtor to pay a specified amount to clean up the land (or the state had itself performed the cleanup and had ordered the debtor to reimburse the state) and the state's interest in the land is, under applicable state law, 89 a lien on the land (or a perfected security interest in the land), then the state's interests should survive the trustee's abandonment of the land as property of the estate. 90 Again, "[u]nder 11 U.S.C. § 554, abandonment divests the property from the estate. Ownership and control of the asset is reinstated in the debtor with all the rights and obligations as before the filing a petition in bankruptcy." 91 Upon the trustee's abandoning the property (and the automatic stay being lifted), the state may exercise its state law liens or security interests in the land. However, if at the commencement of the debtor's bankruptcy, the state had only an unsecured claim 92 against the debtor to pay for an environmental cleanup, then, when the property is abandoned, the abandonment does not elevate the state's interest to a lien or a security interest. The state had no interest in the land itself and the state's claim against the debtor would remain an unsecured claim against the bankruptcy estate to be satisfied from whatever distribution is provided for under the Bankruptcy Code.

But what if the environmental statute provides that the obligation to remove the hazardous waste runs with the property? That is, the statute provides that whoever owns or holds the possessory interest in the property is responsible for the cost of the cleanup and, more importantly, this duty to clean up the land is a continuous duty until such time as the toxic or hazardous waste is removed. 93 Then, the trustee's abandonment of the burdensome property, though perhaps removing the estate's obligation to clean up the property because it is dispossessed of the land, has not extinguished the state's interest in

---

89. See Butner v. United States, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of the bankrupt's estate to state law").
90. Such a lien or security interest would not burden the debtor as the debtor could just let the state foreclose on the property.
92. Or the state has no "bankruptcy claim" because, for example, the state had not ordered a cleanup and, under state law, the obligation to pay does not arise until such order is made.
having the owner or possessor interest holder remove the waste. Additionally, if such a state regulation is a valid and legitimate exercise of the state’s police powers to protect the health and safety of its citizens, then the trustee’s abandonment of the property does not relieve the person with the possessory interest in the property of the obligation to comply with the state’s environmental laws. “Plainly, that person or firm may not maintain a nuisance, pollute the waters . . . , or refuse to remove the source of such conditions.”

Yet, if the trustee’s abandonment of the hazardous property usually vests the debtor with the property, the revested property returns to the debtor with all its burdens, including the obligation not to maintain a nuisance or threat to the public health or safety. Then, this obligation would be a burden to the debtor. It is not merely the return to the debtor of the burden to pay money, but a revesting in the debtor of the obligation to remove the hazardous waste.

Yet, if the ultimate consequence of the trustee’s abandoning the hazardous property is to shift such burden onto the debtor (and potentially debtor’s postpetition assets), then, in the Bankruptcy Code’s version of the Nietzschean eternal recurrence, the debtor is forced to confront a liability that it sought to escape through bankruptcy. Thus, interpreters of abandonment under § 554 face the horns of the Bankruptcy Code’s own internal dilemma—the Bankruptcy Code does authorize the trustee’s abandoning such onerously burdensome property notwithstanding the fact that, under applicable state law, the debtor will be exposed to certain liabilities running continuously with the abandoned property. This is property which the debtor was revested with upon the trustee’s abandoning the estate’s interest in the property. The Bankruptcy Code does not authorize the trustee’s abandoning certain property, despite the fact that the property is burdensome (and of relatively inconsequential value and benefit to the estate), because

95. This revesting of the burdensome property in the debtor and the shifting of the burdens of the waste removal from the bankruptcy estate back to the debtor may have no practical importance to the Chapter 7 corporate debtor. The value and the benefit of the abandoned property are less than the cost of the burdens possession of the property entails, otherwise the trustee would not have acted to abandon the property. But, except for the abandoned burdensome property, all the debtor’s assets would have been liquidated with the proceeds being distributed to the creditors. Consequently, there is little or nothing belonging to the debtor for the state to look towards in enforcing its police powers with respect to the property constituting the threat to the public health and safety. (We leave aside whether the state might look to the debtor’s directors, officers or creditors, or to prior owners of the property, for the cost of the environmental cleanup.)
under applicable state law the debtor will be exposed to certain liabilities running continuously with the abandoned property. The competing concerns, principles or objectives sharpening the dilemma’s two horns do not pertain to whether certain nonbankruptcy, federal or local, environmental laws are preempted by the abandonment provisions of the Bankruptcy Code, or vice versa. Rather, the horns are sharpened by the Bankruptcy Code’s dual concerns of providing debtors relief from their debts and serving the best interests of the creditors by maximizing the distribution the creditors receive from the estate in a Chapter 7 liquidation or under a Chapter 11 plan of reorganization.

This dilemma is precisely at the core of the question that the Midlantic majority refused to reach, namely, “whether certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself.” 96 This can be slightly reconstituted in the form of “whether certain state laws delineating the legal consequences of abandonment may be so onerous as to interfere with the bankruptcy adjudication.” 97 The question, the answer to which is crucial to understanding the outer limits of the trustee’s abandonment powers under § 554, is sidestepped in the Midlantic majority in two quick moves. One, the majority restructured the issue as that of determining whether Congress, in enacting the Bankruptcy Code’s § 554, intended to preempt state environmental protection law. Federal preemption of state law would permit abandonment, but block the states from enforcing its law against the debtor postabandonment. Two, the majority appealed to federal nonbankruptcy environmental protection statutes as evidence of Congress’ alleged legislative intent not to preempt state environmental protection statutes. 98 Consequently, not only was the trustee as administrator of the estate required to comply with applicable state environmental laws, the trustee also could not abandon property in contravention of state laws reasonably designed to protect the public health

96. Midlantic, 474 U.S. at 507.
97. A state law’s imposing of a condition on abandonment may be in the form of a specific restriction on the abandonment (in Midlantic, for example, a restriction limiting the power to abandon property constituting a threat to the public health and safety), or it can be in the form of defining the legal consequences of the abandonment under state law (for example, a law permitting one to abandon the property but not extinguishing one’s liability for the cost of the cleanup). These are two sides of the same exercise of the state’s police power.
98. See Midlantic, 474 U.S. at 505-06.
and safety. The *Midlantic* Court majority may be correct in its analysis, but, for reasons similar to those of the dissent, I do not believe so.

Yet, the dissent's reasoning, with its narrow, formalistic, plain-meaning reading of § 554—if the legislature did not explicitly write a limitation to the trustee's abandonment powers into § 554, or incorporate such limitation by reference, then courts should not read the limitation into a § 554—is also unsatisfactory. The dissent failed to consider (as did the majority) the potential impact on debtors of a strict application of § 554, especially if, as argued below, there exist two classes of property burdensome to the estate, and the abandonment of one class of property imposes a nontrivial threat to the debtor's fresh-start—an overall aim or purpose of the current bankruptcy legislation itself.

This Article does not attempt to settle differences between the majority and dissent on the *Midlantic* Court. Nor is it within the Article's immediate scope to resolve the broader bankruptcy policy issue concerning the proper balancing of bankruptcy's two competing agendas—debtor's relief and creditors' best interest. However, with respect to the *dilemma* respecting bankruptcy abandonment which those competing aims give rise, the balancing of these competing agendas presents a slightly narrower issue which is of concern here. When there is a conflict between serving the creditors' best interest and granting the debtor a fresh-start, in deciding whether to authorize the trustee's abandoning of property burdensome to the estate, should there be a presumption in favor of the creditors' interest or in favor of the debtor's interest (i.e., the debtor's fresh-start or rehabilitation)? The thrust of the Article is: (1) that the debtor's interests are of importance in determining whether the trustee should abandon property of the estate, and (2) that the debtor's interests should have considerable weight in balancing it against the interests of the creditors. This is not to suggest that, where there is a conflict between the two interests, the conflict always be resolved in favor of debtors. Rather, I would endorse a presumption in favor of the debtors' interest.

99. See id. at 507-08.

100. Id. at 514-15 (Rehnquist, J., dissenting). Rehnquist stated that "[i]n these cases, it is undisputed that the properties in question were burdensome and of inconsequential value to the estate. Forcing the trustee to expend estate assets to clean up the sites would *plainly* be contrary to the purposes of the Code." *Id.* (emphasis added).
VIII. ABANDONING BURDENSOME PROPERTY UNDER SECTION 554

Consider how property abandoned by the trustee might become burdensome to the debtor. Section 554(a) of the Bankruptcy Code provides that: “After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”101

On a cursory reading, § 554(a) would appear quite simply to specify two sets of circumstances under which the trustee may102 abandon property of the estate. If either one or the other of the two sets of circumstance is present, there would seem to be no further restraints on the trustee’s deciding to abandon property of the estate. Furthermore, the notice and hearing requirements of § 554 function primarily as procedural safety-valves or checks on the trustee’s determination that one or the other condition for abandonment holds true. This reduces the likelihood that the trustee is mistaken in her assessment of the property’s burden, value or benefit to the estate or makes sure that the trustee is not abandoning the property for reasons beyond or in contravention of her responsibilities to administer the estate for the benefit of the creditors.

Under the first set of circumstances, the trustee may abandon property of the estate if the property is burdensome to the estate.103

---

102. Note, § 554(a) is permissive only. The trustee’s power to abandon is, at least in the first flush, discretionary. See Morgan v. K.C. Machine & Tool Co. (In re K.C. Machine & Tool Co.), 816 F.2d 238, 246 (6th Cir. 1987). The Bankruptcy Code does not itself require the trustee to abandon property of the estate that is burdensome, or of inconsequential value and benefit to the estate. The trustee may choose not to abandon such property. Under what conditions a trustee would knowingly choose not to abandon burdensome property and no-equity property is not critical to the present discussion. Besides, § 554(b) provides the mechanism for sometimes compelling the trustee to abandon property. But it is there as well that the bankruptcy court’s power to order the abandonment is discretionary. “On request of a party in interest . . . the court may order the trustee to abandon . . . .” 11 U.S.C. § 554(b) (emphasis added). For example, “once the trustee determines that the assets in the hands of the estate are not property of the estate, he should abandon the asset.” In re Joliet-Will County Community Action Agency, 847 F.2d 430, 431 (7th Cir. 1988). Yet before abandoning property of the estate, the trustee must obtain an independent appraisal of the value and marketability of the property. N.J. Dep’t of Env’t Protection v. National Smelting of N.J., Inc. (In re National Smelting of N.J., Inc.), 49 B.R. 1012 (Bankr. D. Colo. 1985). Still, “[t]he courts have always recognized that a trustee is under no duty to retain the title to a piece of property or a course of action that is so heavily encumbered, or so costly in preserving or securing, that it does not promise any benefit to the funds available for distribution.” Fluharty v. Fluharty (In re Fluharty), 7 B.R. 677, 680-81 (Bankr. N.D. Ohio 1980) (citing 4A COLLIER ON BANKRUPTCY § 70.42[1], at 501 (14th ed. 1976)).
103. As previously stated, this “burden to the estate” basis for authorizing a trustee to
In this Article, property of a sufficient burden to the estate to warrant its abandonment by the trustee is referred to as “burdensome property.” We will eventually see that there are at least two classes of burdensome property and that the trustee’s flexibility in dealing with one of these classes is somewhat limited. We return to all this in short order below after a brief discussion of the other set of circumstances where the trustee may be authorized to abandon property of the estate.

The second set of circumstances under which the trustee may abandon property involves those situations where the property is both of inconsequential value and benefit to the estate. The paradigm of the property being of inconsequential value to the estate is where the estate holds no equity in the property. The property would be of inconsequential value to the estate, for example, if creditor liens exceed the present market value and if the creditors’ security interests in the property are superior to those of the trustee. Similarly, although the appraised value of the property might be consequential, the property is of no value to the estate where, after allowing for secured creditors, cost of sale, taxes, insurance and debtor’s homestead exemption deduction, there would be no proceeds available for the unsecured creditors. Property may be of inconsequential value to the estate, yet be of consequential benefit. For example, a debtor may have no equity in certain business equipment, but the presence of the equipment may enhance the value of selling the entire business as a unit.

abandon property is the primary concern of this Article.

104. See K.C. Machine, 816 F.2d at 245 (“Originally, § 554(b) ostensibly allowed abandonment if the property was burdensome or of inconsequential value to the estate. Congress clarified its intent by amending § 554(b) in 1984 to require a finding of both inconsequential value and inconsequential benefit to the estate before the bankruptcy court can order a compelled abandonment.”).


107. In re Berger Steel, 51 B.R. 59, 60-61 (Bankr. N.D. Ind. 1985). The property of the estate involved in the Berger Steel case was certain liabilities of the debtor’s insurance policies. Under the policies, the insurer was obligated to tender a defense and pay on behalf of the debtor in judgments or settlements of cases arising out of occurrences covered by such policies. Since the funds underlying the policy could only be used to pay settlements or judgments of tort claims, the funds were not generally available to the debtor’s creditors. However, absent immediate abandonment of the policy, there was an increased likelihood of protracted litigation on the insurance claims and the real possibility that the maximum amount
What does it mean to say of property of the estate that the property “is burdensome to the estate?” Unfortunately, in enacting § 554, Congress did not define “burdensome to the estate,” or provide necessary or sufficient conditions for abandoning property as burdensome. The Bankruptcy Code informs us that “burdensome to the estate” does not mean that the property is of inconsequential value and inconsequential benefit to the estate. Section 554 explicitly provides the burdensome and equity grounds for abandonment as distinct justifications. Clearly, if the property is both “burdensome to the estate” and is “of inconsequential value and benefit to the estate” (that is, “burdensome-and-inconsequential” property), the trustee should abandon the property. For if the trustee fails to abandon such property, the creditors will shoulder the risk that the estate’s other assets are being wasted on preserving, maintaining, developing, pursuing, or whatever, the burdensome property. Conversely, if the property is not burdensome to the estate and is either of consequential value or benefit to the estate (that is, “nonburdensome-and-consequential” property), the trustee would be acting improperly in abandoning the property (and it would be an abuse of the court’s discretion to authorize abandonment). There the creditors that would benefit from the property remaining as property of the estate, either because the property remaining part of the estate facilitates the debtor’s reorganization or increases the anticipated total distribution to the creditors in a liquidation proceeding.

Between these two poles there are, of course, those circumstances where the property is not burdensome, but is of inconsequential value and benefit to the estate (that is, “nonburdensome-inconsequential” property, the no-equity circumstances discussed above); and the trustee may abandon such property pursuant to § 554. But the trustee does not have to abandon the property, because neither the abandonment nor the retention of the property would materially impact the amount of any distribution the creditors would ultimately receive through the administration of the estate. If abandoning the proper-

available under the policy would not be sufficient to pay all the insurance settlements or judgments. In that event, “the judgment creditors could very well be placed in a situation in which they are forced to compete with the general creditors. This would clearly have a substantial impact on the estate.” Id. at 60.

109. 11 U.S.C. § 554(a) & (b).
110. The property’s being nonburdensome to the estate and of inconsequential value and benefit to the estate does not mean the property is of inconsequential value or benefit to the
ty would have a material impact on the administration of the estate, the property must, almost by definition, be (1) burdensome to the estate, if the impact of the abandonment on the remainder of the estate would be positive, or (2) of consequential value or benefit, if the impact of the abandonment on the remainder of the estate would be negative. But in the absence of any such material impact on the estate of either abandoning or retaining certain property, the trustee is free to postpone making a decision as to the ultimate merits of abandoning the property.

There is yet one last category of property of the estate giving rise to another set of circumstances where the trustee must seriously weigh the possibility of abandoning estate property. It involves property which, though burdensome to the estate, is thought to have consequential value or benefit to the estate (that is, "burdensome-consequential" property). And the trustee, the court, and the other parties in interest (including a state's environmental protection agency) will be forced to weigh the effect that retention or abandonment of the property is likely to have upon the estate. Should the trustee abandon the property? Should the court compel the trustee to abandon such property? Again, § 554 is permissive: "the trustee may abandon,"111 or "the court may order the trustee to abandon."112 So the question is when would it be an obvious act of poor judgment for the trustee not to abandon, or an abuse of discretion for the court not to compel abandonment? Since in either case, notice and hearing is required before abandonment, the only time the issue will arise is either where the trustee wants to abandon property of the estate and a party in interest objects, or where some party in interest seeks to compel the

---

debtor, a creditor, or another party in interest. And such person may have sufficient motivation and cause to seek to compel the trustee to abandon the property pursuant to § 554(b). Similarly, what is considered as burdensome to the estate by the trustee (or even the court and the debtor's creditors) may not be considered overly burdensome by the debtor. Subsequently, upon abandonment of certain property of the estate by the trustee, the debtor may freely choose to invest her time, efforts and resources to bring value to the asset. For example, consider Sparhawk v. Yerkes, 142 U.S. 1 (1891). In that case, the assignees in bankruptcy viewed the bankrupt's stock exchange seat as having no value, and payment of the annual dues and assessments on the seat as burdensome. Subsequently, they took no steps to accept the seat as property of the estate. Yet the bankrupt for years paid the annual dues and the assessments out of his own postbankruptcy earnings, for his own benefit. This induced the stock exchange membership (which was one of his creditors) not to sell the seat under the stock exchange's own rules, and he eventually paid the stock exchange in full. Consequently, "this worthless and abandoned property became valuable." Id. at 15.

111. 11 U.S.C. § 554(a).
112. 11 U.S.C. § 554(b).
trustee to abandon the property and some party in interest (perhaps, but not necessarily, the trustee) objects.

Clearly, if the property is burdensome to the estate but the anticipated cost of the burden is less than the value or benefit (or the anticipated increase in value or benefit) of the property to the estate, then the property should not be abandoned.\footnote{113. And where the trustee can readily dispose of the property (such as when the trustee has a ready buyer for the property), the property is not burdensome to the estate. Morgan v. K.C. Machine & Tool Co. (In re K.C. Machine & Tool Co.), 816 F.2d 238, 245 (6th Cir. 1987).} On the other hand, if the property is burdensome to the estate and the anticipated cost of the burden is greater than the value or benefit (or the anticipated increase in value or benefit) of the property to the estate, then the property should be abandoned.\footnote{114. See Estate of Reich v. Burke (In re Reich), 54 B.R. 995, 1004 (Bankr. E.D. Mich. 1985).} One underlying principle, to be employed by both the trustee and the court in reaching their respective decisions as to whether the property (which is considered burdensome but of consequential value or benefit to the estate) should be abandoned, is that of serving the best interest of the creditors—that is, whether the creditors will benefit from retention or abandonment of the property. The trustee’s responsibility is to administer the estate for the benefit of the creditors. If on balance the greater benefit to the creditors is in abandoning the property, then normally, the property should be abandoned.\footnote{115. In a Chapter 7 liquidation proceeding, “[t]he trustee’s purpose is to liquidate the estate for the benefit of unsecured creditors. The trustee need not take property burdensome to the estate because the unsecured creditors would not benefit thereby.” K.C. Machine, 816 F.2d at 245-46.} But, if the scales tilt the other way and the greater benefit to the creditors is in keeping the property as part of the estate, then normally, the property should be retained notwithstanding the fact that it is burdensome.

Are the creditors’ interests the only interests to be weighed in the decision whether to abandon property of the estate? Midlantic concerned itself with the state’s interests in protecting the public health or safety. And the Midlantic Court, correctly or not, went
outside the Bankruptcy Code and determined that the state’s interest in protecting the public health and safety outweighed whatever burden the property placed upon the estate—and, consequently, outweighed whatever burden the property had on the creditors as a result of reducing the net amount of any distribution to those creditors. But, whether the Midlantic Court was correct in weighing the interests of the creditors against a state’s interests (e.g., the state’s interest in protecting the public health and safety) is not the immediate concern of this Article. What is of concern, however, is whether the interests of another party to the bankruptcy proceeding might be affected by the abandonment of the burdensome property; whether that party’s interests must be weighed against the interests of the creditors; and whether, if the abandonment of the property so negatively impacts that party, to the extent that the abandoned property becomes burdensome to the party, the trustee should not be permitted to abandon the property.

And which party to the bankruptcy proceeding might have an interest which would trump those of the creditors? The answer is the debtor, especially if compromising the debtor’s interest defeats the other fundamental purpose of the bankruptcy: providing bankruptcy relief to the debtor. Since in most instances it is the debtor who will hold the possessory interest in the abandoned property, if the burdens of the property abandoned are borne by the person with the possessory interest, the Bankruptcy Code’s goal of providing the debtor with relief from its debts would be frustrated. Therefore, the trustee should not be allowed to abandon property burdensome to the estate under circumstance where the burden would shift to the debtor upon the debtor’s being revested with the property. Burdensome property of the estate which, as a result of being abandoned by the trustee, becomes burdensome to the debtor is, in a very real sense, “onerous” to the bankruptcy adjudication. The trustee’s abandonment of the property fails to relieve both the estate and the debtor of the property’s burdens.116

Thus, the distinction must be drawn between two classes of

116. It is not materially significant whether the burdens to the debtor are the same as those of the estate, only that the abandonment by the trustee results in the property being burdensome to the debtor. Or similarly, whether the property was not burdensome to the estate and abandoned due to its inconsequential value and benefit to the estate, if the property becomes burdensome to the debtor as a result of the abandonment. This limitation to the trustee’s abandonment powers turns, primarily, on the effect on the debtor of the abandonment.
property burdensome to the estate. One class will consist of property of the estate which is merely burdensome to the estate, such that its abandonment by the trustee benefits the creditors without undermining the debtor’s bankruptcy relief. The second class consists of property of the estate which is not only burdensome to the estate, but which, if abandoned by the trustee, threatens to undermine the debtor’s bankruptcy relief. Furthermore, the trustee’s abandonment powers should be limited so as to restrict abandonment of estate property to those instances where the debtor will not be burdened by the abandonment. The language of the possible amendment to § 554, reflecting that presumption, might read as follows:

At any hearing concerning abandoning property of the estate, the debtor may object to the proposed abandonment, and the court shall not authorize the trustee to abandon property of the estate when abandoning property causes the property to become materially burdensome to the debtor.

It would be left to the courts to develop standards of “materially burdensome to the debtor.”

**IX. APPLICATION TO MIDLANTIC**

*Midlantic* could have been decided on these narrower grounds and upon grounds rooted in the Bankruptcy Code itself. The reason why the trustee may not abandon property posing an immediate threat to the public health and safety is *not* due, per se, to the existence of a nonbankruptcy regulation reasonably designed to protect the public health and safety preempting § 554 of the Bankruptcy Code. Rather, the trustee’s power to abandon the property is restrained because if the trustee were to abandon the property, such regulation places the burden of complying with the regulation on the person with the possessory interest in the property. In the case of property abandoned by the trustee, the person with the possessory interest in the property is usually the debtor.117 Consequently, abandonment of the hazardous

---

117. The fact that a creditor may have a nonbankruptcy, state law right to dispossess the debtor of the property (because, for example, the contract gives the creditor right to take possession if the debtor is in breach of the underlying obligation giving rise to the creditor’s security interest), does not lessen the fact that, upon abandonment of the property by the trustee, it is the debtor who holds the immediate possessory interest in the property. And the creditor, if it has not obtained prior relief from the automatic stay, may not exercise its nonbankruptcy, state law right to take possession of the property. See *In re Cruseturner*, 8 B.R. 581, 592 (Bankr. D. Utah 1981).
property has the effect of shifting the burden of the cleanup from the bankruptcy estate to the debtor. In this way a nonbankruptcy law (federal, state or foreign), to use the language of the *Midlantic* Court, "may be so onerous as to interfere with the bankruptcy adjudication itself." If the debtor could (under applicable nonbankruptcy law) likewise abandon the property, then the trustee abandoning the burdensome property would probably not impose a burden on the debtor. Similarly, were the bankruptcy court to condition the trustee's abandoning the property by, for example, enjoining enforcement of the regulation against the debtor, or by specifying that the abandoned property is abandoned to someone other than the debtor (for example, a party who was jointly and severally liable with the debtor, or a party secondarily liable for the cleanup), then the debtor would not be burdened by the trustee abandoning burdensome estate property. For it is the *shifting* of the burden of complying with the regulatory statute to the debtor which, in frustrating the debtor's obtaining bankruptcy relief, restrains the trustee's power to abandon property of the estate. The *Midlantic* Court did not give adequate attention to the concept of abandonment under the Bankruptcy Code and did not give sufficient weight to the effect on the debtor of the trustee's abandonment of property of the estate under § 554.

*Midlantic* specifically involved a Chapter 7 corporate debtor, where, if the trustee were permitted to abandon the property in question, someone other than the debtor (either the prior owners of the property, certain lenders, or the taxpayers) may ultimately have shouldered the cost of the cleanup. Usually after a Chapter 7 liquidation is completed, the corporate debtor simply ceases to exist (i.e., all the stock of the corporate debtor is canceled), or the corporate debtor continues to legally exist but with no assets. And ceasing to exist or having no assets, as a legal or practical matter the corporate debtor cannot be held to account for the cost of an environmental cleanup. A non-entity cannot be held liable for the cost of an environ-

---


119. The debtor in *Midlantic*, Quanta Resources Corporation, initially filed for bankruptcy reorganization under Chapter 11. Later it converted to a Chapter 7 liquidation when the prospects of reorganizing darkened in light of its potential liability for the cost of certain environmental cleanups.


In a chapter 7 proceeding under the Bankruptcy Code, a corporate debtor transfers its property to the trustee for distribution among the creditors who hold cognizable claims, and then generally dissolves under state law. Because the corporation usual-
mental cleanup; and getting shareholders in a corporation with no assets (but facing the prospects of an environmental cleanup) to contribute new capital to the debtor is not a very realistic option. And if the Chapter 7 corporate debtor ceases to exist upon liquidation, then, more importantly for appreciation of abandonment in bankruptcy, the now defunct corporate debtor cannot be viewed as holding the possessory interest in the abandoned property.\footnote{Corporate stockholders do not hold possessory interests in specific corporate assets.} Or can it?

Bankruptcy abandonment situations are not the "usual" cases of bankruptcy liquidation. The corporate debtor cannot liquidate completely, as it retains the abandoned property—that is, unless the property abandoned by the trustee can, in turn, be abandoned by the corporate debtor. But the debtor being permitted to abandon the burdensome property upon the trustee prior to abandoning the estate's interest in the property and its revesting in the debtor, begs rather than answers the issue of onerous nonbankruptcy law. If the applicable nonbankruptcy law prohibits the subsequent abandonment by the debtor, there can be no final liquidation of such corporate debtor. Liquidating the bankruptcy estate from which the abandoned property came is possible, but the debtor remains unliquidated. So in theory, the abandoned property remains a burden on the corporate debtor.

Section 554, however, not only applies to Chapter 7 corporate debtors, it also applies to both Chapter 7 individual debtors and all Chapter 11 debtors. And Chapter 11 itself specifically applies to, among others, corporate debtors who, if the reorganization is successful, in some form survive bankruptcy. These entities do exist after the bankruptcy, and they can hold (though they might not want to hold) the possessory interest in any property of the estate abandoned by the trustee.\footnote{That the debtor has a "suspended" possessory interest in property of the estate, which, upon abandonment, reverts the debtor with the property, can be observed in § 554(c): "Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title." 11 U.S.C. § 554(c) (emphasis added).} For these two classes of debtors, the trustee's abandonment of such property burdensome to the estate could, in a material way, shift the burden of the property to the debtor. This possibility that the abandoned property will become a burden to the debtor re-
strains the trustee’s power to abandon the property. The factual circumstances of *Midlantic* are simply a more specific instance of those circumstances where the trustee should not be allowed to abandon property of the estate. The burden of the environmental cleanup would shift to certain debtors upon the trustee’s abandonment of some hazardous property. The *Midlantic* Court failed to fully contemplate the potentially burdensome impact on debtors were the trustee allowed to abandon property under the basic facts of *Midlantic*.

X. Conclusion

Prior to *Midlantic*, § 554 read literally, granted the trustee the power to abandon property burdensome to the estate without qualification—“burdensome to estate” to be determined in each case by the bankruptcy court. The *Midlantic* Court recognized a narrow exception to the literal reading of § 554, in that the trustee may not abandon burdensome property when that property is an immediate threat to public health and safety—“presence of an immediate threat to public health and safety” to be determined in each case by the bankruptcy court. This Article took exception to the *Midlantic* approach and articulated an alternative abandonment rule, one focused more on balancing the competing interests of debtors and creditors. The alternative proposed would have denied, as in *Midlantic*, the trustee’s request to abandon the hazardous waste, but would do so on grounds that, as a general rule, such abandonment would tend to be burdensome to debtors. Permitting the trustee to abandon burdensome property of the estate, in a manner which shifts the burden to the debtor, is contrary to the fresh-start and rehabilitation policies of the Bankruptcy Code. For that reason, the trustee’s abandonment power should be appropriately constrained.