

# DEBTOR/CREDITOR

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## *Abandonment of Hazardous Waste*

The federal bankruptcy statute permits a trustee to abandon property which is of inconsequential value to the bankruptcy estate. The Supreme Court has created an exception to this bankruptcy power where the property contains hazardous waste that would create a danger to public safety. A New Jersey federal court recently decided who must demonstrate the presence or absence of a risk to public safety.

A bankruptcy trustee sought to abandon commercial property. The New Jersey Department of Environmental Protection objected to the abandonment, asserting that the trustee was required to prove that the abandoned property would not injure public safety. The trustee argued that the DEP must show environmental risk. The court decided that the party opposing abandonment must show risk of harm to the public.

*New Jersey Dept. of Env'tl. Protection v. Atkinson (In re St. Lawrence Corp.)*, 248 B.R. 734 (D.N.J. 2000)

## *Kid Sister Escapes IRS*

If a corporation fails to remit employee withholding taxes, liability for those unpaid taxes is assessed against the "responsible person". The courts have examined factors, such as corporate officer status, control over financial affairs, authority to disburse corporate funds, stock ownership and the ability to hire and fire employees, which indicate whether a particular individual had actual ability within the corporation to pay the taxes owed.

A Boston bankruptcy judge was presented with a family-owned corporation which failed to remit withholding taxes. The older brother was president, while the younger sister was the of bookkeeper. Both had authority to sign checks. Both were directors and officers.

The bankruptcy judge found that the family dynamics did not give the younger sister actual ability to pay the taxes contrary to the direction of her older brother, and so absolved her of liability for their non-payment.

*In re Aboody*, 250 B.R.1 (Bankr. D. Mass. 2000).

## *Attorney/Client Privilege Lost*

In 1985, the United States Supreme Court ruled that a corporate debtor's attorney/client privilege is held by its trustee in a bankruptcy case. The Court permitted a trustee to question the corporation's pre-bankruptcy attorneys regarding communications with the corporation's management. The Court left undecided the application of its ruling to an individual debtor.

In determining whether communications between an individual debtor and counsel are protected, an Ohio bankruptcy judge determined this year to apply a test which balances the interests of full and frank discussion between attorneys and clients against the trustee's duty to maximize the value of the debtor's estate.

Attorneys should be aware of this significant exception to the attorney/client privilege and exercise appropriate care in communicating with clients.

*French v. Miller (In re Miller)*, 247 B.R. 704 (Bankr. N.D. Ohio 2000).

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*This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.*

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