BANKRUPTCY—ABANDONMENT—TRUSTEE IN BANKRUPTCY MAY NOT ABANDON BURDENSOME PROPERTY OF DEBTOR'S ESTATE IN CONTRAVENTION OF STATE AND LOCAL ENVIRONMENTAL PROTECTION LAWS—*In re* Quanta Resources Corp., 739 F.2d 912 (3d Cir. 1984), *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985).

Section 554(a) of the Bankruptcy Reform Act of 1978 (1978 Act)[1] permits the trustee in bankruptcy[2] to abandon[3] "any property of the [debtor's] estate that is burdensome. . .[or] of inconsequential value to the estate."[4] Unlike state and local environmental protection legislation,[5] however, the Federal

---

[1] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2603 (codified as amended at 11 U.S.C. §§ 101-151326 (1982)), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 93-353, 98 Stat. 333. See Klee, *Legislative History of the New Bankruptcy Code*, 54 AM. BANKR. L.J. 275 (1980), for a succinct overview of earlier bankruptcy acts.

[2] Previously, under section 70(a) of Title 11, title to the debtor's property vested in the trustee in bankruptcy. *See* 4 COLLIER ON BANKRUPTCY ¶ 554.02[2], at 554-57 (L. King 15th ed. 1984) [hereinafter cited as 4 COLLIER]. *See generally* 4A COLLIER ON BANKRUPTCY ¶ 70.11, at 114.1-18 (L. King 14th ed. 1978) [hereinafter cited as 4A COLLIER] (detailed discussion of former § 70(a) and its legislative history). The trustee was deemed "a transferee by operation of law. He [was] not a bona fide purchaser or encumbrancer, but [took] the bankrupt's property in the plight in which he [found] it." *Id.* ¶ 70.42, at 499-500. By virtue of section 551 of Title 11 to the 1978 Act, which defines property of the bankruptcy estate, the trustee no longer takes title to the debtor's property, "but instead acquires a controlling interest in it." 4 COLLIER, *supra*, ¶ 554.02[2], at 554-57.

[3] Property may be abandoned by the trustee "to any party with a possessory interest" in it. 4 COLLIER, *supra* note 2, ¶ 554.02[2], at 554-58. Abandonment irrevocably dispossesses the trustee of any interest in the property abandoned. *Id.*; *see In re* Enriquez, 22 Bankr. 934, 935-36 (Bankr. D. Neb. 1982) (trustee cannot recoup interest in abandoned property regardless of subsequent increases in value); *In re* Torpley, 4 Bankr. 145, 146 (Bankr. M.D. Tenn. 1980) (exception to rule that abandonment is irrevocable). Abandonment, however, does not divest the debtor of his interest in the property. *See In re* Tyler, 15 Bankr. 258, 260 (Bankr. E.D. Pa. 1981); *In re* Motley, 10 Bankr. 141, 145 (Bankr. M.D. Ga. 1981).

[4] 11 U.S.C. § 554(a) (1982). Section 554(a) of the 1978 provides that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." *Id.* Section 554(a) was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 93-353, 98 Stat. 333, to include property that is "of inconsequential value *and benefit* to the estate." 11 U.S.C.A. § 554(a) (West Cum. Supp. 1985) (emphasis added). So long as there is no objection to abandonment, the trustee may disclaim the property absent court approval. *In re* Trim-X, Inc., 695 F.2d 296, 300 (7th Cir. 1983) (citing *In re* Motley, 10 Bankr. 141 (Bankr. M.D. Ga. 1981); *In re* Peninsula Roofing & Sheet Metal, 9 Bankr. 257 (Bankr. W.D. Mich. 1981)).

[5] *See, e.g.*, N.J. STAT. ANN. §§ 13:1E-1 to -116 (West Cum. Supp. 1984-1985);

bankruptcy scheme does not contemplate the trustee's disposal[6] of property of the debtor's estate that also constitutes hazardous waste.[7] In an attempt to resolve the conflict between the trustee's Federal statutory authority to abandon[8] and the state's traditional police power to protect public health and safety,[9] the United States Court of Appeals for the Third Circuit, in *In re Quanta Resources Corp.*,[10] recently held that a trustee's abandonment power does not preempt state and local laws regulating the disposal of hazardous waste.[11]

Quanta Resources Corporation (Quanta)[12] was formerly in

N.Y. ENVTL. CONSERV. LAW §§ 27-0900 to -0923, 71-2702 (McKinney Supp. 1982); N.J. ADMIN. CODE tit. 7, § 26-2.1(b) (Supp. 1984).

6 "Disposal" of hazardous waste is defined by New York environmental statute as

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste or hazardous waste into or on any land or water so that such waste or hazardous waste or any related constituent thereof may enter the environment or be emitted into the air or discharged into any waters of the state including groundwaters thereof.

N.Y. ENVTL. CONSERV. LAW § 27-0901(2) (McKinney Supp. 1982); *cf.* N.J. ADMIN. CODE tit. 7, § 26-1.4 (Supp. 1984) (New Jersey Department of Environmental Protection's definition of "disposal").

7 "Hazardous waste" is defined by New York environmental statute as "a waste or combination of wastes which because of its quantity, concentration, or physical, chemical or infectious characteristics may . . . [p]ose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed, or otherwise managed." N.Y. ENVTL. CONSERV. LAW § 27-0901(3) (McKinney Supp. 1982); *cf.* N.J. Admin. Code tit. 7, § 26-1.4 (Supp. 1984) (New Jersey Department of Environmental Protection's definition of "hazardous waste").

8 *See* 11 U.S.C. § 554(a) (1982) (codification of trustee's abandonment power) (current version as amended at 11 U.S.C.A. § 554(a) (West Cum. Supp. 1985)).

9 *See, e.g.*, Standard Oil Co. v. City of Marysville, 279 U.S. 582 (1929) (municipal ordinance regulating storage of petroleum products upheld as valid exercise of state's police power); Gardner v. Michigan, 199 U.S. 325 (1905) (municipal ordinance governing garbage disposal upheld as legitimate exercise of state's police power to protect public health); California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318 (1905) (cogent summary of source of state's police power to legislate in interest of public health and safety).

10 739 F.2d 912 (3d Cir. 1984) (New York suit), *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985); 739 F.2d 927 (3d Cir. 1984) (New Jersey suit), *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985). The Third Circuit issued two companion opinions as a result of the *Quanta* litigation, both of which are entitled *In re Quanta*. One involved New York's environmental legislation; the other involved New Jersey's environmental legislation. In order to clarify which opinion is being referred to in this Note, a reference to the appropriate jurisdiction will be included in parentheticals after cites to either of the *Quanta* opinions.

11 *Quanta*, 739 F.2d at 922 (New York); *Quanta*, 739 F.2d at 928-29 (New Jersey).

12 Quanta was "a wholly owned subsidiary of Quanta Holding Corporation, which is a wholly owned subsidiary of Waste Recovery Inc., which is a wholly owned

the waste oil recovery business.[13] It stored and treated industrial and automotive waste oil and sludge for resale.[14] It operated facilities at Long Island City, New York[15] and Edgewater, New Jersey.[16] Business activities at the sites were regulated by state environmental protection agencies.[17] The agencies prohibited

---

subsidiary of Warburg Paribas Becker, Inc." Brief of Appellant New Jersey Department of Environmental Protection, app., at A41, *In re* Quanta Resources Corp., 739 F.2d 927 (3d Cir. 1984), *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985) [hereinafter cited as NJDEP Brief].

[13] *See* Petition of Midlantic National Bank for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 3, Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985) [hereinafter cited as Midlantic's Petition].

[14] *Quanta*, 739 F.2d at 928 (New Jersey).

[15] *See Quanta*, 739 F.2d at 913 (New York). The New York facility is located in the center of New York City. *See id.* Quanta acquired the facility when it purchased the "assets, facilities and operations of the Hudson Oil Refining Corporation." Brief of Appellants at 4, *In re* Quanta Resources Corp., 739 F.2d 927 (3d Cir. 1984), *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985) [hereinafter cited as Brief of Appellants]. Mortgages on the New York facility were held by the Equitable Life Assurance Society and the Portland Holding Co. *Quanta*, 739 F.2d at 914 n.3 (New York). At the time of the bankruptcy proceedings, the aggregate amount due on the mortgages exceeded $428,000. *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 4-51, O'Neill v. City of New York, *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985) [hereinafter cited as O'Neill's Petition]. A judgment was entered by the bankruptcy court establishing the validity of the mortgage liens in the amount of $344,464. *Id.* app. G, at 53a. These liens were subsequently foresaken. *Quanta*, 739 F.2d at 914 n.3 (New York).

[16] *See Quanta*, 739 F.2d at 928 (New Jersey). Quanta occupied the New Jersey facility under an assignment of a lease by Edgewater Terminals, Inc. Midlantic's Petition, *supra* note 13, at 3. The premises were owned by appellants, James Frohla and Albert Von Dohlin. NJDEP Brief, *supra* note 12, at 3.

On June 3, 1981, Midlantic National Bank (Midlantic) loaned $600,000 to Quanta for working capital. Midlantic's Petition, *supra* note 13, at 3. A judgment was entered by the bankruptcy court on April 5, 1982, establishing a "first priority secured interest" in Midlantic against Quanta's New Jersey inventory, equipment, and accounts receivable. *Id.* at 3 n.1.

[17] The New York facility was subject to an administrative consent order between Quanta and New York State Department of Environmental Conservation. *See* Brief of Appellants, *supra* note 15, at 4-5. The consent order required that Quanta maintain and operate the facility in accordance with the state's environmental conservation laws. *Id.* at 5.

Quanta's New Jersey facility was previously operated by its assignor, Edgewater Terminals, Inc., as a special waste facility for storage, reprocessing, and reclamation of waste oil, oil emulsions, and sludge. *See* NJDEP Brief, *supra* note 12, at A11. Similarly, the New Jersey facility was operated under an administrative consent order, whereby Quanta was required to operate the site in accordance with N.J. ADMIN. CODE tit. 7, § 26-2.1(b) (Supp. 1984). NJDEP Brief, *supra* note 12, at A14.

Quanta from accepting polychlorinated biphenyl (PCB)[18] waste.[19]

PCB contaminated waste was discovered, however, at both facilities.[20] Quanta, because of the contamination, had exceeded its operating authority and thus was in violation of state environmental protection laws.[21] While negotiations concerning its duty to clean up the New Jersey site in compliance with state hazardous waste disposal laws were pending, Quanta filed a voluntary petition in bankruptcy for reorganization under Chapter 11 of the 1978 Act.[22] The Chapter 11 action was subsequently converted to a liquidation proceeding under Chapter 7, and Thomas J. O'Neill was appointed trustee for the debtor.[23]

O'Neill filed notices to abandon the facilities under section 554(a).[24] He claimed that the property was burdensome, inasmuch as the cost of cleaning up the PCB waste in accordance with

---

18 PCB's are toxic. PCB oxidation products, such as polychlorinated dibenz-p-odioxins (dioxins) and polychlorinated dibenzo forans, are also toxic. *Quanta*, 739 F.2d at 913 n.1 (New York).

19 *See id.* at 913; *Quanta*, 739 F.2d at 928 (New Jersey).

20 *See Quanta*, 739 F.2d at 913 (New York); *Quanta*, 739 F.2d at 928 (New Jersey). Of the 500,000 gallons of waste oil and chemicals stored at the New York site, 70,000 gallons were contaminated with PCB's. *Quanta*, 739 F.2d at 913 (New York).

The New Jersey Department of Environmental Protection (NJDEP) discovered PCB contamination at the New Jersey site on June 23, 1981. *Quanta*, 739 F.2d at 928 (New Jersey). When the facility was abandoned, there were approximately 800,000 gallons of mixed industrial and automotive waste oil that was contaminated with greater than 50 parts per million (ppm) of PCB's. *See* NJDEP Brief, *supra* note 12, at A4.

21 *See Quanta*, 739 F.2d at 913 n.2 (New York); *Quanta*, 739 F.2d at 928 (New Jersey).

22 *Quanta*, 739 F.2d at 928 (New Jersey). The NJDEP had submitted an administrative consent order to Quanta setting forth Quanta's responsibility to clean up the New Jersey site. Quanta, however, did not sign the order. NJDEP Brief, *supra* note 12, at A42. On October 6, 1981, Quanta filed a petition in bankruptcy. *Quanta*, 739 F.2d at 928 (New Jersey). On October 7, 1981, the NJDEP ordered Quanta to cease all operations, clean up the facility, and close the site within one year. *Id.*

23 *Quanta*, 739 F.2d at 913 (New York); *Quanta*, 739 F.2d at 928 (New Jersey).

24 *See Quanta*, 739 F.2d at 913 (New York). On March 18, 1982, the clerk of the bankruptcy court issued a notice of "sale by public auction or abandonment" of the New York facility. *See* O'Neill's Petition, *supra* note 15, at 5. No offers were received at the auction sale. *Id.* Subsequently, however, an offer to purchase the facility for $3000, subject to mortgages and liens, was approved by the court. Later, the court voided the approved sale when it was determined that the offeror was unaware of the PCB contamination at the facility. *Id.* at 6.

On May 25, 1982, a second notice of abandonment was issued. *Id.* Following hearings on June 8 and 22, 1982, the bankruptcy court authorized abandonment, and a formal order of abandonment was entered on July 7, 1982, effective June 22, 1982, *nunc pro tunc*. *Id.* at 6-7.

state hazardous waste disposal laws would exhaust the debtor's estate.[25] New York and New Jersey objected to the trustee's abandonment of the contaminated sites, arguing that it would be tantamount to unlawful disposal of hazardous waste.[26]

Following hearings, the bankruptcy court permitted the trustee to abandon the facilities,[27] reasoning that "[t]he City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility."[28] The debtor and its creditors, in the court's view, were not financially responsible for the cleanup.[29] The court refused to stay its order pending appeal and also denied New York's request for a first lien on the property on account of monies expended by the state to clean up the facility.[30]

In affirming the order granting abandonment, the United States District Court for the District of New Jersey expressly adopted the rationale espoused by the bankruptcy court.[31] Judge Lacey, author of the court's opinion, distinguished the common law authority to abandon from the Federal statutory abandonment power.[32] Because the traditional rule with respect to abandonment was judge-made, the court reasoned that it had to "yield to federal statutes and the general public interest."[33] In Judge Lacey's view, the absence of any clear congressional intent to limit the trustee's Federal statutory power to abandon demonstrated that section 554(a) was not contingent "upon a finding that abondonment [sic] does not harm the public interest or vio-

---

25 *See Quanta*, 739 F.2d at 913-14 (New York). The New York facility had an appraised fair market value of $535,000 and a forced sale value of $428,000. O'Neill's Petition, *supra* note 15, at 4-5. It was also estimated that the cost to clean up the facility would exceed $1,000,000. *Id.* at 5. In addition, after the discovery of the PCB contamination, the trustee was required to maintain 24 hour surveillance at the site at a cost greater than $1000 weekly. *Id.* O'Neill also personally borrowed $20,000—most of which was allocated for security. *Id.* The record does not reveal the status of the trustee's loan, *i.e.*, whether it was recoverable as an administrative expense of the debtor's estate.

26 *Quanta*, 739 F.2d at 914 (New York); *Quanta*, 739 F.2d at 928 (New Jersey).

27 *See Quanta*, 739 F.2d at 914 (New York); *Quanta*, 739 F.2d at 928 (New Jersey).

28 O'Neill's Petition, *supra* note 15, app. K, at 73a (transcript of bankruptcy proceedings on June 22, 1982).

29 *Id.*

30 *Quanta*, 739 F.2d at 914 (New York). After abandonment, New York incurred approximately $2,500,000 in cleanup costs. *Id.*

31 *See* O'Neill's Petition, *supra* note 15, app. G, at 57a (memo. opinion of Judge Frederick B. Lacey, D.N.J. Jan. 1983).

32 *See id.* at 56a.

33 *Id.*

late any statutes."[34] The Third Circuit subsequently reversed the order permitting abandonment and remanded.[35] Before any action was taken by the lower court, however, the United States Supreme Court granted certiorari.[36]

Prior to the enactment of section 554(a) of the 1978 Act, the trustee had no statutory authority to disclaim title to burdensome property of the debtor's estate.[37] Nevertheless, courts developed a judge-made rule of abandonment predicated in part upon the trustee's comprehensive authority to marshall the debtor's assets for liquidation and distribution to creditors.[38]

More than a century ago, the Supreme Court of the United States, in *American File Co. v. Garrett*,[39] recognized the trustee's right to abandon burdensome property of the debtor's estate.[40] In that case, the Court allowed the shareholders' assignees to dis-

---

[34] *Id.* at 57a.

[35] *See Quanta*, 739 F.2d at 914 (New York); *Quanta*, 739 F.2d at 928 (New Jersey).

[36] Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 105 S. Ct. 1168 (1985).

[37] *See* 4A COLLIER, *supra* note 2, ¶ 70.42[2], at 502.

[38] *See id.* at 502-04 & n.4; *see also* 11 U.S.C. § 704 (1982); *cf. Quanta*, 739 F.2d at 916 (New York) (mentioning trustee's statutory power to reject executory contracts, applications involving intellectual property, and real property encumbered with taxes). Section 704 enumerates the duties of the trustee as follows:

> The trustee shall—
>
> (1) collect and reduce to money the property of the estate for which such trustee serves, and close up such estate as expeditiously as is compatible with the best interests of parties in interest;
>
> (2) be accountable for all property received;
>
> (3) investigate the financial affairs of the debtor;
>
> (4) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
>
> (5) if advisable, oppose the discharge of the debtor;
>
> (6) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
>
> (7) if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court requires; and
>
> (8) make a final report and file a final account of the administration of the estate with the court.

11 U.S.C. § 704 (1982).

[39] 110 U.S. 288 (1884).

[40] *Id.* at 295. *See generally* Note, *Rights of a Trustee of Bankrupt Estate to Abandon Burdensome Assets in Contravention of Federal Navigation Acts*, 13 MD. L. REV. 229, 232 (1953) (discussion of history of trustee's common law right to abandon burdensome property of bankrupt's estate). Ten years prior to *American File*, the Supreme Court of the United States acknowledged in dicta the trustee's common law right to

claim title to the bankrupt's stock, which was burdened with personal liability for corporate indebtedness.[41] Observing that a shareholder's individual liability did not generally attach to the assignees of his shares,[42] the Court reasoned that "[t]he same result would follow under [bankruptcy] law."[43] Relying upon early English bankruptcy cases, the Court determined that "[i]t has long been a recognized principle of the bankrupt laws that the assignees [are] not bound to accept property of an onerous or unprofitable character."[44]

This well-established common law right to abandon burdensome property, however, was not absolute.[45] The bankruptcy courts, in the exercise of their equitable powers, occasionally disallowed the trustee's disclaimer.[46] Specifically, the judge-made rule of abandonment was held to be inapplicable when it conflicted with "general regulations of a police nature."[47]

In the 1942 decision of *In re Chicago Rapid Transit Co.*,[48] the Seventh Circuit, utilizing the police power exception permitted

---

abandon property of an "onerous or unprofitable character." Glenny v. Langdon, 98 U.S. 20, 31 (1878).

41 *American File*, 110 U.S. at 294-95. Because the American File Company had not filed certain documents with the town clerk, its stockholders were individually liable under state statute for the company's debts, as evidenced by promissory notes guaranteed by them. *Id.* at 288-89.

42 *Id.* at 295.

43 *Id.*

44 *Id.*

45 *E.g.*, Brown v. O'Keefe, 300 U.S. 598 (1937) (judicial review of trustee's abandonment of bankrupt's stock burdened with personal shareholder liability); *see* 4A COLLIER, *supra* note 2, ¶ 70.42[2], at 502-04; *see also* Note, *supra* note 40, at 232 (describing trustee's common law abandonment power as "discretionary").

46 *See, e.g.*, Lincoln Nat'l. Life Ins. Co. v. Scales, 62 F.2d 582 (5th Cir. 1933) (disallowing abandonment when it would infringe upon creditors' rights). *See generally* Note, *Abandonment of Worthless Barges by Trustee Disapproved Because Violation of Federal Navigation Statute Would Result*, 66 HARV. L. REV. 921, 922 (1953) (briefly discussing disallowance of abandonment in limited circumstances).

47 4A COLLIER, *supra* note 2, ¶ 70.42[2], at 504.

48 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942). In *Chicago Rapid Transit*, the trustees of a public utility corporation petitioned the district court for permission to reject the lease of a railroad branch line, and if necessary to prevent the termination of transportation service on the leased line, to authorize them to operate the service for the lessor's account. *Id.* at 3-4. The request for abandonment was predicated upon the losses incurred on the leasehold. Specifically, when the lessee filed for reorganization, it was in substantial rental arrears. Similarly, the receivers were subsequently unable to fulfill the financial obligations under the lease. *Id.* Finding that the lease was burdensome, the district court permitted its abandonment. *Id.* at 4. In addition, the district court directed the trustees to maintain transportation service on the branch line for the benefit of the lessor pending authorization to the contrary by the state's public utility commission. *Id.* The order of the district court was affirmed by the Seventh Circuit. *Id.* at 6.

the trustees of a public utility corporation to abandon a burdensome lease of a railroad branch line.[49] The court also directed them, however, to maintain transportation service on the line for the lessor's benefit, pending contrary authorization by the state's public utility commission.[50]

The Seventh Circuit majority focused upon the distinction between disclaiming the lease and abandoning transportation service on the lease.[51] After examining the scope of Federal jurisdiction in bankruptcy vis-a-vis the state's traditional power to regulate local transportation,[52] the court found that the lease was burdensome property subject to the jurisdiction of the bankruptcy court,[53] whereas the transportation service was a public utility regulated by state statute.[54] The majority reasoned that in the absence of explicit congressional intent to supersede the state's regulation of local transportation,[55] the bankruptcy court lacked jurisdiction to authorize the trustees' abandonment of the state's public service.[56] The Seventh Circuit, therefore, held that the trustees "[had to] comply with valid statutory regulation by the state."[57]

In 1952, the Fourth Circuit in *Ottenheimer v. Whitaker*[58] broadened the scope of the common law police power exception to include the Federal police power. The court in *Ottenheimer* disallowed the trustee's abandonment of burdensome barges that were anchored in Baltimore Harbor[59] and, in addition, directed

---

49 *Id.* at 3-5.
50 *Id.* at 5-6.
51 *Id.*
52 *Id.*
53 *Id.* at 6.
54 *Id.*
55 *Id.* at 5.
56 *Id.*
57 *Id.*
58 198 F.2d 289 (4th Cir. 1952).
59 *Id.* at 290. The application to abandon was premised upon the trustee's inability to sell the barges and the expenses incurred by the estate in keeping them afloat and lighted as required by the Federal Wreck Act. *In re* Eastern Transp. Co., 102 F. Supp. 913, 914 (D. Md.), *aff'd sub nom.* Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952). In addition, the trustee claimed that the high costs of removing the barges from the bay and sinking them at sea would diminish the value of the debtor's estate. Therefore, the trustee argued that under the common law rule of abandonment, he should be permitted to disclaim the barges as burdensome property of the debtor's estate. The bankruptcy referee entered an order granting abandonment, and the Federal government appealed. *Id.*

The government's opposition to abandonment was based upon the grounds that it would constitute a violation of Federal law, because if abandonment were allowed, the barges would sink in the harbor and thereby impede the navigability of

him to remove the barges from the harbor at the expense of the debtor's estate.[60] Judge Soper, speaking for a unanimous court, found that abandonment of the barges would have constituted a violation of a Federal statute that was enacted in the interest of public safety.[61] Determining that the Federal interest in public safety was paramount, the Fourth Circuit held that a Federal statute of a police nature preempted a trustee's common law right to abandon.[62]

Subsequently, in 1978, the bankruptcy court in *In re Lewis Jones*[63] applied the police power exception to the common law rule of abandonment despite the nonexistence of a competing Federal or state statute safeguarding the public welfare.[64] The *Lewis Jones* court conditioned the abandonment of a steam heating system, which served the Greater Philadelphia area, upon the trustees first taking affirmative steps, at the expense of the estates, to protect the public from potential danger.[65] In reaching its decision, the court reasoned that "even absent the violation of a state or federal act, the public interest must be protected by the Bankruptcy Court."[66] In support of its rationale, the *Lewis Jones* court relied upon both the public interest consideration underlying railroad reorganizations and the equitable power vested in the bankruptcy courts.[67]

In 1984, the Third Circuit, in *Penn Terra Ltd. v. Department of Environmental Resources*,[68] defined the scope of the statutory police power exception to the automatic stay provision of section 362 of the 1978 Act. The *Penn Terra* court first observed that the exception applied to the " 'commencement or continuation of an ac-

---

waters of the United States. The government also posited that the common rule of abandonment was discretionary and, therefore, should not be applied when it would operate in contravention of Federal law. *Id.* at 916-17. Finding that the Federal Wreck Act would be violated if the trustee was permitted to disclaim the barges, *id.* at 915-18, and dismissing as immaterial the lack of funds available to satisfy the statutory obligation, the district court rescinded the abandonment order and directed the trustee to remove the barges at the expense of the bankrupt's estate. *Id.* at 918. The Fourth Circuit subsequently affirmed the decision of the district court. *Ottenheimer*, 198 F.2d at 290.

60 *Id.*

61 *Id.*

62 *See id.*

63 1 Bankr. 277 (Bankr. E.D. Pa. 1974).

64 *Id.* at 279-80.

65 *Id.* at 280.

66 *Id.* (citing *In re* Eastern Transp., 102 F. Supp. 913 (E. Md.), *aff'd sub nom.* Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952)).

67 *Id.*

68 733 F.2d 267 (3d Cir. 1984).

tion or proceeding by [the government] to enforce [its] police . . . power.' "[69] The court further noted, however, that by virtue of the money judgment exception to the police power exception, actions for money judgments or their enforcement were subject to automatic stay.[70] Judge Garth, writing for the court, concentrated on delineating the parameters of the money judgment exception. On the basis of general principles of statutory construction, he determined that the money judgment exception should be construed narrowly, while the police power exception should be interpreted broadly.[71] In the court's view, the "inquiry is . . . properly focused on the nature of the injuries which the . . . remedy is intended to redress—including whether plaintiff seeks compensation for past damages . . . in order to reach the ultimate conclusion as to whether these injuries are traditionally rectified by a money judgment and its enforcement."[72]

The *Penn Terra* court then observed that Pennsylvania's suit against a debtor for injunctive relief to remedy environmental hazards, which existed in violation of the state's antipollution statutes, was neither an action for a money judgment nor enforcement of a money judgment.[73] Finding that the issued injunction "was meant to prevent future harm to, and to restore, the environment," Judge Garth reasoned that the suit was intended to enforce the state's police power and thus did not fall within the money judgment exception to the police power exception.[74] Hence, the Third Circuit held that an injunction that required a debtor to comply with state environmental protection legislation was excluded from the automatic stay provision in section 362 by virtue of the police power exception.[75]

Three months following his delivery of the unanimous decision in *Penn Terra*, Judge Garth authored the majority opinion in *Quanta*. In rejecting the trustee's argument that Federal law is not limited by state law, the *Quanta* court relied primarily upon

---

69 *Id.* at 271 (quoting 11 U.S.C. § 362 (1982)).

70 *See id.* (quoting 11 U.S.C. § 362(b)(5) (1982)).

71 *Id.* at 272-73.

72 *Id.* at 278.

73 *Id.* at 274-78.

74 *Id.* at 278.

75 *Id.* at 278-79; *cf.* Note, *When Is a Governmental Unit's Action to Enforce Its Police or Regulatory Power Exempt from the Automatic Stay Provisions of Section 362*, 9 FLA. ST. U. L. REV. 369 (1981) (advocating court's cognizance of purpose underlying governmental action in determining scope of statutory police power exception set forth in section 362(b)(4) of Title 11 of the 1978 Act).

the supremacy clause.[76]

Judge Garth began his analysis from the perspective that Federal preemption is not preferred " 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.' "[77] Thus, he maintained that a proper analysis initially proceeds in two steps: "first, an examination of the primary purposes of each of the laws at issue; [and] second, a determination of whether state law is an obstacle to the effectuation of federal objectives."[78]

According to the *Quanta* court, the general goal of Federal bankruptcy legislation is to resolve justly the creditors' claims against the debtor.[79] The specific aim of liquidation, the court noted, is to distribute equitably the debtor's assets among creditors.[80] The means of accomplishing this twofold purpose, according to the Third Circuit, lies in the trustee's statutory abandonment authority.[81] Because abandonment empowers the trustee to disclaim burdensome property, the court reasoned that it accelerates administration of the estate and thwarts depletion of the debtor's assets.[82] Hence, in Judge Garth's view, abandonment promotes the creditors' interests.[83]

The *Quanta* court next observed that the quintessential purpose of state and local hazardous waste disposal regulation is to protect the public from toxic exposure.[84] After concluding that the concurrent exercise of state and Federal power would result in irreconcilable conflict,[85] the majority moved on to the third phase of its supremacy clause analysis—whether "Congress in-

---

76 *See Quanta*, 739 F.2d at 915 (New York). The supremacy clause provides that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

77 *Quanta*, 739 F.2d at 915 (New York) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); citing Consolidated Edison v. Montana, 453 U.S. 609, 634 (1981)).

78 *Id.* at 915.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *See id.*

85 *Id.*

tend[ed] that the trustee's abandonment power be unrestricted by public health and safety regulations."[86]

After succinctly reiterating its preemption standard,[87] the *Quanta* court noted that section 554(a) of the 1978 Act is devoid of legislative history.[88] It also observed that prior to the enactment of the 1978 Act, Federal statutory authority to abandon burdensome property was nonexistent, although common law abandonment was prevalent.[89] The Third Circuit then concluded that "Section 554 obviously codifies this judge-made law."[90] Proceeding from that premise, Judge Garth examined existing common law precedent.[91]

The *Quanta* court commenced its survey of prior law with *Ottenheimer*.[92] It focused on the *Ottenheimer* court's balancing of the trustee's and government's competing interests.[93] Assaying *Ottenheimer*, the *Quanta* majority construed it to mean "that the determinations of the legislature and the policy of safeguarding the public [as embodied in the Federal statute] were paramount" when juxtaposed to the trustee's common law power to abandon.[94]

In next discussing *Lewis Jones*,[95] the court observed that while the holding therein was premised in part upon the rationale of *Ottenheimer*, it was grounded principally in the equitable jurisdiction of the bankruptcy courts.[96] Likewise, the decision in *Chicago Rapid Transit*,[97] in Judge Garth's view, resulted from the bankruptcy court's exercise of its equitable powers.[98] Judge Garth also asserted, however, that the result in *Chicago Rapid Transit* was based upon the supremacy clause.[99] The absence of any express congressional intent to withdraw from the state its traditional power to regulate local transportation, according to the *Quanta*

---

86 *Id.*

87 *Id.* at 916 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981) and *Penn Terra*, 733 F.2d at 272)).

88 *Id.*

89 *Id.*

90 *Id.*

91 *See id.* at 916-18.

92 See *supra* notes 58-62 and accompanying text for a discussion of *Ottenheimer*.

93 *See Quanta*, 739 F.2d at 916 (New York).

94 *Id.*

95 See *supra* notes 63-67 and accompanying text for a discussion of *Lewis Jones*.

96 *See Quanta*, 739 F.2d at 917 (New York).

97 See *supra* notes 48-57 and accompanying text for a discussion of *Chicago Rapid Transit*.

98 *See Quanta*, 739 F.2d at 917 (New York).

99 *See id.*

majority, dissuaded the bankruptcy court in *Chicago Rapid Transit* from authorizing abandonment and interfering with the state's railroad service.[100]

The *Quanta* court concluded its review of the prior law with *In re Adelphi Hospital Corp.*,[101] wherein the trustee was allowed to abandon medical records despite countervailing state law. After quoting at length from that opinion, Judge Garth distinguished the state statute in *Adelphi Hospital* on the basis of its tenuous nexus with public safety.[102]

Finally, in synthesizing its exposition of existing precedent, the *Quanta* majority extrapolated "[a] common concern. . .in all four. . . cases: that where important state law or general equitable principles protect some public interest, they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their supersession by the abandonment power."[103] Concluding that the mere existence of conflicting state law is insufficient to invoke Federal preemption,[104] the court found it necessary to analyze several other provisions of the 1978 Act to determine whether any of those sections expressly supplants state law.[105]

That the 1978 Act does not preempt state and local environmental protection laws, according to the *Quanta* court, is evidenced by the recently adopted abandonment provision.[106] Section 554, in the majority's view, speaks solely in the affirmative, and hence is bereft of any express negation of state powers.[107] Moreover, according to the Third Circuit, 11 U.S.C. § 362(b)(4) is similarly persuasive because it explicitly excepts a state's suit to enforce its environmental protection laws from being stayed by virtue of the initiation of bankruptcy proceedings.[108]

In addition, the *Quanta* court maintained that 28 U.S.C.

---

100 *See id.*

101 [1977-1978 Transfer Binder] BANKR. L. REP. (CCH) ¶ 66,882, at 76,855 (2d Cir. June 26, 1978).

102 *See Quanta*, 739 F.2d at 918 (New York).

103 *Id.*

104 *Id.*

105 *See id.* at 918-21.

106 *See id.* at 918; *see also supra* note 4 and accompanying text (discussing abandonment provision).

107 *Quanta*, 739 F.2d at 918 (New York).

108 *Id.* at 918-19; *see also* 11 U.S.C. § 362(b)(4), (5) (1982). The statute sets forth, in pertinent part:

§ 959(b) lends further support to the proposition that the 1978 Act does not preempt state and local environmental legislation.[109] Section 959(b), the court observed, requires that a trustee "manage and operate [the debtor's estate] . . . according to the requirements of the valid laws of the State."[110] Inherent in that section, according to the court, is the concept that the objectives of the Federal bankruptcy scheme do not condone contravention of state laws concerning business conduct and activities.[111]

Finding no legislative history from which to glean the meaning of "manage and operate," the majority opined that it would not be unreasonable to construe the phrase as encompassing abandonment of a facility.[112] According to the court, the distinction between operating a business and abandoning a facility

---

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; . . .

. . . .

(b) The filing of a petition under section 301, 302, or 303 of this title . . . does not operate as a stay— . . .

. . . .

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

Id.

109 *Quanta*, 739 F.2d at 919 (New York). 28 U.S.C. § 959(b) (1972) states: [E]xcept as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Id.

110 *See Quanta*, 739 F.2d at 919 (New York).

111 *Id.*

112 *Id.*

should not be unequivocally employed so as to preclude abandonment from within the purview of section 959(b).[113] Such an unyielding distinction, in the court's view, would vitiate the significance of the provision.[114]

To support its interpretation of section 959(b), the *Quanta* court examined and compared the interests sought to be protected in Chapter 7 liquidation and Chapter 11 reorganization proceedings, respectively.[115] The court observed that creditors' interests are the same in Chapter 7 as in Chapter 11.[116] The court further found that reorganization proceedings also implicate the debtor's interest in rehabilitation.[117] Nevertheless, section 959(b), according to the Third Circuit, is applicable in Chapter 11 to defeat both the creditors' and debtor's interests.[118] Judge Garth thus concluded that Section 959(b) should not be inapposite to Chapter 7 solely because the creditors' interests may be impaired.[119] Concluding that Section 959(b) does not demonstrate that the Legislature has " 'unmistakably ordained' that state law is superseded by the trustee's powers to administer the property of the estate,"[120] the *Quanta* court then examined 11 U.S.C. § 105 and 28 U.S.C. § 1481.[121]

Judge Garth observed that both of these provisions incorporate general equitable principles into the bankruptcy scheme.[122] Section 105, according to the majority, specifically empowers bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions"[123] of the 1978 Act; while Section 1481 expressly vests them with equitable jurisdiction.[124] After considering both the absence of express legislative intent to supersede state and local environmental protection laws and the clear congressional intent to the contrary, the *Quanta* court concluded that "federal law is supreme only if those

---

113 *Id.* at 920. The court noted, however, that the difference between operating a business and abandoning a facility is valid in the context of Federal preemption of inconsistent state laws establishing creditors' rights. *Id.* (citing American Surety Co. v. Sampsell, 327 U.S. 269, 272 (1946)).

114 *Id.*

115 *See id.*

116 *See id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *See id.* at 920-21.

122 *Id.* at 920.

123 *Id.* (citing 11 U.S.C. § 105 (1982)).

124 *Id.* (28 U.S.C. § 1481 (1982)).

[equitable] principles demand that state police powers be suspended to the extent they interfere with the liquidation of the estate."[125]

The Third Circuit next identified and balanced the competing state and Federal policies to determine whether equity dictated the suspension of the state and local hazardous waste disposal laws.[126] In the court's view, environmental protection laws "advance a very important policy: [protection of] the public health by regulating disposal of toxic wastes."[127] According to Judge Garth, the trustee's abandonment not only would violate those laws but, in addition, would present "severely deleterious implications for the public safety."[128] These circumstances, in Judge Garth's view, made *Quanta* analogous to *Ottenheimer* and *Lewis Jones*.[129]

Conversely, the purpose underlying abandonment, Judge Garth explained, is "to preserve as much of the estate as possible for distribution to creditors."[130] According to the majority, however, the abandonment policy also must take into account the attendant Federal policy of noninterference with state police powers.[131] While acknowledging that statutory compliance would absorb assets otherwise available to satisfy creditors' claims, the *Quanta* court nevertheless held that this financial consideration was "not in itself sufficient to outweigh the public interest at stake."[132] In the court's opinion, greater significance should be afforded to heightened public awareness of dangerous toxic waste, the unprecedented possibility of abandoned nuclear power plants, and the fear of "substitut[ing] . . . governmental action for citizen compliance" with statutory cleanup provisions.[133] Concluding its constitutional analysis, the Third Circuit held that "[t]he supremacy clause does not require the suspension of the operation of. . .hazardous waste disposal laws."[134]

Finally, in addressing whether the state's cleanup costs are recoverable as an administrative expense under 11 U.S.C. §§ 503(b) and 507(a), the *Quanta* court determined that the cate-

125 *Id.* at 921.
126 *See id.* at 921-22.
127 *Id.* at 921.
128 *Id.*
129 *Id.*
130 *Id.*
131 *See id.*
132 *Id.*
133 *See id.* at 921-22.
134 *Id.* at 922.

gories enumerated in those provisions are merely illustrative, not exhaustive.[135] In the majority's view, cleanup costs appear to fall within the scope of "actual, necessary costs of preserving the estate."[136] Judge Garth asserted, however, that because the priority of the state's cleanup claim had not been addressed by the lower court, the issue was not properly before the Third Circuit.[137]

In a vehement dissent, Judge Gibbons rejected the majority's supremacy clause analysis and concluded that the trustee should be permitted to abandon the *Quanta* facilities.[138] In his view, the majority's reliance on *Ottenheimer* and *Lewis Jones* was misplaced, because those cases had been decided before trustees were vested with statutory abandonment power.[139] Moreover, to the dissent, the absence of any stated exception to section 554(a) demonstrated that Congress had not intended to limit a trustee's exercise of the statutory abandonment power.[140] The dissent also criticized the court's exposition of 28 U.S.C. § 959(b), explaining that it "cannot be construed as imposing an obligation to operate *any* business or property."[141]

In conclusion, Judge Gibbons viewed the majority's decision as implicitly assessing cleanup costs against the trustee, debtor, and creditors in violation of the taking clause of the fifth amendment.[142] In his opinion, the majority's interpretation of section 554(a) deviated from the rule that requires a court to avoid,

---

135 *See id.* at 922. 11 U.S.C. § 503 (1982) states, in pertinent part:

> (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

Id. § 503(b)(1)(A).

11 U.S.C. § 507 (1982) states, in pertinent part:

> (a) The following expenses and claims 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. § 507(a)(1).

136 *Quanta*, 739 F.2d at 922-23 (New York); *see also supra* note 135 (text of statutory provision).

137 *Quanta*, 739 F.2d at 923 (New York). The court noted that the record on appeal did not contain "findings of relevant fact" on the issue of priority. *Id.*

138 *Id.*; *Quanta*, 739 F.2d 929 (New Jersey) (Gibbons, J., dissenting).

139 *Quanta*, 739 F.2d at 923-24 (New York) (Gibbons, J., dissenting).

140 *See id.* at 924 (Gibbons, J., dissenting).

141 *Id.* at 926 (Gibbons, J., dissenting).

142 *See id.* at 924-26 (Gibbons, J., dissenting). The taking clause provides: "Nor

whenever possible, constitutional issues when construing a statute.[143] According to the dissent, if the court had followed this principle of statutory construction, the taking issues would have been averted, and abandonment would have been authorized.[144] Instead, in Judge Gibbons's view, the majority reached a result, that is neither legally permissible nor practicably tenable.[145]

In holding that state and local hazardous waste disposal laws are not preempted by section 554(a) of the 1978 Act,[146] the *Quanta* court superimposed the judicially-created police power exception to common law abandonment on the trustee's recently codified Federal power to disclaim burdensome property of the debtor's estate. After noting the absence of legislative history of the provision,[147] the Third Circuit, on the basis of its supremacy clause analysis, divined that the statutory abandonment power in bankruptcy is not pervasive—just as the trustee's authority at common law was not absolute.[148] The court, in essence, conditioned the trustee's exercise of the Federal statutory power to abandon toxic waste sites upon compliance with cleanup provisions of state and local environmental protection laws. However preferable this outcome may be, the Third Circuit's decision, unfortunately, is not sound because the majorty manipulated its supremacy clause analysis in order to achieve the desired result.

Although artfully drafted, the court's application of the preemption doctrine was improper.[149] The majority has gone to

---

shall private property be taken for public use, without just compensation." U.S. CONST., amend. V, cl. 4.

143 *Quanta*, 739 F.2d at 924-25 (New York) (Gibbons, J., dissenting) (discussing United States v. Security Indus. Bank, 459 U.S. 70 (1982)).

144 *Id.* at 925 (Gibbons, J., dissenting).

145 *See id.* at 924-27 (Gibbons, J., dissenting).

146 *Id.* at 922 (New York); *Quanta*, 739 F.2d at 928-29 (New Jersey).

147 *Quanta*, 739 F.2d at 916 (New York); *see also* Klee, *supra* note 1, at 294-95 (setting forth nine step procedure to search legislative history for ascertaining congressional intent in interpreting the 1978 Act).

148 *See supra* notes 37 & 38 and accompanying text.

149 The doctrine of Federal preemption does not depend entirely upon the supremacy clause. Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630, 634-35 (1972). Rather, "the preemption of conflicting state and local action . . . flow[s] *directly* from the substantive source of the congressional action *coupled* with the supremacy clause." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-23, at 376 (1st ed. 1978) (emphasis supplied). Just as the essence of congressional power to preempt emanates from various sources, reinforced by the supremacy clause, the manner in which this authority is exercised also takes numerous forms, including occupation of the field, literal impossibility, state frustration of the Federal scheme, actual conflict, and expressed and implied preemption. *See generally id.* at 376-86 (discussing various forms). Although case law has blurred the distinctions among the sources of Federal authority to preempt, the decisions have

great length to disguise its gloss-over of the threshold inquiry—"whether application of the state law frustrates the full effectuation of the objectives of federal bankruptcy legislation."[150] Had

---

nevertheless contributed to the development of the preemption concept by "identif[ying] federal-state conflict as being of several kinds with different attitudes being shown by the Court as to each." *Id.*

Federal authority to legislate in the area of bankruptcy is derived explicitly from the Federal Constitution, which states, in pertinent part, that "[t]he Congress shall have Power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United states." U.S. CONST., art. I, sec. 8. There is no comparable enumerated power conferred upon Congress in the field of environmental protection. On the contrary, that area traditionally has been reserved for regulation by the states. For a proper understanding of the preemption issue here involved, it is essential to recognize that: (1) Federal potency to preempt state and local hazardous waste disposal laws lies in article I, section 8 of the Constitution and consequently is licensed by the supremacy clause; (2) the 1978 Act, like the earlier acts, occupies the field of bankruptcy, except insofar as state law may establish creditors' rights, Butner v. United States, 440 U.S. 48, 54 (1979); (3) the respective Federal and state legislatures are not legislating on the same subject matter—Congress is addressing bankruptcy whereas the state houses are considering environmental protection; and (4) neither the 1978 Act in general, nor section 554(a) in particular, expressly preempts state and local hazardous waste disposal laws. *But see infra* note 156 (sections 362(b)(4) expressly excepting enforcement of police powers from within scope of automatic stay). Thus, the issue in *Quanta* is more accurately couched in terms of implied preemption due to an actual conflict between Federal and state objectives.

[150] *Quanta*, 739 F.2d at 915 (New York) (citing Perez v. Campbell, 402 U.S. 637, 652 (1971)). In *Perez*, the Court addressed the question of whether a provision in the Bankrputcy Act, which fully discharges the debtor from particular judgments, preempted an Arizona motor vehicle financial responsibility statute. *Perez*, 402 U.S. at 638. The state statute provided that " '[a] discharge in bankruptcy following the rendering of any . . . judgment [entered pursuant hereto] shall not relieve the judgment debtor from any of the requirements of this article.' " *Id.* at 642. According to the *Perez* court, "[d]eciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Id.* at 644.

Justice White, writing for the majority, found that the main objective of the state statute was " 'the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons.' " *Id.* at 644 (quoting Schecter v. Killingswort, 93 Ariz. 273, 380 P.2d 136 (1963)). By contrast, the Court reiterated that " '[o]ne of the primary purposes of the bankruptcy act' is to give debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' " *Id.* at 648 (quoting Local Loan Co. v. Hunt, 292 N.E. 234, 244 (1934)).

Thereafter, the Court traced the Federal doctrine of preemption from the seminal case of Gibbons v. Odgen, 9 Wheat. 1 (1824) to the twentieth century case of Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). The majority rejected as "aberrational" a preemption test emanating from two bankruptcy cases previously decided by the Court. *Id.* at 650-52 (citing Kester v. Department of Pub. Safety, 369 U.S. 153 (1962) and Reitz v. Mealey, 314 U.S. 33 (1941)). Asserting that those cases turned on the articulated purposes of the state statutes instead of their actual effect, the *Perez* court held that they had "no authoritative effect to the extent

the majority squarely applied this standard, it would have been apparent to the court at the outset that the state's exercise of its statutory cleanup provisions completely negatived any possibility of paying creditors' valid claims. Instead, the court purported to glean justification for its decision from incongruous sections of the 1978 Act.

In an overt effort to compensate for this oversight, the Third Circuit turned to 11 U.S.C. § 362(b)(4).[151] The court's reliance upon an express police power exception in a separate and distinct provision, however, does not support its salutary cause. A generally accepted rule of statutory construction provides that an express exception to one provision should not be interpolated into another section absent clear legislative intent to that effect.[152]

The majority's exposition of 28 U.S.C. § 959(b) also extended beyond legally permissible boundaries. The scope of that section's applicability was not at issue in the case. Nonetheless, the *Quanta* court derivatively determined that section 959(b) applies to liquidation proceedings under Chapter 7.[153]

Finally, the Third Circuit disregarded both the financial ramifications and the constitutional implications of its deci-

---

that they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Id.* at 652. Finding that the Arizona statute had the effect, as well as purpose, of frustrating the Federal bankruptcy law, the Court concluded that the state statute was unconstitutional. *Id.* at 686.

Although the *Quanta* majority purported to follow *Perez*, it clearly deviated from that decision. Conspicuously absent in *Perez* is any weighing of the competing Federal and state purposes. In fact, the *Perez* court expressly overruled earlier decisions upholding state statutes as against the Federal bankruptcy scheme because of their reliance upon the purposes underlying the state legislation. *See id.* at 650-52; *see also Quanta*, 739 F.2d at 924 (New York) (Gibbons, J., dissenting) (citing Railroad Reorganization Act Cases, 419 U.S. 101, 122-36 (1974) for proposition that balancing of competing interests is inappropriate).

151 *See supra* notes 107 & 108 and accompanying text.

152 *See, e.g., In re* Saco Local Dev. Corp., 25 B.R. 876, 878 (D. Minn. 1982) ("Generally, when an exception to a statute appears in a different section or subdivision from the section containing the enacting words, the party claiming the benefit of the exception has the burden of proving that he qualifies for the exception."); Denis v. Perfect Parts, 142 F. Supp. 259, 262 (D. Mass. 1956) ("no doctrine of general construction [exists] that requires an unexpressed exception to be read into one section merely to broaden the meaning of another"); *see also Quanta*, 739 F.2d at 924 (New York) (Gibbons, J., dissenting) (comparing express police power exception to automatic stay provision and absence of comparable exception to abandonment provision). *See generally* SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.11 (N. Singer 4th ed. 1984 & 1985 Cum. Supp.) (exception only restricts clause immediately preceding it).

153 *See supra* notes 115-19 & 141 and accompanying text.

sion.[154] While mandating compliance with state hazardous waste disposal laws, the court did not clearly identify the parties who were to be charged with effectuating and financing the statutory cleanup.[155] Although the *Quanta* court emphatically denied that cleanup costs were at issue,[156] its suggestion that funds, which already had been expended by New York toward that end, might qualify as reimbursable administrative expenses of the debtor's estate, belies that assertion.[157] In any event, the court's cursory observation is of no moment in resolving the concomitant issue of cleanup costs. The majority did not account for either the substantial interests of third parties[158] or the apparent disparity between exorbitant cleanup expenses and existing funds.

Moreover, the precedential import of the Third Circuit's decision must be evaluated in light of the United States Supreme Court's holding in *Ohio v. Kovacs*.[159] In that case, the state of Ohio had obtained an injunction against Kovacs, both individually and in his capacity as an officer of a corporation, which was engaged in hazardous waste disposal, compelling him to clean up a hazardous waste site in accordance with its antipollution statutes.[160] When Kovacs failed to comply with the order, a court-appointed receiver intervened.[161] Subsequently, while the receiver was effectuating the required clean up, Kovacs filed a personal bankruptcy petition.[162] The Supreme Court, affirming the decisions below, found that the injunction, notwithstanding its affirmative mandate to dispose of the hazardous waste, actually imposed upon the debtor a financial obligation to pay the costs of cleanup.[163] After concluding that Kovacs's duty constituted a "debt" or "liability" on a claim within the meaning of 11 U.S.C. § 101, Justice White, writing for a unanimous court, determined that it was dischargeable in bankruptcy.[164]

Although Justice White subsequently stated that the *Kovacs* Court was not adjudicating the issue of whether a trustee may abandon a hazardous toxic waste site notwithstanding competing

154 *See supra* notes 142-45 and accompanying text.
155 *See supra* note 142 and accompanying text.
156 *See Quanta* 739 F.2d at 929 (New Jersey).
157 *See Quanta*, 739 F.2d at 922-23 (New York).
158 *See id.* at 925, n.2-3 (Gibbons, J., dissenting).
159 105 S. Ct. 705 (1985).
160 *Id.* at 707.
161 *Id.*
162 *Id.*
163 *Id.* at 710.
164 *Id.* at 709-10.

state environmental protection legislation,[165] he nonetheless revealed, in dicta, the analytical approach that the Supreme Court most likely will adopt when confronted with the question in *Quanta*.[166] Justice White envisioned that

> the trustee would. . .determine whether it [the hazardous waste site] was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of. . .its ability.[167]

Furthermore, Justice O'Connor, in her concurrence in *Kovacs*, suggested that because state law generally establishes property rights in the debtor's estate,[168] "a State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims."[169]

It is apparent from these excerpts that the Supreme Court does not foresee state environmental protection laws as constituting an obstacle to the trustee's abandonment of a hazardous toxic waste site. In *Kovacs*, the Court invoked neither the supremacy clause nor the taking clause; rather, it simply assumed that the trustee was free to abandon the debtor's property. It thus can be inferred from *Kovacs* that, in the Supreme Court's view, the trustee's Federal statutory power to abandon is not limited by state and local hazardous waste disposal laws; hence, section 554(a) does not codify the police power exception to the common law rule of abandonment. This inference casts further doubt on the Third Circuit's decision in *Quanta* and lends additional support to Judge Gibbons's rationale.

The majority and dissent in *Quanta* reached opposite conclusions primarily because Judge Gibbons shared neither his colleagues' assumption concerning the codification of common law abandonment nor their zeal to effectuate a particular result. Hence, the dissent, on the basis of the Federal statute itself, determined that the trustee could abandon the facilities despite the fact that they

---

165 *Id.* at 711.

166 *See id.*

167 *Id.* at 711 n.12.

168 *See id.* at 712 (O'Connor, J., concurring) (citing Butner v. United States, 440 U.S. 48, 54 (1979)).

169 *Id.*

were laden with hazardous, toxic waste.[170] Unfortunately, principled supremacy clause analysis yields no other result. It thus appears that the Supreme Court, absent intervening Federal legislation, will be constrained to reverse the Third Circuit's decision in *Quanta* and to adopt Justice Gibbons's rationale. In addition, if the Court addresses cleanup costs, it may seize upon Justice O'Connor's purported solution to the disposal dilemma, enunciated in her concurrence in *Kovacs*, by granting the state a statutory lien against the Quanta estate on account of expenses incurred in enforcing its environmental protection laws.

Congressional action should be taken, however, to prevent the abandonment of hazardous toxic waste sites and to avert this type of tragic legal consequence in the future. Notwithstanding the deficiencies of the *Quanta* majority's supremacy clause analysis, Judge Garth's cognizance of public safety, and the value he assigns to it,[171] should not be underestimated. The breadth of the dangers posed by hazardous toxic waste are potentially enormous. Moreover, the rising incidents of toxic contamination, together with the likelihood of abandoned nuclear power plants have intensified public anxiety.[172] Under these circumstances, public safety should be foremost. Now is the time, pending imminent public disaster, for Congress to treat the liquidation of toxic hazardous waste sites as a matter *sui generis*.[173] The corporate generator of hazardous toxic waste should not be permitted to escape financial responsibility through bankruptcy at the expense of public health and safety.

Catherine A. Kiernan

---

170 *See Quanta*, 739 F.2d at 923 (New York) (Gibbons, J., dissenting).

171 *See id.* at 922.

172 *See id.* at 921.

173 That Federal legislation in bankruptcy may take into consideration the general public interest is demonstrated by the railroad reorganization statute contained in the 1978 Act. *See* 11 U.S.C. § 1165 (1982). Section 1165 states, in pertinent part, that "the court and the trustee shall consider the public interest in addition to the interests of the debtor, creditors, and equity security holders." *Id.*