

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-801 & 84-805

TITLE MIDLANTIC NATIONAL BANK, Petitioner V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, DEBTOR, Petitioner, V. CITY OF NEW YORK, ET AL.

PLACE Washington, D. C.

DATE October 16, 1985

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MIDLANTIC NATIONAL BANK, :

4 Petitioner, :

5 V. :

No. 84-801

6 NEW JERSEY DEPARTMENT OF :

7 ENVIRONMENTAL PROTECTION; :

8 and :

9 THOMAS J. O'NEILL, TRUSTEE IN :

10 BANKRUPTCY OF QUANTA RE- :

11 SOURCES CORPORATION, DEBTOR :

12 V. :

No. 84-805

13 CITY OF NEW YORK, ET AL. :

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15 Washington, D.C.

16 Wednesday, October 16, 1985

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United States
19 at 10:02 o'clock a.m.
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1 APPEARANCES:

2 WILLIAM F. MC ENROE, ESQ., Newark, New Jersey; on behalf
3 of the petitioner in No. 84-805.

4 A. DENNIS TERRELL, ESQ., Morristown, New Jersey; on
5 behalf of the petitioner in No. 84-801

6 ROBERT HERMANN, ESQ., Solicitor General of New York,
7 New York, New York; on behalf of the respondents
8 in No. 84-805.

9 MARY CAROL JACOBSON, ESQ., Deputy Attorney General of
10 New Jersey, Trenton, New Jersey; on behalf of the
11 respondent in No. 84-801.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Midlantic National Bank against New Jersey Department of Environmental Protection.

Mr. McEnroe, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM F. MC ENROE, ESQ.,
ON BEHALF OF THE PETITIONER IN NO. 84-805

MR. MC ENROE: Mr. Chief Justice, and may it please the Court, this case presents to the Court the question of the scope of the abandoned tower rented to a trustee in bankruptcy under Section 554(a) of the Bankruptcy Code.

That section provides that after notice and a hearing, a trustee may abandon a property of the estate that is burdensome to the estate or of inconsequential value to the estate. The specific issue here is whether the trustee may abandon property where it is uncontroverted that that property is both burdensome and of inconsequential value, but where abandonment is opposed by governmental agencies on environmental grounds.

The debtor in this case, Quanta Resources Corporation, was engaged in the business of recycling waste oils. They operated sites in New York and New

1 Jersey. In 1981, it was determined that there existed
2 on both sites substantial quantities of oil that were
3 contaminated with PCB's.

4 In July of 1981, Quanta ceased its
5 operations. At the time it ceased its operations, there
6 were already in effect orders from the states of New
7 York and New Jersey requiring Quanta to clean up the
8 sites and to take other remedial actions.

9 In October, 1981, Quanta filed a voluntary
10 petition for reorganization under Chapter 11 of the
11 Bankruptcy Code. Those proceedings were converted to a
12 Chapter 7 liquidation in November, and Thomas J. O'Neill
13 was appointed trustee.

14 Upon his appointment as trustee, Mr. O'Neill
15 undertook an analysis of the property of the estate
16 similar to the procedure outlined by this Court in its
17 decision in Ohio versus Kovaks. He obtained appraisals
18 of the property, searches as to judgments and liens, and
19 also estimates of the cleanup costs for the sites. It
20 was determined that the cleanup costs would far exceed
21 the value of the property that is in question in this
22 case. It was also determined that because of the liens
23 against the property, even if the property were cleaned
24 up, there would be value to the estate.

25 Under those circumstances, the trustee had no

1 alternative. He was obligated by the duties of a
2 trustee under the Bankruptcy Code to seek authorization
3 to abandon. The Bankruptcy Court held that he succeeded
4 in establishing the grounds of burdensome and
5 inconsequential value and granted the application to
6 abandon.

7 The District Court also upheld that decision,
8 holding that the language of Section 554(a) was very
9 clear, and once the trustee had established the
10 standards of burdensome and inconsequential value, the
11 Court could not look to any additional conditions on the
12 trustee's right to abandon.

13 That decision, however, was reversed by the
14 Third Circuit. Both the Third Circuit and the
15 respondents in this case contend that the right of
16 abandonment pursuant to Section 554(a) is not
17 unconditional. They contend that Section 554(a)
18 codified a body of pre-Code law that imposed certain
19 conditions upon the trustee's right of abandonment, and
20 specifically a public safety or public purpose
21 doctrine.

22 QUESTION: Mr. McEnroe, what are the legal
23 consequences of the bankruptcy law of abandonment,
24 insofar as the title to the property goes? If the
25 bankruptcy judge approves abandonment, does that mean

1 that title -- where does title then go?

2 MR. MC ENROE: In this particular case, the
3 property can be abandoned to anyone with a possessory
4 interest. In this case it would be abandoned back to
5 the debtor, Quanta Resources Corporation, and it would
6 remain in that corporation.

7 QUESTION: Are there liens on the property?

8 MR. MC ENROE: Well, there are two different
9 properties. In New York there is real property
10 containing the oil. There are substantial liens against
11 that property which according to the estimates we
12 obtained exceeded even the fair market value in a clean
13 state.

14 The New Jersey property consists of personal
15 property. The site was leased by the debtor. There are
16 liens against personal property of the debtor, but that
17 particular site is owned by a third party.

18 QUESTION: But the legal effect of abandonment
19 is to have the title of the property revert back to the
20 debtor.

21 MR. MC ENROE: That's correct. The
22 interpretation urged --

23 QUESTION: Under the new Bankruptcy Act, does
24 -- I know under the old title was vested in the
25 trustee. Is it now?

1 MR. MC ENROE: No, it is not.

2 QUESTION: It is not. And it remains in the
3 debtor.

4 MR. MC ENROE: It remains in the debtor, and
5 possession and title after abandonment are in the
6 debtor.

7 QUESTION: Well, and before and after, then,
8 the technical title --

9 MR. MC ENROE: Title does not change.

10 QUESTION: Yes. But what interest does the
11 trustee have?

12 MR. MC ENROE: The trustee has custody of the
13 property while it is in --

14 QUESTION: And with all the powers to do with
15 it what the bankruptcy law gives it.

16 MR. MC ENROE: That's correct. The
17 interpretation of Section 554(a) urged by the
18 respondents is wrong, and it is wrong for several
19 reasons. First, there is no established body of
20 pre-code law which imposed the conditions on the right
21 of abandonment that they urge.

22 The respondent cites to this Court two
23 isolated cases, the cases of Ottenheimer versus
24 Whittaker and In Re Louis Jones, in which the
25 abandonment power was conditioned. However, two cases,

1 isolated cases, which were never passed upon by this
2 Court do not constitute an established body of law.

3 Moreover, both of those cases specifically
4 recognize that at the time abandonment was not a
5 statutory power. Abandonment at that time was only a
6 judge-made rule which had come down to facilitate the
7 administration of bankruptcy states. Courts recognized
8 that in weighing the merits of the case, the judge-made
9 rule would have to give in the case of the public
10 welfare.

11 Both of those cases, it is very likely that
12 both of those cases would have been decided differently
13 had there been a statutory right of abandonment at that
14 time.

15 QUESTION: Mr. McEnroe, do you concede that
16 there may be some limitation on the power of abandonment
17 to meet public safety concerns? For example, the
18 Solicitor General in a brief has suggested that the act
19 of abandonment cannot create a public nuisance. Do you
20 concede there is any limitation at all?

21 MR. MC ENROE: No, Your Honor, other than the
22 burdensome and inconsequential value set forth in the
23 statute. As far as the facts of this case and creating
24 a nuisance, I do not believe that the act of the trustee
25 in abandoning creates any nuisance. If anything, the

1 abandonment by the trustee allowed the environmental
2 agencies to correct the problem. The abandonment by the
3 trustee avoids the possibility of a nuisance being
4 created.

5 QUESTION: Do you mean that the trustee could
6 abandon a burning building, or a great excavation that
7 would attract a nuisance and a hazard?

8 MR. MC ENPOE: In all cases, the analysis by
9 the trustee would be the same. He must analyze first
10 whether the property in question is of any value to the
11 estate or is of burdensome nature to the estate. If he
12 determines that that property is of no value to the
13 estate, then it is his obligation to proceed with an
14 application for abandonment, which is upon notice to the
15 applicable bodies, as in this case the state of New
16 York, the state of New Jersey, to notify them of the
17 imminent danger.

18 Without any disregard for the trustee in this
19 case, I don't think a trustee is in a position where he
20 is going to be able to fight a burning fire. It is his
21 duty to immediately notify the appropriate authorities
22 to avoid any possssibility of a nuisance being created or
23 danger to the public.

24 QUESTION: That may be true about what the
25 trustee should do. He should try to abandon, but what

1 about the judge? What about the court? Do you think
2 the court must let him abandon it if he shos it is a
3 burden?

4 MR. MC ENROE: Yes.

5 QUESTION: He cannot say, well, wait a minute,
6 you can't abandon it without taking some precautions
7 against having this property be a public danger?

8 MR. MC ENROE: I think the Bankruptcy Code as
9 it is written says that the court must consider only the
10 standards of burdensome and of inconsequential value.

11 QUESTION: Bankruptcy Courts are courts of
12 equity, I suppose, aren't they?

13 MR. MC ENROE: They are courts of equity, but
14 in doing their -- exercising their equitable powers,
15 they cannot act contrary to the Bankruptcy Code. And I
16 think that would be acting contrary to the Bankruptcy
17 Code if the property was valueless to the estate and the
18 claims, for instance, of the estate agencies here. If
19 the trustee expended money in any way on those sites, he
20 would be giving priority to their claims over the claims
21 of other debtors, which I do not believe he has the
22 power to do.

23 It would be allowing for a distribution to the
24 state other than is set forth in the Bankruptcy Code.

25 QUESTION: Well, it takes time to go through

1 the process of deciding whether to abandon, to file the
2 petition, and to have the hearing conducted. Is there
3 no obligation even in the interim for the trustee to
4 take emergency measures to prevent something in the
5 estate from constituting a public nuisance, for
6 example?

7 MR. MC ENROE: In the interim, the trustee
8 should do what is necessary if he has the ability to do
9 so. If he has no ability to comply with state law or to
10 remedy any situations, then his obligation at that point
11 is to on an emergency basis seek the authorization to
12 abandon with notice to the appropriate governmental
13 authorities who can do something about the problem.

14 QUESTION: Well, suppose he has some --
15 suppose there are assets in the estate that hopefully
16 would be distributed later to pay the claims of
17 unsecured creditors, but while he is waiting for the
18 action on the abandonment petition, he thinks he has to
19 spend some money to keep the property in decent shape,
20 and he spends some money.

21 Is that an administrative expense?

22 MR. MC ENROE: If he spends money in the
23 interim? Yes, it is.

24 QUESTION: And which would deplete the assets
25 available to unsecured creditors, I suppose.

1 MR. MC ENROE: That's correct, it would.

2 QUESTION: But you think he would be breaching
3 his duties if he used those free assets to clean up the
4 site.

5 MR. MC ENROE: If it is clear that the asset
6 will never be of any value to the state, that the cost
7 of cleanup will exceed the value of the estate, and in a
8 clean state would never generate any benefit for the
9 estate.

10 QUESTION: Well, what if -- so it means that
11 he -- so it means -- well, suppose the assets available
12 to creditors are plenty to clean up the site, and the
13 site would then be worth something.

14 MR. MC ENROE: Then he would clean up the
15 site.

16 QUESTION: He would. Would you say then that
17 he could use the assets available to creditors, other
18 creditors to clean up the site?

19 MR. MC ENROE: If it is clear that after he
20 expended the assets to clean up the site, the value of
21 that property would exceed what he expended on it.

22 QUESTION: I know, but there may be liens on
23 the property.

24 MR. MC ENROE: Well, that is a different
25 situation. It has to be clear that after cleaning up

1 the site, and the extent of the liens are paid off, that
2 there is still a --

3 QUESTION: So the creditors would then just
4 have an interest in the property instead of the other
5 assets.

6 MR. MC ENROE: That's correct.

7 QUESTION: May I pursue that? I am a little
8 puzzled. Say you have three oil tanks and one of them
9 is contaminated, and it costs a lot of money to clean it
10 up, and the authorities say clean it up. The other two
11 could be sold. Could he -- is he required regardless of
12 the economics of it to abandon the one? He can't use
13 the assets by selling the other two to clean up that
14 one?

15 MR. MC ENROE: That's correct.

16 QUESTION: That is inconsistent with what you
17 said, isn't it? Suppose he could, by selling the other
18 two tanks, he could clean up the other one. And it
19 would be of some use.

20 MR. MC ENROE: That particular asset, again,
21 is of no value to the estate.

22 QUESTION: I see.

23 MR. MC ENROE: And he could abandon. An
24 example may be in this case the debtor also owned
25 trucks.

1 QUESTION: Yes.

2 MR. MC ENROE: The trucks contained certain
3 residues of PCB's which in order to sell the property
4 needed to be cleaned up. The trustee did undertake that
5 duty because it was clear that even after cleaning up,
6 and after paying off the liens, there would be benefit
7 to the estate upon the sale of those trucks.

8 QUESTION: I see.

9 MR. MC ENROE: I believe that is the
10 distinction there.

11 QUESTION: I suppose if the state has a law
12 that gives the state a first lien on property which it
13 has to clean up and restore and expend its funds to do
14 so, that that state's first lien can take priority over
15 the secured creditor?

16 MR. MC ENROE: I believe it would depend on
17 the time. For instance, here, with the New York site
18 after the trustee was granted the right to abandon, the
19 state of New York undertook a cleanup on this site, and
20 asserted their liens for the property. The other
21 lienholders, there was no judicial determination, but
22 they walked away from the property.

23 QUESTION: But that wouldn't be settled in the
24 Bankruptcy Court.

25 MR. MC ENROE: No, once the property was

1 abandoned, and the bankruptcy judge recognized that when
2 he refused to consider that issue, once it was abandoned
3 it was beyond his jurisdiction. It was matter of state
4 law.

5 QUESTION: But as a matter of state law it is
6 possible that the state can give itself a first lien
7 that would come in ahead of any security interest on the
8 property. Is that right?

9 MR. MC ENROE: Well, that involves an
10 interpretation of state law and the rights of creditors,
11 which -- or the rights of lienholders, which is not, I
12 don't believe --

13 QUESTION: But you concede it is possible.

14 MR. MC ENROE: It is certainly possible.

15 QUESTION: Were any of these sites covered by
16 the mortgage? Were any of the sites subject to a lien?

17 MR. MC ENROE: Yes, the New York real estate
18 was subject to a mortgage lien. Two mortgage liens.
19 And the extent of those liens exceeded the fair market
20 value of the property even in a clean state.

21 QUESTION: The mortgage would attach to the
22 excess value, if any.

23 MR. MC ENROE: That's correct. I believe in
24 determining the proper construction of Section 554(a) --
25 my time is up, Your Honor. Thank you.

1 QUESTION: Mr. Terrell.

2 ORAL ARGUMENT OF A. DENNIS TERRELL, ESQ.,

3 ON BEHALF OF PETITIONER IN NO. 84-801

4 MR. TERRELL: Mr. Chief Justice, and may it
5 please the Court, Midlantic National Bank asked this
6 Court to reverse the decision of the Third Circuit
7 because in its opinion the Third Circuit decision
8 effectively destroys its admittedly valid and existing
9 security interest, and the inventory, certain equipment,
10 and accounts receivable of the debtor.

11 Midlantic did not have a mortgage on any of
12 the land. Atlantic had a mortgage on the personalty of
13 the debtor, and in our opinion the Third Circuit opinion
14 effectively destroys that lien by mandating that the
15 trustee use available funds in the estate for cleanup
16 purposes rather than to pay secured liens.

17 QUESTION: How does that disadvantage
18 Midlantic as a secured credit?

19 MR. TERRELL: Well, Justice Rehnquist, here we
20 have an estate that is valued at about \$400,000. We
21 have a New York cleanup cost which admittedly is \$2.5
22 million. If the trustee as directed by the Third
23 Circuit is to clean up the site, clearly the \$400,000 is
24 going to go for that cleanup. There will be nothing
25 left for secured creditors -- nothing left for unsecured

1 creditors, but I am only concerned with secured
2 creditors.

3 QUESTION: So your lien isn't on any
4 particular property?

5 MR. TERRELL: Our lien is on the inventory
6 which included the good waste oil in this case, certain
7 equipment which the trustee sold, and accounts
8 receivable, of which there were none.

9 QUESTION: Well, did the Third Circuit say
10 your lien was subordinated then to the cleanup costs?

11 MR. TERRELL: It did not in so many words, but
12 I think the net effect of their opinion, and especially
13 Footnote 11, comes down to that. In essence, in
14 Footnote 11, they found that there was no taking problem
15 by finding that the exercise, by subjecting the exercise
16 of abandonment to the cleanup costs, that would be valid
17 regulatory powers. We don't think that's what happened
18 at all here. We think that what happened is that by
19 expending all the moneys in the estate, it effectively
20 does destroy our -- and that is why we are here before
21 you today.

22 QUESTION: What would have happened if no
23 bankruptcy had been filed at all, and the corporation
24 have dissolved? Could New York have come in and done
25 its cleanup and had a first lien under state law that

1 would come in ahead of secured creditors?

2 MR. TERRELL: First of all, Justice O'Connor,
3 our lien covered personal property in New Jersey, and
4 personal property in New York, but it never got that far
5 because that personal property was never sold by the
6 trustee. So, our lien covered only personal property in
7 New Jersey.

8 QUESTION: Well, let's talk about the
9 theoretical --

10 MR. TERRELL: Fine.

11 QUESTION: -- possibilities, if you would for
12 a minute. What would happen -- if you remember the
13 question --

14 MR. TERRELL: Yes, I do.

15 QUESTION: -- go ahead and answer it.

16 MR. TERRELL: Under state law, in New Jersey,
17 our lien would have priority to any other liens,
18 including that of the state of New York, and so under
19 state law, if the corporation went defunct, we could
20 have foreclosed under New Jersey law and sought sale of
21 those assets to pay for our secured interest.

22 I do not know --

23 QUESTION: Is it possible, of course, that a
24 state could give itself first priority?

25 MR. TERRELL: Yes, you are absolutely right.

1 As a matter of fact, New Jersey does have such a state
2 law. And I think that if New Jersey -- if the DEP in
3 New Jersey came in pre-bankruptcy, cleaned up that site,
4 under the Spill Act, there is an absolute law which
5 gives them a first priority. If they clean up, and if
6 they assert the lien -- of course, they didn't do that
7 in this case, but that certainly is possible. There is
8 no question about that. But in the facts of this case,
9 if Quanta had not gone bankrupt, and the state did not
10 clean up, there is no question but that Midlantic has a
11 first prior lien to those assets on which it has a
12 lien.

13 That is what the Third Circuit decision
14 destroys, we believe.

15 QUESTION: May I ask at that point, did your
16 lien also include, also attach to the property that the
17 trustee sought to abandon?

18 MR. TERRELL: Yes, it did. It covered all
19 inventory. He did --

20 QUESTION: So basically what you are saying
21 is, you could foreclose your lien by taking the valuable
22 property and ignoring the -- you could make a selective
23 foreclosure.

24 MR. TERRELL: Yes, I believe state law permits
25 you to do that. I think the T.P. Long case also

1 supports that position, that the secured creditor can
2 pick and choose among the security he wishes to
3 foreclose.

4 I think this Court's analysis in Security
5 Industrial Bank is where one must begin the analysis of
6 Midlantic's position in this case. As the Court well
7 knows, in that case this Court did not reach a
8 constitutional issue by construing the statute in a way
9 that avoided the constitutional issues.

10 We believe the Third Circuit opinion does
11 raise a constitutional issue of taking by construing 554
12 in a way that we don't believe Congress intended, and of
13 course that construction was to condition the
14 abandonment power on compliance with state environmental
15 laws.

16 Under Security Industrial Bank, we believe
17 that what the result should be is that 554 should be
18 construed not to be so conditional, and therefore not to
19 raise the taking question. That is what the Court held
20 in Security Industrial Bank. That is what we think has
21 to be done here.

22 I think there is another issue that
23 overshadows all this. All of the briefs from, the
24 amicus from the various states, the DEP and the New York
25 Department of Environmental Protection stress

1 environmental concerns, and Midlantic National Bank is
2 not here saying that it is not concerned with the
3 environment, but there is an equal and, I think, just as
4 valid concern with the commercial side of public policy.

5 It is certainly in the interest of public
6 policy to have commercial lenders lend to companies and
7 lend to companies in environmentally sensitive
8 industries. But if those companies lend to those
9 businesses, and believe they have a security interest
10 and a first priority lien, and that lien is knocked out
11 as per the Third Circuit opinion, I think we are going
12 to find that financial institutions will tread very
13 lightly in this field, and will not lend to these
14 companies.

15 I don't think that's what Congress intended by
16 the abandonment power, and I think that is an interest
17 that this Court should be concerned with, just as it is
18 concerned with the environmental aspect of this case.
19 Obviously, it is a balancing act, and I think the
20 Bankruptcy Act under 554 did occasion that balance, and
21 the balance came out on the side of the trustee to
22 permit him to abandon, as the trustee's counsel pointed
23 out, in those circumstances where the property is either
24 burdensome or of inconsequential value to the estate. It
25 did not put any condition on that power.

1 In addition, I believe it should -- the Court
2 should be aware that there are other alternatives to the
3 state when they clean up sites like this. The trustee
4 isn't the only pocket here, and as pointed out, I
5 believe, by Judge Davida in the Bankruptcy Court opinion
6 below, the trustee didn't create the situation. The
7 secured lenders didn't create the situation. The debtor
8 created the situation.

9 QUESTION: Could I ask, when a secured
10 creditor has a -- well, he has a lien on real or
11 personal property, and he wants to foreclose the debtors
12 in bankruptcy, you must get permission to foreclose?

13 MR. TERRELL: If the debtor is in bankruptcy,
14 that's right. You get relief from the automatic stay.

15 QUESTION: But the only time you wouldn't get
16 it is if the property is worth more than the debt, I
17 suppose.

18 MR. TERRELL: No, that is not the only
19 reason. If the property is necessary for an effective
20 reorganization --

21 QUESTION: No, this is straight bankruptcy.

22 MR. TERRELL: Straight bankruptcy. That's
23 right. That's right. That would be the only case. If
24 there was equity in the property, then the Bankruptcy
25 Court would --

1 QUESTION: If there is no equity in the
2 property, couldn't the trustee say if the secured
3 creditor is -- couldn't the trustee say, I want to
4 abandon this property?

5 MR. TERRELL: Well, the trustee must go to the
6 Court to --

7 QUESTION: Exactly. He says, I want to
8 abandon this property. The lien on it is worth more
9 than the property.

10 MR. TERRELL: Certainly that happens every day
11 in the --

12 QUESTION: Why shouldn't it have happened in
13 this case? Your lien is worth more than the personal
14 property, isn't it? Or not? Or do you know?

15 MR. TERRELL: Well, it is worth more than the
16 personal property, but there was a combination of assets
17 here, Justice White. There were a number of vehicles on
18 which there were --

19 QUESTION: You had no lien on.

20 MR. TERRELL: We had no lien. There were
21 liens by the GMAC or whatever the truck companies were,
22 but those vehicles on which we had no lien were worth a
23 lot more than the liens, and the trustee did move ahead
24 and sell those vehicles.

25 QUESTION: Thank you.

1 MR. TERRELL: There is, as I indicated, there
2 is an important consideration here about how the state
3 can go about cleaning up the site other than reaching
4 into the pockets of either the trustee or secured
5 lenders. Certainly here there are landlords involved in
6 this site. The Quanta site in New Jersey was a
7 leasehold interest. The owners of that site are still
8 existing, and own the site, and under New Jersey's
9 environmental laws, they certainly have responsibility
10 for the site.

11 The state and federal government themselves by
12 statute have provided avenues and ways to proceed to
13 clean up these sites, and so there is that avenue to
14 clean up the site. There is also suits that happen now
15 every day against the generators of these wastes on
16 these sites.

17 The generators can be sued or can be coerced
18 into paying for the cleanup of these sites, so that it
19 seems to me to say that the assets of the estate are the
20 only way this site can get cleaned up really does not
21 focus on the true state of affairs in the environmental
22 area. There is another overriding concern here, I
23 believe, for secured lenders such as Midlantic.

24 The thrust of the environmental laws is to
25 place upon private parties initially the burden to clean

1 up the sites. New Jersey happens to be a state where
2 there are a lot of environmentally sensitive
3 industries. Probably there is as much cleanup going on
4 in New Jersey as in any place in the country. Certainly
5 these companies, if they are to seek financing for these
6 businesses, must rely upon banks such as Midlantic to do
7 that. Midlantic, if they are going to finance this kind
8 of industry, certainly has a legitimate aim in having
9 its lien secured. Obviously secured loans carry less
10 interest. Obviously, they carry less risk. And
11 obviously, they are the preferred means of borrowing
12 both from the borrower's standpoint and the lender's
13 standpoint.

14 By allowing the Third Circuit opinion to
15 stand, it seems to me you are sending the signal to
16 financial institutions that you must beware if you lend
17 to environmentally sensitive industries. I don't
18 believe that that is the signal that should go out from
19 this Court. I believe that the signal should be that
20 financial institutions should be encouraged to finance
21 these industries, should be encouraged to finance these
22 industries so that they can take care of their
23 environmental problems themselves. By permitting the
24 Third Circuit opinion to stand, that signal does not go
25 out to the financial community, and I think they will

1 shy away from these kinds of industries.

2 QUESTION: Mr. Terrell, you mentioned the fact
3 that the New Jersey site was leased.

4 MR. TERRELL: Yes, sir.

5 QUESTION: The lease was terminated. Is the
6 owner of the fee according to this case?

7 MR. TERRELL: He is not according to this
8 case. No, he is not.

9 QUESTION: And no action has been instituted
10 against -- him?

11 MR. TERRELL: In the Bankruptcy Court, not
12 this case on appeal, there was a separate action started
13 by the landlord. Basically the landlord said to the
14 trustee, I want a lot of rental. I want you to give me
15 the assets in the estate to pay me for the rental of the
16 property that you have had for the many months that you
17 have had prior to abandonment.

18 The DEP intervened in that case and said, no,
19 we want the moneys for cleanup costs. Midlantic
20 intervened in that case and said, no, we want our
21 secured lien paid. That case was stayed pending
22 resolution of this matter before the Court, so while the
23 landlord is not here before you, the landlord is
24 involved in the bankruptcy proceeding, albeit in an
25 ancillary proceeding.

1 QUESTION: He would be an unsecured credit, or
2 would he?

3 MR. TERRELL: Well, he claims he is entitled
4 to administrative rent.

5 QUESTION: Landlord.

6 MR. TERRELL: Yes, he claims that he has an
7 administrative lien for rent, but his claim was
8 dismissed by the Bankruptcy Court, and that is all the
9 farther that has gotten. It has not gotten any farther
10 than that.

11 QUESTION: Well, did he claim priority over
12 your lien?

13 MR. TERRELL: No, he did not claim priority
14 over our lien, but he claimed an administrative lien.

15 QUESTION: Expense.

16 MR. TERRELL: Expenses. That's right.

17 QUESTION: Mr. Terrell, could I ask you about
18 your signal to the financial community. Couldn't one
19 argue the contrary, that the signal ought to be that you
20 should not be lending money to these companies unless
21 you are satisfied they will be able to comply with the
22 environmental laws? That that is just another
23 precaution that the business community ought to take
24 before financing a venture like this takes place?

25 MR. TERRELL: I don't disagree, Justice

1 Stevens. Certainly when a bank loans to an
2 environmentally sensitive industry, it has to take that
3 into consideration, but I don't think it should have the
4 added burden that when it thinks it has a secured lien
5 on its assets, it has to worry about the fact that if
6 this company goes in bankruptcy with the Third Circuit
7 opinion on the books, that it won't have a lien at all.

8 I think that is the signal that the Third
9 Circuit opinion gives to the financial community which
10 we are asking this Court to reverse, but I agree with
11 you. I think that a bank in the environmentally
12 sensitive area has to be concerned about that, but I
13 don't think it should have the added concern that if it
14 believes it has a security interest in a secured lien
15 that has taken all the steps under state law to have a
16 secured lien, that it should worry that in bankruptcy
17 that lien will be wiped out, and that is what we believe
18 the signal is from the Third Circuit opinion, and that
19 is why we are asking this Court to reverse that Third
20 Circuit opinion.

21 Thank you.

22 QUESTION: Very well. General Hermann.

23 ORAL ARGUMENT OF ROBERT HERMANN, ESQ.,

24 ON BEHALF OF RESPONDENTS IN NO. 84-805

25 MR. HERMANN: Mr. Chief Justice, and may it

1 please the Court, seven years ago Congress codified the
2 power of a trustee in bankruptcy to abandon worthless,
3 burdensome property. In so doing, the trustee here
4 argues Congress meant to displace not only existing case
5 law, but other provisions of the Bankruptcy Code section
6 of the Judicial Code, and much significant environmental
7 legislation that had been enacted to that time, even
8 though Congress never said so in codifying Section
9 554(a).

10 Furthermore, as a result, the trustee argues
11 that he has an absolute right to abandon property that
12 can't do the estate any good, whether that property
13 consists of toxic wastes or plutonium rods from a
14 failing nuclear plant. We hope that that view is wrong,
15 and we submit that it is.

16 In the time allotted to the states here
17 insofar as some division of responsibility will be
18 helpful to the Court, I am going to address our overview
19 of the case, the abandonment provision, and its
20 relationship to other statutes and case law, and the
21 preemption question, and my co-counsel from New Jersey
22 is going to address the taking question, whether this
23 case is really about priorities and money, and the
24 applicability of the Kovaks case to the situation here.

25 I think it is important at the outset to

1 underscore that the situation before the Court here is a
2 limited one. This case is not about the \$2 million
3 which New York spent to clean up the site. The case in
4 our view is about the bankruptcy's decision to allow
5 abandonment in an emergency situation. The states were
6 faced --

7 QUESTION: Why are you here?

8 MR. HERMANN: We are here, Your Honor, to
9 reaffirm what we think is an essential police power of
10 the state, the ability of the states to step in in an
11 emergency situation to get an order maintaining the
12 status quo and preventing a situation where toxic wastes
13 are leaking into the Hudson River and the court of
14 equity is powerless to do anything about it.

15 QUESTION: So you -- did you go into the
16 Bankruptcy Court and attempt to have this effected?

17 MR. HERMANN: Yes, we did, Your Honor. We
18 opposed the abandonment on --

19 QUESTION: On that ground.

20 MR. HERMANN: Well, the situation was not
21 simply that the trustee proposed to walk away from
22 dangerous property. The trustee proposed to eliminate
23 the safety precautions that were necessary at the same
24 time to keep those facilities from becoming even more
25 dangerous.

1 In New York City, for example, it amounted to
2 dismissing the guard service, removing the fire
3 suppression equipment. In New Jersey it involved
4 failing to keep an eye on the pollution control
5 equipment, in essence not simply abandoning a property,
6 but making more grave and serious a situation that was
7 already highly dangerous with some of the most toxic
8 carcinogens known.

9 QUESTION: Well, how are you any worse off
10 than before Quantas' bankruptcy? The title has gone
11 back to Quantas.

12 MR. HERMANN: Well, Quantas in this situation,
13 Your Honor, was completely without assets to do anything
14 about the situation.

15 QUESTION: But I presume that was the case on
16 the day it filed for bankruptcy.

17 MR. HERMANN: I believe that the situation
18 deteriorated substantially over a period of eight months
19 in New York, and over more than a year, I believe, in
20 New Jersey. There were actual leaks in these cases
21 which were growing more grave. Pollution control
22 equipment had during the time the trustee was in
23 possession of the property become inoperative, and what
24 was proposed was to remove even the minimum amount of
25 security that was already there.

1 So, the situation, as the Solicitor General's
2 office says in its brief, the trustee has no right to
3 make a grave situation worse. And that is what happened
4 during the --

5 QUESTION: What you wanted to effect was to
6 make the trustee use whatever assets he had to minimize
7 the danger.

8 MR. HERMANN: That's right, Your Honor. I
9 think it is important to emphasize that New York here --

10 QUESTION: I suppose you wouldn't have come in
11 if you thought he was absolutely without any assets.

12 MR. HERMANN: That's right. And I emphasize --

13 QUESTION: Assets such as -- some of the
14 assets were under a lien.

15 MR. HERMANN: That's correct, Your Honor.

16 QUESTION: You claim a right to those security
17 assets, too, I take it.

18 MR. HERMANN: That is right, Your Honor, we
19 do.

20 QUESTION: Well, isn't this really a question
21 of priority of claims? It seems to me the abandonment
22 question in this context is pretty much of a red
23 herring.

24 MR. HERMANN: Well, Your Honor, we don't think
25 it is. We believe that the relief we are asking here

1 for was of an emergency short-term nature. The
2 Bankruptcy Court as a court of equity should have the
3 ability to essentially enjoin the trustee from walking
4 away, to look into the factual --

5 QUESTION: Well, in the present posture of the
6 case, money has been expended by New Jersey and by the
7 city of New York. They want to be repaid to the extent
8 there are assets in the estate. Isn't that right?

9 MR. HERMANN: That's correct, but that's not
10 the issue we --

11 QUESTION: So it really is a priority claim.

12 MR. HERMANN: But that is not the issue before
13 the Court now. There has been no finding about that.
14 New Jersey hasn't cleaned up the site. That hasn't
15 happened yet in New Jersey, and New York didn't clean up
16 the site until after the relevant proceedings in the
17 Bankruptcy Court and in the District Court.

18 QUESTION: After the abandonment.

19 MR. HERMANN: After the abandonment took
20 place. So we believe that issue isn't before the
21 Court. Certainly New York --

22 QUESTION: What if the corporation had just
23 chosen to dissolve and walk away from all these assets?
24 Then the state would have to come in and take whatever
25 measures it wanted to take, and by its own law try to

1 get priority to be recouped, right?

2 MR. HERMANN: That's right, Your Honor.

3 QUESTION: And why should the filing of a
4 bankruptcy change that outcome?

5 MR. HERMANN: Well, the debtor here was
6 seeking to avail itself of some of the protections of
7 the Bankruptcy Code which would not otherwise have been
8 available in a dissolution proceeding. What we were
9 arguing for, if I may emphasize this, is simply the
10 ability of the Bankruptcy Court to deal with the
11 emergency situation.

12 As I say, New York would like to be able to
13 recover cleanup costs. New York is obviously not able
14 to step in and clean up every toxic waste site as soon
15 as someone is prepared to abandonment. Put the most
16 fundamental state interest that we are trying to assert
17 here is the ability of the state to go in on an
18 emergency basis and prevent the situation from getting
19 worse.

20 We are not saying necessarily that an owner --
21 that the trustee operating a toxic waste facility must
22 ensure a cleanup before that property can be abandoned.
23 What we are saying is that a court -- as a court of
24 equity, the Bankruptcy Court should take into consider
25 the public health and safety and environmental

1 consequences, and stabilize the situation so that the
2 abandonment power does not become subject to abuse.

3 QUESTION: But certainly if the state of New
4 York were concerned with emergency environmental
5 situation, and wherever this place was in New York, it
6 wouldn't be logical to go to the trustee in bankruptcy
7 and say we need emergency action in the next 12 hours,
8 you take it. I mean, the trustee in bankruptcy is the
9 last place you would go for that sort of action.

10 MR. HERMANN: I think that's right, Your
11 Honor, but we are asking essentially for status quo
12 relief. In essence we were saying, don't take away
13 these precautionary devices that are needed to protect
14 the public until this situation can be taken in hand by
15 the state or by the Bankruptcy Court until a hearing can
16 be held on the question of what assets there really are
17 in the estate. I can't emphasize too strongly that
18 there has been no hearing to determine what assets
19 really are in the estate.

20 QUESTION: You mean the Court shouldn't act on
21 the abandonment petition until all that is sorted out?

22 MR. HERMANN: Well, I think the abandonment
23 provision itself provides for notice in a hearing, and
24 the hearing, we believe, should consider those public
25 health and safety consequences.

1 QUESTION: Why?

2 MR. HERMANN: In the same way that any other
3 emergency situation is dealt with by a court of equity.

4 QUESTION: That may be so, but what do you
5 mean, you have to have a hearing to see what assets are
6 available?

7 MR. HERMANN: Well, we are accepting it at
8 face value for purposes of the hypothetical here, that
9 there were no assets in the estate to stabilize the
10 situation in the short term. There has been no finding
11 to that effect in this record. That is an assertion of
12 the trustee that was never tested at a hearing in this
13 case. We think the state should be entitled to a
14 hearing, to say, show us that there are no assets
15 available to keep running -- the trustee here was asking
16 in essence to stop doing what he had been doing for over
17 eight months already, which is to treat as
18 administration expenses the cost of maintaining this
19 property.

20 QUESTION: General Hermann, do you think the
21 equities in any sense enter into this balance? For
22 example, obviously, something has been going wrong
23 here. Now, the police power of New York and New Jersey
24 was always available to put a stop to it a long time
25 ago, wasn't it?

1 MR. HERMANN: That's true, Your Honor. I
2 think the equities do enter into the consideration that
3 is before the Bankruptcy Court. Certainly in a
4 situation where the trustee has assets that are
5 miniscule compared, for example, to the costs of a
6 cleanup, or where in essence the situation is one of
7 bleeding the estate dry bit by bit. The Court should
8 consider that. As I say, we are not saying that the
9 state is entitled to a total cleanup before the trustee
10 can abandon the property or the Bankruptcy Court can
11 take any other action, but we are saying these are
12 factors which the Court should consider and which courts
13 traditionally do consider in such situations.

14 QUESTION: Do you think the old equity
15 doctrine of in pari delicto would encourage comes into
16 play here at all?

17 MR. HERMANN: I don't think in this situation
18 that we were in pari delicto, because one of the things
19 that was clear here is that on the record, this
20 particular debtor was notorious, was subject to consent
21 orders in both New York and New Jersey for violations.
22 One of the things that the lenders here certainly failed
23 to do and hasn't been pointed out is to note that there
24 were on record both in New York and New Jersey cleanup
25 orders which required Quanta in both cases to clean up

1 these sites.

2 It was only very shortly before these
3 proceedings took place that these orders were in effect.
4 It would seem to me the most basic precaution on the
5 part of a lender would be to say what are your
6 outstanding obligations to the various states? This
7 wasn't a hypothetical situation. This was a very real
8 -- a very real situation where there were people who had
9 agreed in both states to clean up these very sites in
10 question.

11 One of the interests that the state here is
12 seeking is to prevent the creation of what we regard as
13 a very large loophole in the environmental laws.
14 Certainly we believe that toxic waste dumpers should not
15 be able to manipulate the bankruptcy laws to avoid
16 compliance with them, but I would also point out that
17 while this case has been cast in preemption terms, the
18 result is really far broader, because the trustee is
19 saying that there is an impossibility of dual compliance
20 with both the bankruptcy abandonment power and the
21 federal environmental --

22 QUESTION: I thought a moment ago, General
23 Hermann, that you were suggesting this was kind of an
24 interim type of thing, that the trustee was -- you are
25 attacking him here for having made matters worse since

1 he took over.

2 MR. HERMANN: That's right.

3 QUESTION: I would sense from what you just
4 said that you would fault the trustee for things that
5 Quantas had done in the past.

6 MR. HERMANN: No, I am merely pointing out,
7 Your Honor, the breadth of the argument, that it goes
8 not simply to ignoring state environmental concerns, but
9 also to ignoring federal environmental concerns as well,
10 and essentially granting them an unfettered right to
11 abandon property which he regards as worthless.

12 QUESTION: But that is what the Bankruptcy
13 Court may well do. It certainly has no conditions on
14 it.

15 MR. HERMANN: That's right, Your Honor. It
16 doesn't expressly contain any conditions in it, but we
17 believe that it incorporates prior case law, which we
18 believe is more well developed than the trustee
19 acknowledges.

20 Much has been made of the proposition that the
21 Bankruptcy Court doesn't -- that the abandonment
22 provision doesn't expressly incorporate an exception
23 into it, and we think that that proposition, essentially
24 that Congress knew how to write the exception when it
25 wished to do so, doesn't really help decide this case,

1 because there are numerous other statutes in this case
2 that are called into play which are equally unqualified,
3 and which intersect with the policies of Section
4 554(a).

5 QUESTION: Are you suggesting that the
6 abandonment should just have been put off, so that the
7 trustee could continue to take care of the property and
8 avoid damage, or are you saying, go ahead and let him
9 abandon it, but then the trustee would have to spend
10 money to keep the property from deteriorating after
11 abandonment? Which are you? Or both?

12 MR. HERMANN: What we are suggesting, Your
13 Honor, is that in the short term the trustee should be
14 required to do what he had been doing for eight months.

15 QUESTION: What short term? Pending what?

16 MR. HERMANN: Until the court can hold a
17 hearing and determine how serious the problems are, how
18 much it would cost to clean those problems up, what
19 assets are really available in the estate, what
20 prospects there are for --

21 QUESTION: That isn't what the abandonment
22 power says. The abandonment power focuses on the
23 property the trustee wants to abandon.

24 MR. HERMANN: That's right, Your Honor, but
25 there are also other statutes which come into play here.

1 There is Section 959(b), about which very little has
2 been said, which requires the trustee to obey the valid
3 laws of the state.

4 There is Section 362(b)(4), which allows the
5 government enforcement proceedings, which are already in
6 place, to continue to fight the filing of a petition in
7 bankruptcy. All of these policies also come --
8 essentially a situation of focusing on one statute. The
9 Court has before it several statutes which intersect in
10 the circumstances that are presented here.

11 QUESTION: May I ask this? Is it your
12 position in a situation like this, perhaps not your
13 particular case, would New York insist that the assets
14 of the estate could be totally exhausted or had to be
15 totally exhausted if it were necessary to clean up the
16 environmental problem?

17 MR. HERMANN: No, I don't think our position
18 goes quite that far, Your Honor. I think there is
19 authority for it.

20 QUESTION: Do you think there would come a
21 point when something would be left for creditors?

22 MR. HERMANN: I think there is authority, Your
23 Honor, if that would be -- the situation were such that
24 it could be stabilized, and there could be an orderly
25 winding up of the estate, and responsible parties were

1 on the scene, to handle the situation and prevent it
2 from getting out of hand. I don't think it is New
3 York's position that all assets of the estate must be
4 exhausted for abandonment of a particular property would
5 be -- .

6 QUESTION: You have to find somebody other
7 than the state to clean up the sites.

8 MR. HERMANN: In many situations, reality
9 forces us to recognize that the private parties are
10 simply not in a position to do it. In this case, New
11 York spent over \$2 million already, and the cleanup is
12 only partial, and much remains to be done.

13 But we believe there is authority for it, and
14 that authority relies on the administration expenses
15 sections of the code, 503 and 506.

16 Furthermore, I would point out that the
17 Bankruptcy Courts have continued since the enactment of
18 the code in 1978 to apply this kind of public
19 endangerment qualification, and Congress again has had
20 an opportunity to reverse that, and has not done so.

21 QUESTION: Mr. Hermann, I am puzzled by your
22 response to Justice Powell, and I really can't think it
23 through, perhaps, but are you contending, though, that
24 the state's interest in recovering the cleanup costs --
25 forget for a moment the costs of maintaining the guards,

1 the temporary problem, but the large amount spent
2 cleaning it up, are you contending that that comes ahead
3 of the first lien in all --

4 MR. HERMANN: No, New York does not have a
5 first lien statute, as New Jersey does. New York is in
6 the process of considering that. As of now, New York
7 does not have a first lien statute.

8 QUESTION: Do you disagree with the suggestion
9 by one of your adversaries that the lienholder could
10 make a selective foreclosure and just foreclose on the
11 good assets, and just ignore the liability aspect?

12 MR. HERMANN: Yes, we do. We disagree with
13 that.

14 QUESTION: I am not clear, then, on why you
15 don't think they are able to foreclose. How does the
16 abandonment of the tainted oil affect their right to
17 foreclose their land on the assets that have a value --

18 MR. HERMANN: It doesn't.

19 QUESTION: -- under your view?

20 MR. HERMANN: I don't believe it does.

21 QUESTION: Maybe I have asked too much for the
22 time -- when you don't have any time. I really don't
23 understand your position.

24 MR. HERMANN: I don't believe it does.

25 QUESTION: It doesn't affect it at all.

1 MR. HERMANN: No, I don't believe it does.

2 QUESTION: Yes.

3 CHIEF JUSTICE BURGER: Your time has expired
4 now, counsel.

5 Ms. Jacobson.

6 ORAL ARGUMENT OF MARY CAROL JACOBSON, ESQ.,

7 ON BEHALF OF THE RESPONDENT IN NO. 84-805

8 MS. JACOBSON: Thank you, Mr. Chief Justice,
9 and may it please the Court. What the Third Circuit
10 held, and what we seek to have affirmed here, is that
11 abandonment cannot go forward without regard for public
12 health and safety concerns.

13 The bank in this case has argued that this
14 holding amounts to a taking of creditors' property.
15 There is nothing in the decision of the Third Circuit,
16 however, which directly interferes with the rights of
17 creditors. Indeed, it remanded the priority issue for a
18 complete factual proceeding in the Bankruptcy Court.

19 QUESTION: I am not sure I track that, Ms.
20 Jacobson. It is going to cost millions of dollars to
21 clean up this problem, and that absorbs all of the
22 assets that the preferred creditors are looking to. How
23 do you way that that doesn't hurt them?

24 MS. JACOBSON: It is an issue -- the effect on
25 the creditors is something that we don't know at this

1 point, because the Bankruptcy Court has not looked at
2 that issue on remand. Certainly on remand the state of
3 New Jersey is going to make whatever arguments are
4 available to say that the existing assets should be used
5 for cleanup purposes, but how the Bankruptcy Court --

6 QUESTION: Do you include -- your insistence
7 is that even with respect to the inventory that is
8 covered by the bank loan, that that inventory could have
9 been used by the trustee to clean up.

10 MS. JACOBSON: We would make that argument
11 before the Bankruptcy Court.

12 QUESTION: Well, you are making it.

13 MS. JACOBSON: Yes. Yes.

14 QUESTION: And do you think New York shares
15 this view, that it could -- that the -- even the assets
16 with a lien on it could be dissipated, not dissipated,
17 but used to clean up?

18 MS. JACOBSON: New York in their brief raised
19 the possibility that under Section 506(c) of the
20 Bankruptcy Code, it is possible under some circumstances
21 that the state through the state could reach the assets
22 of secured creditors.

23 QUESTION: And that is your view, too, I
24 gather.

25 MS. JACOBSON: That is one of the views that

1 we would press before the Bankruptcy Court. The other
2 is simply an equitable argument that goes to the issue
3 that Justice Stevens raised, and that is whether or not
4 it is equitable for the bank to be able to foreclose
5 only on the claim property while the contaminated
6 property essentially becomes a ward of the state.

7 QUESTION: Well, Ms. Jacobson, assuming that
8 what you say may well be correct as to the priorities,
9 why should all this marshalling of assets discussion
10 turn on whether or not the property is allowed to be
11 abandoned?

12 I mean, isn't it more, as Justice O'Connor
13 suggests, just a question of priorities of claims that
14 really doesn't turn on whether or not abandonment is
15 granted at all?

16 MS. JACOBSON: Well, it certainly goes beyond
17 the abandonment issue. The problem is raised in this
18 case in the abandonment context, and we are seeking not
19 only to have whatever assets of the estate available for
20 cleanup, but as Mr. Hermann pointed out, we are seeking
21 to have -- to establish a principle that the trustee in
22 bankruptcy who has custodial care of the estate cannot
23 allow the estate to become a further hazard or further
24 endanger the public throughout his custodial -- during
25 his custodial responsibilities.

1 QUESTION: Are you saying that he cannot
2 through the process of abandonment relieve himself of
3 those custodial responsibilities?

4 MS. JACOBSON: We are saying that the
5 Bankruptcy Court should not allow abandonment until the
6 public health and safety concerns are addressed.

7 QUESTION: That means your answer is yes.

8 MS. JACOBSON: And this may be different given
9 any -- given the particular circumstances of the case.
10 For example, if the landlords here were in a position to
11 step in on the New Jersey site and take care of all the
12 cleanup, that would be something that should have been
13 put before the Bankruptcy Court, and if the abandonment
14 had been conditioned upon landlords taking over and
15 cleaning up the site, well, that is something that would
16 have been acceptable to the state of New Jersey.

17 What we were seeking to enforce in the
18 abandonment context was that all the assets of the
19 estate, everything that was available to the trustee
20 should have been used for cleanup purposes.

21 QUESTION: May I interrupt with a question?
22 It seems to me that at least arguably there are two
23 different issues on the cost. One is the cleanup cost
24 independently of avoiding the risk of further
25 deterioration of the property. You don't need guards.

1 Somebody has got to clean up what has been done in the
2 past.

3 And secondly, the problem presented by
4 guarding the property to be sure it doesn't get worse.
5 Do you think the costs of both of those items present
6 the same legal question?

7 MS. JACOBSON: It seems to be part of the same
8 continuum. On an immediate basis, in the short term,
9 before a decision can be made on abandonment, it is our
10 position that the trustee does have the obligation to
11 secure and stabilize the property.

12 QUESTION: I understand that. Does he also
13 have the obligation to decide who is going to pay the
14 cleanup costs, the full, total bill, the \$2.5 million,
15 before he allows abandonment?

16 MS. JACOBSON: That is an issue that we want
17 to raise with the Bankruptcy Court. The trustee
18 certainly is limited --

19 QUESTION: Well, then, are you agreeing that
20 they do present separate issues? The analysis regarding
21 the guards and the cost of keeping, maintaining the
22 property does not necessarily apply to recovering the
23 \$2.5 million, the total cleanup?

24 MS. JACOBSON: Well, we see it as the
25 threshold part of the same issue. If you had a

1 different hypothetical, for example, where all the
2 cleanup could be done easily within the assets available
3 to the estate, then it might be one and the same
4 question. At this point we have to face the reality of
5 the situation, which is that there were limited assets
6 in this estate, and that the cleanup was going to cost
7 far beyond the available assets.

8 QUESTION: Your view then, as I understand it,
9 is that cleanup costs should take priority over all
10 other claims of creditors.

11 MS. JACOBSON: That is the view that we want
12 to press before the Bankruptcy Court. Yes.

13 QUESTION: Well, if you just -- considering
14 that part of the problem of preventing further
15 deterioration, if the trustee is going to have to
16 maintain guards and what-not, that means that he can't
17 abandon the property. But he certainly isn't going to
18 spend money on property that he has already abandoned.

19 MS. JACOBSON: That is correct.

20 QUESTION: So it just means essentially that
21 if you must spend -- if you must prevent the property
22 from deteriorating further, you just can't abandon it.

23 MS. JACOBSON: That's correct, and that's
24 essentially what the Third Circuit held.

25 QUESTION: Yes, it is.

1 MS. JACOBSON: That where you have an imminent
2 public health and safety threat, you can't abandon
3 property without regard to that threat.

4 QUESTION: And you must use whatever assets
5 that's available to the trustee to prevent that hazard.

6 MS. JACOBSON: That is an implication of the
7 decision which --

8 QUESTION: A pretty strong one.

9 MS. JACOBSON: -- which absent factual
10 findings it is hard to play out in this case. The
11 taking issue itself is an issue in the area of law which
12 requires expensive factual findings. It is our position
13 that they simply aren't present in this case, and that
14 the issue therefore is not before the Court.

15 As the representative of the estate, the
16 trustee certainly had an obligation to the public to
17 prevent that estate from becoming a public danger. In
18 this situation, we did have a case where the property
19 was getting increasingly worse throughout the
20 trusteeship.

21 In the Kovaks decision decided last term by
22 this Court, it was explicitly stated that the trustee
23 must comply with state law. The court was also careful
24 to point out that the Kovaks decision did not give
25 bankrupts, debtors a license to pollute, nor, do we

1 submit, does the Kovaks decision give the trustee a
2 license to exacerbate an already dangerous situation.

3 In the Kovaks case, the debtor there had been
4 completely dispossessed by the property, dispossessed
5 from the property, and all that remained for him to do
6 was to pay a money judgment. In this case, the trustee
7 had complete management control of the premises, a
8 situation very different from Kovaks, and it is our
9 position that the trustee had an obligation to use that
10 management control to protect the public. He had to
11 consider the public interest as well as the interest of
12 creditors.

13 The Kovaks case, of course, did not squarely
14 have the abandonment issue before it. It did not have a
15 situation of imminent public health and safety such as
16 is involved in this case. When the Court looks at the
17 factual situation here and the danger involved to the
18 public, we submit that it should affirm the ruling of
19 the Third Circuit.

20 One thing that was raised earlier was, why
21 couldn't the landlords or some other party, including
22 the state, step in to take the remedial action that was
23 necessary. In this case, the state sought to have
24 whatever responsible parties it could find take remedial
25 action on the site. We did seek enforcement activities

1 against the landlords, but as the documents filed with
2 the Court by the Solicitor General demonstrate, those
3 efforts came to naught.

4 Again, the Bankruptcy Court did not look at
5 the environmental health and safety concerns at all. In
6 regard to the state participation in this matter, the
7 funds were simply not available in New Jersey in 1981 to
8 step in and take the remedial action that was necessary
9 on this property.

10 QUESTION: Could I ask you, why do you think
11 that the costs of cleanup or of avoiding some public
12 health hazard should be paid by the secured and
13 unsecured creditors? It is one thing, I suppose, if
14 there were an equity in the property to make the
15 stockholders pay for it, but just by definition this is
16 a bankrupt company. It is insolvent. The stockholders
17 no longer have an interest. There are no assets
18 available to them whatsoever. Why do you -- you think
19 it is -- you say that it is equitable to saddle the
20 creditors with the expense. Now, why? Do you think
21 just because they have been dealing with the company?
22 They took the risk? Or what?

23 MS. JACOBSON: Well, in this case the
24 creditors certainly did take the risk. At the time the
25 bank --

1 QUESTION: Both the secured and unsecured
2 creditors?

3 MS. JACOBSON: Certainly the secured creditor
4 in this case, Midlantic National Bank. At the time they
5 made the loan, it was June of 1981. At that time all of
6 the state and federal environmental statutes had been in
7 place for many years. And --

8 QUESTION: Were there any wage claims in this
9 case, do you know?

10 MS. JACOBSON: I don't know.

11 QUESTION: But you say that regardless of who
12 the unsecured creditor is, his claim should be
13 subordinated to the administrative expense of cleaning
14 up.

15 MS. JACOBSON: That's correct, Your Honor.
16 The reach of the police power is very great, as this
17 Court has recognized, sometimes so great that even the
18 destruction of property interests are allowed. In the
19 Miller versus Shoen case, for example, the owners of
20 those cedar trees that were endangering the apple
21 orchard next door had to have all those cedar trees
22 destroyed to protect the apple orchard.

23 Society makes different choices, and the
24 legislature of New Jersey and the Congress have decided
25 that the environment --

1 QUESTION: Of course, you would have to be --
2 you certainly would be implying quite a variation in the
3 priority structure of the Bankruptcy Act. It certainly
4 isn't express that these kinds of expenses would be --

5 MS. JACOBSON: But the Bankruptcy Code is
6 known for its equity and its flexibility, and when it is
7 faced with a situation --

8 QUESTION: Well, you are just saying -- you
9 are saying, yes, you have to be an implied, but that
10 there is -- it certainly is the right approach because
11 of the equitable powers of the court.

12 MS. JACOBSON: Because of the equitable powers
13 of the Bankruptcy Court. That's correct. The equitable
14 powers of the Bankruptcy Court in the past were used to
15 address public endangerment problems. Under the common
16 law in the cases that we cited, the Ottenheimer case and
17 the Lewis Jones case, the bankruptcy laws were made
18 flexible enough to take into account public danger, even
19 at the expense of creditors.

20 What the states are seeking here is to enforce
21 the most classic of their police powers, and that is the
22 protection of the public through the prevention and
23 control of serious public nuisances.

24 QUESTION: But as between the bank and the
25 state, who had the opportunity to correct this earlier?

1 MS. JACOBSON: As to the bank?

2 QUESTION: As between the bank and the state.
3 The state -- you have been talking about the police
4 powers, the state.

5 MS. JACOBSON: Right. Well, in this situation
6 --

7 QUESTION: The bank has put some money in
8 here.

9 MS. JACOBSON: In this situation the --

10 QUESTION: Should the bank be monitoring this
11 thing, or should the state?

12 MS. JACOBSON: Both the bank and the state
13 have to monitor the situation, the bank because it is
14 interested in protecting its property and should be
15 interested in what the person it loaned the money --

16 QUESTION: What police powers does the bank
17 have?

18 MS. JACOBSON: The bank does not have the
19 police powers of the state, and it is a balancing test,
20 as the Third Circuit held, and you have to look at the
21 rights of secured creditors and what they knew or should
22 have known at the time they made this loan to Quanta.

23 In addition to the regulatory background that
24 was in place when the loan was made, there was also
25 outstanding administrative consent orders against Quanta

1 ordering cleanup. The bank knew or should have known
2 about these things, and this should have been factored
3 into their decision. They made a business risk, and it
4 is the position of the states that that risk should not
5 be transferred to the public.

6 Thank you.

7 CHIEF JUSTICE BURGER: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 11:03 o'clock a.m., the case in
10 the above-entitled matter was submitted.)
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CERTIFICATION.

erson Reporting Company, Inc., hereby certifies that the
th ed pages represents an accurate transcription of
tronic sound recording of the oral argument before the
eme Court of The United States in the Matter of:

#84-801-MIDLANTIC NATIONAL BANK, Petitioner V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION; and

#84-805-THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION,
DEBTOR, Petitioner V. CITY OF NEW YORK. ET AL.

that these attached pages constitutes the original
script of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

