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CERCLA AND THE "EROSION" OF TRADITIONAL CORPORATE LAW DOCTRINE

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The Erosion of Traditional Corporate Law Doctrines in Environmental Cases.[1] *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions.*[2] *Corporate Successor Liability Under CERCLA: Who's Next?*[3] *Corporate Acquisitions and Mergers: Environmental Trap for the Unwary.*[4] *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA.*[5]

The titles of these recent legal writings reflect a widespread and growing concern among legal commentators that federal law is needlessly broadening corporate liability for environmental violations.[6] Many commentators (and defendants) argue that recent court decisions have cast the net of federal environmental legislation too wide, snaring parties who traditionally have been shielded from liability for tortious or illegal corporate actions, such as corporate officers, shareholders, and parent corporations.[7] The results, they believe, are unwarranted and unsound

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1 McMahon & Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T 29 (1988).

2 Angelo & Bergeson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. REV. 101 (1985).

3 Squire, Ingram & Frost, *Corporate Successor Liability Under CERCLA: Who's Next?*, 43 SW. L.J. 887 (1990).

4 Laswell, *Corporate Acquisitions and Mergers: Environmental Trap for the Unwary*, 2 CBA REC. 17 (July-Aug. 1988).

5 Comment, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA*, 1987 UTAH L. REV. 585 [hereinafter Comment, *Threat*].

6 For additional citations, see *infra* notes 7-8.

7 *See, e.g.*, McMahon & Moertl, *supra* note 1, at 29 (arguing that court decisions construing environmental legislation have eroded traditional corporate law protection of officers, directors, shareholders, and successor corporations); O'Hara, *Minimizing Exposure to Environmental Liabilities for Corporate Officers, Directors, Shareholders, and Successors*, 6 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 1 (1990) ("The most alarming characteristic of environmental liability is that it can reach far beyond the protection of the corporate shell and reach parent corporations and individual officers, directors and shareholders."); Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What Are the Consequences?*, 38 MERCER L. REV. 677, 677 (1987) ("In the past few years, environmental legislation has eroded a traditional incentive for incorporation—limited liability.") [hereinafter Comment, *Consequences*]; Comment, *Threat*, *supra* note 5, at 619-20 (suggesting that extending shareholder liability under CERCLA may thwart legislative intent by encouraging minimal disposal or cleanup efforts and may bankrupt corporate and individual shareholders); Note, *Refining the Scope of CERCLA's Corporate Veil-Piercing Remedy*, 6 STAN. ENVTL. L.J. 43, 44 (1986-87) (finding CERCLA's veil-piercing remedy "underbroad in that the statute does not clearly impose liability on a controlling parent corporation of a responsible subsidiary" and "overbroad" in

deviations from traditional liability exposure rules that will have chilling, if not killing, effects on industrial progress and corporate investment.[8]

Experience has proven that the costs of cleaning up environmental degradations are shockingly expensive; these costs will undoubtedly continue to increase.[9] As the costs of cleanup increase, so does the potential liability exposure of corporate actors; this, coupled with the aggressive stance of the Environmental Protection Agency (EPA) in prosecuting cleanup actions,[10] has understandably made many in the business world uneasy. Adding to their apprehensions, the principal statute governing cleanup actions, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[11] is unequivocal in its insistence that those responsible for environmental contamination bear the costs of cleanup. CERCLA is disturbingly reticent, however, as to who is ulti-

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that the statute "imposes a form of punitive liability on individual defendants [such as officers, directors and shareholders] when it is not necessary or appropriate to the statutory scheme") [hereinafter Note, *Scope*]; Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1471 (1989) (arguing that CERCLA's broad liability scheme creates "grossly inequitable" results) [hereinafter Note, *Misery*].

It has been suggested that the legislative history and statutory language of CERCLA do not call for such expansive liability. Some commentators have argued that the scope of corporate liability under CERCLA could be extended only by amending the statute itself. *See, e.g.*, Note, *The Triumph of Substance Over Waste Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980: A Case Analysis of United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989), 13 HAMLINE L. REV. 407 (1990).

[8] *See, e.g.*, Wallace, *Liability of Corporations and Corporate Officers, Directors, and Shareholders Under Superfund: Should Corporate and Agency Law Concepts Apply?*, 14 J. CORP. L. 839, 842 (1989) (the "uncertainties and fears" engendered by broad interpretation of CERCLA liability "unnecessarily diminish the affected industries' contributions to certain basic economic and business functions in society"); Comment, *Threat*, *supra* note 5, at 622-23 (arguing that broad liability under CERCLA could discourage investment and encourage divestment in certain industries); Comment, *Consequences*, *supra* note 7, at 690 ("A corporate officer faced with the prospect of being personally liable for violation of hazardous waste laws . . . may choose to resign and seek employment in a less risky business."); Note, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 WASH. U.J. URB. & CONTEMP. L. 289, 315-16 (1987) (expansive CERCLA liability may produce a chilling effect on transactions within the chemical and waste industries).

[9] A pre-CERCLA study done by the Environmental Protection Agency (EPA) revealed 30,000 to 50,000 inactive and uncontrolled hazardous waste sites in the United States, 1,200 to 2,000 of which were thought to present a serious risk to public health. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. As of August, 1989, the EPA had identified 1,226 hazardous waste sites for inclusion on the national priority list. 54 Fed. Reg. 33,846 (1989). A 1989 study by the EPA indicated that the average cost for remediation work done to date was in excess of $20 million per site. *See id.* at 33,850.

[10] *See generally* EPA Memorandum, *Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)* (June 13, 1984) (discussing "the extent to which corporate shareholders and successor corporations may be held liable for response costs") [hereinafter *EPA Memorandum*].

[11] Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)) [hereinafter CERCLA], *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) [hereinafter SARA].

mately "responsible" for improper disposal.[12] The judiciary has been forced to fill the void left by CERCLA's deficient drafting. Many commentators believe that courts have overstepped the bounds of legislative intent and have trampled the dictates of traditional corporate law doctrine by encompassing too many parties within the ambit of CERCLA liability.

Corporate owners traditionally have been protected by limited liability. Indeed, limited liability is considered a fundamental characteristic of the corporate form.[13] Commerce and free enterprise, it was thought, could only flourish if shareholders and their personal wealth were insulated from the risks associated with owning a business enterprise.[14] Thus, corporate shareholders, whether individuals or parent corporations, are typically regarded as entities distinct from the corporation itself,[15] and are protected from its liabilities by the corporate veil "unless specific, unusual circumstances" require that the veil be pierced and that the corporate form be disregarded.[16] Other corporate actors are similarly shielded from the liabilities of the corporations with which they are associated. Corporate officers, for example, are traditionally protected from personal liability for the tortious or illegal acts of their corporations unless the officers actually participated in the wrongful acts or knew of and consented to such acts.[17]

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12 *See infra* notes 42-46 and accompanying text (discussing parties responsible under CERCLA for cleanup costs).

13 *See, e.g.*, Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974):

> Basic to the theory of corporation law is the concept that a corporation is a separate entity, a legal being having an existence separate and distinct from that of its owners. This attribute of the separate corporate personality enables the corporation's stockholders to limit their personal liability to the extent of their investment. . . . The corporate form, however, is not lightly disregarded, since limited liability is one of the principal purposes for which the law has created the corporation.

See generally H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 73 (3d ed. 1983); Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 343 (1947); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854 (1982) [hereinafter Note, *Piercing*].

14 Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 371 (1981).

15 H. HENN & J. ALEXANDER, *supra* note 13, § 68, at 127 ("For most purposes, [a corporation] is a person separate and apart from the persons who compose it.").

16 Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967) ("[A]ny court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception."), *cert. denied*, 390 U.S. 988 (1968); *see also Krivo*, 483 F.2d at 1102 ("The corporate form is not lightly disregarded . . . ."); United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905) ("a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears"); Note, *Piercing*, *supra* note 13, at 853 ("Courts normally treat a corporation as an entity distinct from its shareholders, but they will disregard the corporate form if it is abused.").

17 3A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1137 (rev. perm. ed. 1986), states that:

> [A]n officer of a corporation who takes no part in the commission of the tort committed by the corporation is not personally liable to third persons for such a tort, nor for the acts of other

In the past, the inquiries of courts that held corporate actors, whether officers, individual shareholders, or parent corporations, liable for the actions of their corporations focused upon the nature of the activities engaged in by those actors; i.e., did the shareholders engage in acts that violated corporate formalities or that were likely to perpetrate an injustice upon third parties?[18] Did the corporate officers personally participate in tortious or illegal acts of the corporation?[19] Many scholars contend that CERCLA has effected a substantial change in the way courts evaluate the liability of these parties; mere status as a corporate officer, shareholder, or parent corporation, they fear, is enough to support the imposition of liability under CERCLA. The nature of the wrongful acts and the actor's involvement in them, they argue, while key to traditional analysis, has become irrelevant under CERCLA analysis.

If mere status as a corporate owner or officer were sufficient to support individual liability under CERCLA, the statute would indeed constitute a major departure from traditional doctrine and a significant expansion in potential liability for corporate actors. A close reading of the burgeoning case law on CERCLA violations reveals, however, that courts have not interpreted the language of CERCLA in such a broad manner. Rather, careful analysis of the fact patterns of these cases discloses that courts have simply held liable parties that could have been held liable under traditional corporate law doctrine. Active involvement by the corporate actor in the CERCLA violation, as opposed to mere status as an owner or officer, is still a prerequisite to imposition of liability.

This Article contends that, contrary to the fears expressed by many, the courts have not eroded traditional corporate law principles in the environmental arena. Rather, the results that the courts have reached are, for the most part, consistent with traditional doctrine. Part I of this Article describes the fundamental goals and objectives of CERCLA and the statutory provisions relevant to this inquiry. Part II examines the three theories used by courts in evaluating the individual liability of corporate officers for CERCLA violations. The overriding theme, that personal liability is typically imposed only in instances where the actor was personally involved in or responsible for the CERCLA violation emerges again in a slightly different context in Part III, which addresses the liability of individual shareholders and parent corporations. Part IV analyzes the liability risks of successor corporations for the environmental hazards of their predecessors, and determines that courts simply apply corporate

agents, officers or employees of the corporation in committing it, unless he or she specifically directed the particular act to be done, or participated, or cooperated in them.

Id. at 275. *See infra* notes 58-65 and accompanying text (discussing individual liability of corporate officers under traditional doctrine).

18 *See infra* notes 198-300 and accompanying text (discussing liability of individual shareholders and parent corporations).

19 *See infra* notes 58-197 and accompanying text (discussing liability of corporate officers).

doctrine as it has evolved in other tort contexts in assessing the liability of these parties. Finally, Part V contains concluding remarks.

I. CERCLA

In 1980, Congress enacted CERCLA in an effort to address perceived inadequacies of earlier environmental legislation. Congress was particularly concerned about the Resource Conservation and Recovery Act (RCRA),[20] which, to that point, had been the primary statute governing hazardous wastes. RCRA's major failing, in Congress' eyes, was its prospective outlook. RCRA addresses problems created by the current and future production and storage of hazardous substances, but applies to past sites only to the extent that they pose an imminent hazard.[21] A series of environmental disasters throughout the 1970s, culminating in the much-publicized contamination at Love Canal,[22] convinced Congress that a retrospective statute was needed to address the environmental

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20 42 U.S.C. §§ 6901-87 (1988) (RCRA). Congress enacted this statute in 1976 to protect the environment, to conserve natural resources, and to provide "cradle to grave" legislation governing the handling of hazardous waste. RCRA was designed to prevent future open dumping and to facilitate the conversion of existing open dumps to facilities that do not pose a danger to the environment or public health. The statute also regulates the treatment, storage, transportation, and disposal of hazardous wastes that have an adverse effect on the environment and public health. Other environmental statutes include the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988) (governing the discharge of pollutants into navigable waters); the Clean Air Act, 42 U.S.C. §§ 7101-7375 (1988) (governing the discharge of pollutants into the air); the Toxic Substances Control Act, 15 U.S.C. §§ 2601-29 (1988) (providing guidelines regarding the manufacture, processing, and distribution of chemicals); and the Rivers and Harbors Appropriation Act of 1899 (RHA), 33 U.S.C. §§ 401-67 (1988). *See also* H.R. REP. NO. 1016, *supra* note 9, pt. 1, at 17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 6120 (RCRA provides a "cradle-to-grave regulatory regime governing the movement of hazardous waste in our society. Since enactment of that law, a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly [sic] hazardous waste disposal practices known as the 'inactive hazardous waste site problem.' "); Note, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENVTL. AFF. L. REV. 643, 643-44 (1986) (comparing the different functions and purposes of CERCLA and RCRA).

21 *See* H.R. REP. NO. 1016, *supra* note 9, pt. 1, at 22, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 6125 (RCRA "is prospective and applies to past sites only to the extent that they are posing an imminent hazard.").

22 *See, e.g.*, 126 CONG. REC. 30,931 (1980) (remarks of Sen. Randolph, co-sponsor of CERCLA), *reprinted in* SENATE COMM. ON ENVT. & PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), vol. I, at 684 (Comm. Print 1983) (CERCLA was a response to public concerns regarding disposal of hazardous wastes that had been brought to the "national consciousness largely as a result of the severe health problems discovered at Love Canal.") [hereinafter A LEGISLATIVE HISTORY]; Note, *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 ECOLOGY L.Q. 599, 599 n.2 (1981) (originally dug as a canal to connect Lake Ontario with the Niagara River, Love Canal was eventually used as a dumpsite for more than eighty deadly chemicals); Note, *The Preemptive Scope of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: Necessity for an Active State Role*, 34 U. FLA. L. REV. 635, 638-39 (1982) (The problem of unsafe disposal of toxic waste sites "exists throughout the country, from Central Florida . . . to the infamous Love Canal, where cleanup costs ran into the millions.").

problems posed by hazardous waste produced and abandoned in the past.[23]

CERCLA contains three mechanisms designed to rectify the regulatory weaknesses of earlier legislation. First, the statute authorizes the government, through the EPA,[24] to undertake emergency cleanup measures whenever it determines that a threat from hazardous substances presents "an imminent and substantial danger to the public health or welfare."[25] The EPA also has the authority to seek emergency injunctive relief to abate the danger or threat of danger.[26] Second, CERCLA mandates a strong liability scheme that dictates that those responsible for the contamination will, to the extent possible, pay the costs of cleanup.[27] Finally, a hazardous substance trust fund ("Superfund") was created to enable the EPA to finance immediate cleanup of abandoned hazardous waste chemical dump sites[28] where the liable parties are unable to pay the costs of cleanup or cannot be found.[29]

Courts have interpreted CERCLA as imposing strict liability upon responsible parties,[30] and as permitting, but not requiring, joint and sev-

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[23] H.R. REP. NO. 1016, *supra* note 9, pt. 1, at 17-18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 6120 (noting that RCRA is "clearly inadequate" in dealing with the "massive problem" of hazardous waste sites). For a discussion of the history of hazardous waste legislation, see Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465-76 (1986).

[24] CERCLA empowered the President to order responsible parties to undertake cleanup action. The President delegated this power to the EPA. *See* Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981), *as amended by* Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983).

[25] 42 U.S.C. § 9604(a)(1) (1988) provides:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . .

[26] *Id.* § 9606(a) (1988).

[27] 126 CONG. REC. 31,964 (1980) (remarks of Rep. Florio), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 22, vol. I, at 777 ("[A] strong liability scheme will insure that those responsible for releases of hazardous substances will be held strictly liable for costs of response and damages to natural resources."); S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 22, vol. I, at 320 ("To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity.").

[28] Congress initially provided $1.6 billion over five years to the Superfund. *See* 42 U.S.C. § 9631 (repealed by Act of Oct. 17, 1986, Pub. L. No. 99-499, 100 Stat. 1774). SARA increased the Superfund to $8.5 billion. *See* 42 U.S.C. § 9611 (1988).

[29] S. REP. NO. 848, *supra* note 27, at 13, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 22, vol. I, at 320 (one of the goals of CERCLA is to provide "a fund to finance response action where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation").

[30] Section 101(32), 42 U.S.C. § 9601(32) (1988), provides that the "standard of liability" under CERCLA shall be the same as the standard of liability under section 311 of the Clean Water Act, 33 U.S.C. § 1321 (1988), which, though not explicit, has been interpreted by the courts as a strict

eral liability.[31] Specific statutory defenses enable a defendant to avoid liability where the damages result from a federally permitted release,[32] or an act of God, war, or unrelated third party.[33] In 1986, the Superfund

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liability standard. *See generally* New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing background of strict liability standard of CERCLA). Although one might wonder why Congress chose such a circuitous definition of the standard of liability, the legislative history of CERCLA reveals congressional belief that persons who manufacture, use, or dispose of "hazardous substances" are engaged in abnormally dangerous or ultrahazardous activities of the type that normally lead to strict liability. *See, e.g.*, 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 22, vol. I, at 778 ("The standard of liability in these amendments is intended to be the same as that provided in section 311 . . . ; that is, strict liability . . . ."); *id.* at 31,978 (statement of Rep. Jeffords), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 22, vol. I, at 813 ("For purposes of this bill, manufacture, use, transportation, treatment, storage, disposal, and release of hazardous substances are ultrahazardous activities justifying the imposition of strict liability under the standards established by section 311(f) of the Clean Water Act."); *id.* at 30,932 (statement of Sen. Randolph), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 22, vol. I, at 686 ("I understand this to be a standard of strict liability."); S. REP. NO. 848, *supra* note 27, at 13-14, 32-34, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 22, vol. I, at 320-21, 339-41 (noting that the rule of strict liability applies to product liability and "abnormally dangerous" activities such as oil pollution, nuclear incidents, and spills of hazardous substances, and should be applicable to environmental hazards as well).

The strict liability standard has been unanimously adopted by the courts. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 167 & n.11 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme."), *cert. denied*, 490 U.S. 1106 (1989); J.V. Peters & Co. v. Administrator, E.P.A., 767 F.2d 263, 266 (6th Cir. 1985) ("It is true that section 107 imposes a form of strict liability."); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 1000 (D.N.J. 1988) ("Liability under CERCLA is strict—no showing of negligence is required.").

[31] *See, e.g., Monsanto Co.*, 858 F.2d at 171 ("While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm."); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984) ("[T]his Court finds that joint and several liability is at least permissible, if not mandated, under the facts of this case."), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809-10 (S.D. Ohio 1983) (discussing the joint and several liability standard). Section 113(b) of SARA provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable" under CERCLA. 42 U.S.C. § 9613(f)(1) (1988). *See generally* Note, *Contribution Under CERCLA: Judicial Treatment After SARA*, 14 COLUM. J. ENVTL. L. 267 (1989) (discussing right of contribution under CERCLA); Note, *Misery*, *supra* note 7, at 1488-93 (same).

[32] 42 U.S.C. § 9607(j) (1988) (liability for federally permitted release not extended beyond existing law). "Federally permitted release" is defined at 42 U.S.C. § 9601(10) (1988).

[33] 42 U.S.C. § 9607(b) (1988) provides:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions

Amendments and Reauthorization Act (SARA)[34] added an "innocent purchaser" defense to CERCLA.[35] This affirmative defense relieves a purchaser of contaminated property of liability if the purchaser can show that he or she did not know and had no reason to know of the contamination at the time of the acquisition.[36]

CERCLA was hastily enacted in the last days of a lame-duck Congress,[37] and both its sparse legislative history[38] and its imprecise statutory language[39] have caused courts to struggle with the application and interpretation of its provisions. Nonetheless, Congress' fundamental purposes in enacting CERCLA, as reiterated in SARA, are clear: "(1) to provide for clean-up if a hazardous substance is released into the environ-

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against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

The so-called "innocent third-party defense" relieves a defendant of liability only where the environmental damage results solely from an act or omission of a third party (other than an employee or an agent of a defendant, or a party with a direct or indirect contractual relationship with a defendant), and only where the defendant establishes by a preponderance of the evidence that he or she exercised due care with respect to the hazardous substance and took precautions against the foreseeable acts or omissions of third parties. *Id. See generally* Note, *Misery, supra* note 7, at 1476-78 (discussing innocent third-party defense).

34 Pub. L. No. 99-449, 100 Stat. 1613 (Oct. 17, 1986) (codified in scattered sections of 42 U.S.C. §§ 9601-57 (1988)).

35 *See* 42 U.S.C. § 9601(35)(A)(i) (1988).

36 *See id.* § 9601(35)(B) (1988). The purchaser is required to show that he or she inquired into the property's past before purchasing the property. *Id.*

37 For a comprehensive review of the legislative history of CERCLA, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

38 *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985) (describing CERCLA as "an eleventh hour compromise" with an inadequate legislative history); Chemical Waste Mgmt., Inc. v. Armstrong World Indus., 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987) (noting that "CERCLA's legislative history is sparse and generally uninformative" and that "last-minute additions and deletions to the statute render its legislative history of little practical use"); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (CERCLA "was passed hastily by Congress as compromise legislation after very limited debate under a suspension of the rules."); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (CERCLA's legislative history is "unusually riddled by self-serving and contradictory statements."). *See generally* Exxon Corp. v. Hunt, 475 U.S. 355, 365-74 (1986) (reviewing CERCLA's legislative history); Grad, *supra* note 37 (same).

39 *See, e.g.*, United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986) ("The structure of [CERCLA] Section 107(a), like so much of this hastily patched together compromise Act, is not a model of statutory clarity."); *Mottolo*, 605 F. Supp. at 902 ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history."); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions. . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation.") (citations omitted), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983) (describing CERCLA as "inadequately drafted"); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (CERCLA "leaves much to be desired from a syntactical standpoint.").

ment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."[40]

While this latter congressional objective—that those responsible for the environmental contamination bear the costs of cleaning it up—has been recognized by the courts,[41] it has also given rise to great consternation among those in the corporate world. Section 107 of CERCLA authorizes the government and private parties to initiate lawsuits to recover response costs from the parties responsible for the release, or threatened release, of hazardous substances.[42] This provision holds four classes of persons potentially liable for cleanup costs: (1) the current owner and operator of a hazardous waste vessel or facility;[43] (2) any person who formerly owned or operated a facility at the time of disposal of any haz-

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40 H.R REP. NO. 253 (III), 99th Cong., 1st Sess. 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038, 3038; *see also* Chemical Waste Mgmt., Inc. v. Armstrong World Indus., 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987):

> Although CERCLA's legislative history is uninformative with respect to specific questions, . . . Congress expressed its major policy goals quite clearly. Thus, the statute's objectives are the following: to encourage maximum care and responsibility in the handling of hazardous waste; to provide for rapid response to environmental emergencies; to encourage voluntary clean-up of hazardous waste spills; to encourage early reporting of violations of the statute; and to ensure that parties responsible for release of hazardous substances bear the costs of response and costs of damage to natural resources.

41 *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989) (CERCLA "imposes the costs of cleanup on those responsible for the contamination"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.").

42 This section states in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (1988). In addition, section 103, 42 U.S.C. § 9603 (1988), provides for criminal liability for environmental violations. A discussion of this provision would go beyond the confines of this Article, however.

43 42 U.S.C. § 9607(a)(1) (1988) (*see supra* note 42 for text of this section).

ardous substance;[44] (3) any person who arranged for disposal or treatment of a hazardous substance at any facility owned or operated by another person (a "generator");[45] and (4) any transporter of hazardous waste to a facility.[46]

CERCLA broadly defines the terms used in establishing these categories of potentially liable parties. Under the statute, "person" includes individuals as well as corporations and other types of business entities.[47] An "owner or operator" includes any person who owns or operates a facility, or who owned, operated, or otherwise controlled an abandoned facility immediately prior to abandonment. The definition explicitly excludes any person who, without participating in the management of the facility, holds indicia of ownership primarily to protect a security interest in the facility.[48] A "facility" includes any property "where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ."[49] The courts, too, have given generous and expansive interpretation to the terms used in CERCLA. For example, such diverse and nonobvious sites as residential subdivisions[50] and rural roadsides[51] have been held to satisfy the statutory definition of "facility."[52]

Perhaps no phrase in CERCLA has required as much judicial construction as the reference in section 107(a)(1) to the current "owner and operator" of a hazardous waste facility. Although section 107(a)(1) uses

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44 *Id.* § 9607(a)(2) (1988) (*see supra* note 42 for text of this section).

45 *Id.* § 9607(a)(3) (1988) (*see supra* note 42 for text of this section).

46 *Id.* § 9607(a)(4) (1988) (*see supra* note 42 for text of this section).

47 *Id.* § 9601(21) (1988). This section states: "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.*

48 *Id.* § 9601(20)(A) (1988) provides:

> The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

49 *Id.* § 9601(9) (1988).

50 *See, e.g.*, Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988) (residential subdivision); United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1148 (D. Ariz. 1984) (trailer park).

51 *See, e.g.*, United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985) (roadside sites).

52 *See also* Washington v. Time Oil Co., 687 F. Supp. 529, 532 (W.D. Wash. 1988) (filter cake); BCW Assoc., Ltd. v. Occidental Chem. Corp., No. 86-5947 (E.D. Pa. Sept. 30, 1988) (1988 U.S. Dist. LEXIS 11275) (warehouse); United States v. Bliss, 667 F. Supp. 1298, 1305 (E.D. Mo. 1987) (stable, road, and spray trucks); New York v. General Elec. Co., 592 F. Supp. 291, 295-97 (N.D.N.Y. 1984) (dragstrip).

the conjunctive "and,"[53] courts have interpreted the phrase in the disjunctive, extending liability to persons who currently own or operate a facility.[54] It seems likely that the use of "and," rather than "or," was nothing more than a drafting error by Congress, for section 107(a)(2), which addresses the liability of past owners or operators,[55] employs the word "or," as does section 101(20)(A) of the definitional section of CERCLA.[56]

Although some commentators have argued that a party must be both an owner and an operator in order to be held liable under section 107(a)(1),[57] their contentions have fallen on deaf ears. Instead, courts have concentrated their efforts on defining what it means to be an owner, operator, generator, or transporter—a task made difficult by the lack of statutory guidance. Their determinations that corporate officers and shareholders, whether individuals or parent corporations, may, under certain circumstances, be held liable under one or more of these categories have given rise to fears that CERCLA has eroded the traditional protections of corporate law doctrine. Yet, as illustrated below, most of these fears appear to be groundless.

II. CORPORATE OFFICER LIABILITY

A. Traditional Doctrine: Limited Liability

Generally, tort law holds individuals liable for the torts that they commit. An individual is not relieved of liability merely because he or

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53 *See* 42 U.S.C. § 9607(a) (1988) (*see supra* note 42 for text of this section).

54 *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) ("Although the 'owner and operator' language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts.") (citing United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-78 (D. Md. 1986); Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556, 561 (W.D. Pa. 1989); Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1280 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988), *cert. denied*, 111 S. Ct. 752 (1991)); United States v. Moore, 698 F. Supp. 622, 624 n.1 (E.D. Va. 1988) ("Interestingly, it has been held that current ownership of a facility, without more, is sufficient to create liability under § 9607(a)(1), notwithstanding the 'and.' ") (citing *Maryland Bank & Trust Co.*, 632 F. Supp. at 577; New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162, 190 (W.D. Mo. 1985); City of Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1140 (E.D. Pa. 1982)).

55 42 U.S.C. § 9607(a)(2) (1988) (*see supra* note 42 for text of this section). *See also Fleet Factors*, 901 F.2d at 1554 n.3 (noting the difference in wording between section 107(a)(1) and section 107(a)(2) and stating that it could "perceive no rational explanation, other than careless statutory drafting" for the distinction).

56 42 U.S.C. § 9601(20)(A) (1988) (*see supra* note 48 for text of this section). *See also Fleet Factors*, 901 F.2d at 1554 n.3 (noting that the use of the disjunctive in section 101(20)(A) further indicates section 107(a)(1) should also be interpreted in the disjunctive).

57 *See, e.g.*, Davidson, *Corporate Ownership of Real Estate: The Impact of Environmental Legislation on Shareholder Liability*, 17 REAL EST. L.J. 291, 310-12 (1989).

she is an agent acting on behalf of a principal.[58] Thus, corporate officers can be held personally liable for their torts, regardless of whether they were acting in an official capacity when they committed the wrongs.[59] The liability of the corporate officer is independent of the corporation's liability; it arises through the officer's actual participation in wrongful acts committed in the course of corporate activities, or through the fact that the officer knew of and consented to the wrongful acts.[60] An officer is not held liable simply because of his or her status within the corporation.[61] Rather, the officer must have personally participated in the tort, through affirmative actions of direction, sanction, or cooperation in the

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[58] *See* A. CONRAD, R. KNAUSS, & S. SIEGEL, ENTERPRISE ORGANIZATION 145 (4th ed. 1987) ("The law of agency, which makes employers liable, does not repeal the law of torts, which makes negligent individuals liable."); RESTATEMENT (SECOND) OF AGENCY § 343 (1958) ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal . . . .").

[59] *See* 3A W. FLETCHER, *supra* note 17, § 1135:

> It is thoroughly well settled that a person is personally liable for all torts committed by him . . . notwithstanding he may have acted as the agent or under directions of another. And this is true to the full extent as to torts committed by the officers or agents of a corporation in the management of its affairs.

Id. at 267.

[60] *See* Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978):

> A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort. . . . The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility.

(citations omitted); Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 907 (1st Cir. 1980) ("The general rule . . . is that an officer of a corporation 'is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority.' " (quoting Lahr v. Adell Chem. Co., 300 F.2d 256, 260 (lst Cir. 1962)); *see also* H. BALLANTINE, BALLANTINE ON CORPORATIONS § 112, at 275 (rev. ed. 1946) ("An officer or director is, in general, personally liable for all torts which he authorizes or directs or in which he participates, notwithstanding that he acted as an agent of the corporation and not on his own behalf."); 3A W. FLETCHER, *supra* note 17, § 1135:

> [C]orporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval.

Id. at 267.

[61] As the Tenth Circuit stated:

> It is the general rule that if an officer or agent of a corporation directs or participates actively in the commission of a tortious act or an act from which a tort necessarily follows or may reasonably be expected to follow, he is personally liable to a third person for injuries proximately resulting therefrom. But merely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation. Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation.

Lobato v. Pay Less Drug Stores, Inc., 261 F.2d 406, 408-09 (10th Cir. 1958). *See also* Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 852 (N.D. Cal. 1979) ("Courts have, however, consistently stated that a corporate executive will not be held vicariously liable, merely by virtue of his office, for the torts of his corporation."), *aff'd*, 658 F.2d 1256 (9th Cir.

wrongful acts of commission or omission.[62]

In addition, agency law dictates that the principal can be held derivatively liable for the tortious actions of the agent.[63] A corporation, therefore, can be held liable for the illegal or tortious actions of its corporate officers or employees.[64] Thus, a single tortious act may render two parties liable: the corporate officer and the corporation itself.[65]

B. Corporate Officer Liability Under CERCLA

Since the passage of CERCLA over a decade ago, courts have uniformly ruled that corporate officers may be held individually liable for cleanup costs.[66] However, many courts have failed to articulate clearly the rationales for their holdings, giving rise to concerns that CERCLA has supplanted traditional corporate law and has weakened the traditional protections of the corporate form. Nonetheless, a close reading of the case law addressing officer liability suggests that these fears are unwarranted. True, the rationales and reasoning offered by courts have not always been as coherent or as cohesive as one might wish. A review of the succession of cases dealing with corporate officer liability reveals, however, that although the courts have been forced by the inadequacies of CERCLA's statutory provisions into developing a new body of statutory interpretation, by and large the results they have reached have been consistent with traditional corporate law doctrine.

1981), *cert. denied*, 455 U.S. 1018 (1982); 3A W. FLETCHER, *supra* note 17, § 1137, at 276 (officers are not held liable merely because of their status, but because of their wrongful or negligent acts).

62 *See In re* Arthur Treacher's Franchisee Litig., 92 F.R.D. 398, 421 n.34 (E.D. Pa. 1981) ("Corporate officers may be held 'personally liable for alleged tortious conduct of the corporation if they personally took part in the commission of the tort . . . .' ") (quoting Donner v. Tams-Witmark Music Library, Inc., 480 F. Supp. 1229, 1233 (E.D. Pa. 1979)); 3A W. FLETCHER, *supra* note 17, § 1137, at 275-76 ("So an officer or director of a corporation is not liable for torts in which he has not participated, of which he has no knowledge, or to which he has not consented.").

63 RESTATEMENT (SECOND) OF AGENCY § 216 (1958) ("A master or other principal may be held liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion.").

64 3A W. FLETCHER, *supra* note 17, § 1135, at 267 ("The person injured may hold either [the officer or the corporation] liable, and generally the injured person may hold both as joint tortfeasors.").

65 *Id. See also* Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978) ("The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility."); H. HENN & J. ALEXANDER, *supra* note 13, § 230, at 607 ("An officer who personally participated in a tort is personally liable to the victim, even though the corporation might also be liable under respondeat superior.").

66 In Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 224-25 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991), the district court, in dicta, rejected the analyses of courts that had held officers liable for cleanup costs without first piercing the corporate veil "because they have chosen to ignore the corporate form without an express congressional directive" to do so. *See also infra* notes 248-54 and accompanying text (discussing *Joslyn*).

Distinct categories of reasoning are starting to emerge among the cases addressing officer liability under CERCLA and clear similarities in fact patterns and judicial analyses are evident. The results might well prove surprising to many. Courts typically have not found officers individually liable under CERCLA for environmental violations in instances where they could not likewise have been found liable under traditional corporate law doctrine. Indeed, many courts have applied traditional corporate law principles or analogous rules in resolving CERCLA cases. All too often, however, courts have overlaid their decisions with superfluous and imprecise reasoning that can suggest the erosion of traditional doctrine.

The cases addressing the individual liability of corporate officers for CERCLA violations fall into three categories. In the first group, courts hold corporate officers liable based upon their personal participation in the unlawful activity[67]—a result identical to that which would be found under traditional rules of corporate law.[68] The second category imposes liability based upon the officer's ability to control the activities of the corporation.[69] Although this language seems to expand traditional notions of officer liability, courts generally have applied it in a manner that deviates only slightly from traditional corporate law doctrine. The third category reveals the development of a prevention standard for determining the liability of corporate officers.[70] This category furthers CERCLA's policy goal of placing the burden of cleanup costs on parties responsible for contamination, while simultaneously retaining traditional protections of corporate law by ensuring that corporate officers are not held individually liable merely because of their corporate status.

Before these three lines of cases regarding the individual liability of officers for corporate violations of CERCLA are examined, two important points must be made. First, although it is commonplace to refer to the liability of corporate "officers and directors" as though the terms are either synonymous or inextricably linked,[71] no court has ever held a director personally liable for a corporate violation of CERCLA because of his or her role as a director. Although it is true that some individuals who were held personally liable for CERCLA cleanup costs were directors of the violating corporation, these individuals were also corporate

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67 *See infra* notes 78-132 and accompanying text (discussing the personal participation theory).

68 *See supra* notes 58-65 and accompanying text (discussing traditional corporate law doctrine regarding officer liability).

69 *See infra* notes 133-80 and accompanying text (discussing the control theory).

70 *See infra* notes 181-97 and accompanying text (discussing the prevention theory).

71 *See, e.g.*, O'Hara, *supra* note 7, at 1 ("The most alarming characteristic of environmental liability is that it can reach far beyond the protection of the corporate shell and reach parent corporations and individual officers, directors and shareholders."); Wallace, *supra* note 8, at 847 ("Several courts have held corporate officers, directors, and shareholders individually liable for violations of CERCLA . . . .").

officers.[72] Their liability was based upon their actions undertaken in that latter capacity, not upon their status as directors.

Second, the individual liability of corporate officers for CERCLA violations is a direct liability that is imposed because of the officers' personal participation in the unlawful activity. It is not based on the liability that flows from a "piercing of the corporate veil."[73] Piercing is a technique used by courts to go behind the corporate form to hold the owners (i.e., the shareholders) of a corporation liable.[74] It is not a means for holding liable corporate officers, who are merely employees, rather than owners, of the corporation.[75]

A surprising number of corporate officers have attempted to argue that, in the absence of circumstances warranting piercing of the corporate veil, they cannot be held individually liable for cleanup costs under CERCLA.[76] Although most of the courts that have addressed this argument have correctly rejected it,[77] the mere fact that litigants persist

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72 *See, e.g.*, United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989) (discussed *infra* notes 113-16 and accompanying text); United States v. Ward, 618 F. Supp. 884, 890 (E.D.N.C. 1985) (discussed *infra* notes 128-31 and accompanying text).

73 *See In re* Interstate Agency, Inc., 760 F.2d 121, 125 (6th Cir. 1985) ("It is clear, however, that a corporate officer is personally liable for the tortious injury committed by him regardless of a piercing of the corporate veil."); L.C.L. Theatres, Inc. v. Columbia Pictures Indus., 619 F.2d 455, 457 (5th Cir. 1980) (noting that the corporate veil need not be pierced to hold liable an officer who participated in a wrongdoing). *See also* 3A W. FLETCHER, *supra* note 17, § 1135, at 267 (corporate officer liability "does not depend on the same grounds as 'piercing the corporate veil' ").

74 *See infra* notes 203-08 and accompanying text (discussing "piercing of corporate veil" theory). *See also* Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978) ("The effect of piercing a corporate veil is to hold the owner liable.").

75 *See, e.g.*, 1 W. FLETCHER, *supra* note 17, § 41.45, at 697 ("But it is not necessary that the corporate veil be pierced in order to impose personal liability on a corporate officer when the record shows that the corporate officer knowingly participated in the wrongdoing."). One treatise notes that "[t]he doctrine is *seldom* used against individuals who are directors or officers but not shareholders," but provides no citations in support. *See* 2 F. O'NEAL & R. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 8.04, at 20 (3d ed. 1986) (emphasis added).

Of course, a corporate officer may also be a shareholder, but his or her individual liability in each instance is premised on different theories. *See* notes 58-197 and accompanying text (discussing personal liability of corporate officers), and *infra* notes 209-27 and accompanying text (discussing personal liability of individual shareholders).

76 *See, e.g.*, United States v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879, 20,882-83 (E.D. Mo. 1988) (corporate president argued court could not impose personal liability on him unless it pierced the corporate veil); United States v. Mottolo, 629 F. Supp. 56, 58 (D.N.H. 1984) (corporate president argued he could not be held personally liable because he "did not abuse the privilege of operating in the corporate form").

77 *See, e.g., Bliss*, 20 Envtl. L. Rep. (Envtl. L. Inst.) at 20,883 ("When a corporate officer's liability is based upon his personal participation in the creation of the hazardous waste site, it is not necessary to pierce the corporate veil to impose personal liability.") (citation omitted). Initially, some courts did not address this issue correctly. *See, e.g.*, United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699, 20,700 (D.S.C. 1984) (stating corporate form can be pierced to hold corporate officers involved in tortious conduct or mischief personally liable).

In United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the court drew a clear distinction between holding a corporate

in raising it has made the case law regarding officer liability under CERCLA unnecessarily complex. The notion of "piercing" should simply be expunged from CERCLA analysis of officer liability as an irrelevant theory. Determination of officer liability under CERCLA should focus instead upon the officer's direct liability for actions personally undertaken and upon CERCLA's statutory language.

1. The Personal Participation Theory.—Several cases construing officer liability for CERCLA violations have been decided pursuant to traditional corporate law principles: an individual who personally participated in the CERCLA violation may be held personally liable, despite his or her status as a corporate officer.[78] Where the facts reveal such personal participation, the court need only apply familiar and well-accepted legal principles to reach its result.

Although some officers have argued that they cannot be held individually liable under CERCLA for actions undertaken in their official capacity,[79] the courts have had little difficulty dismissing their contentions. The leading case in this area is *United States v. Northeastern Pharmaceutical & Chemical Co.*[80] (*NEPACCO*). The district court, in an

officer individually liable based upon the officer's involvement in the tortious activity and piercing the corporate veil. One of the individual defendants, the vice president of the violating corporation, argued that none of the traditional grounds for piercing the corporate veil were present; i.e., "there was no evidence that [the company] was inadequately capitalized, the corporate formalities were not observed, individual and corporate interests were not separate, personal and corporate funds were commingled or corporate property was diverted, or the corporate form was used unjustly or fraudulently." *Id.* at 744. Thus, he contended, the district court erred in piercing the veil to hold him liable. As the court of appeals noted, however, the vice-president's individual liability was based upon his personal participation in conduct that violated CERCLA, and "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Id.* Piercing is used to hold an owner of a corporation liable because the corporation is "something less than a bona fide independent entity." Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978). The vice-president's liability was not derivative, but was personal, and was not premised solely upon his status as a corporate officer or employee, but rather rested upon his personal involvement in arranging for the transportation and disposal of hazardous substances in violation of CERCLA. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 744.

The circuit court's analysis regarding the piercing issue is an accurate and clear description of the dictates of traditional corporate agency law. In its concluding sentence, however, the court stated that it "need not decide whether the district court erred in piercing the corporate veil under these circumstances." *Id.* The court's comment is disturbing because it suggests that the district court had engaged in piercing, although the district court's opinion reveals nothing of the kind.

78 *See supra* notes 58-65 and accompanying text (discussing officer liability under traditional doctrine).

79 *See, e.g.*, United States v. Mottolo, 605 F. Supp. 898, 913 (D.N.H. 1985); United States v. Mottolo, 629 F. Supp. 56, 58 (D.N.H. 1984); United States v. Wade, 577 F. Supp. 1326, 1341 (E.D. Pa. 1983); *cf.* United States v. Pollution Abatement Servs., Inc., 763 F.2d 133, 135 (2d Cir.) (addressing individual liability of corporate officers under RHA), *cert. denied*, 474 U.S. 1037 (1985).

80 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

opinion commonly known as *NEPACCO I*,[81] held a chemical manufacturing company, two of its officers, and a waste transporter jointly and severally liable for cleanup costs under section 107 of CERCLA. Both the personal participation and the control theories trace their origins to this ground-breaking case.

NEPACCO, a Delaware corporation, entered into a lease agreement in 1969 to use chemical manufacturing facilities in Verona, Missouri.[82] NEPACCO was formed by Edwin Michaels, the president and a shareholder. Michaels was permanently present at the Missouri facility during the first year of construction and operation, then returned to his home in Connecticut.[83] Direct management responsibility for the plant was turned over at that time to John Lee, the vice-president and a shareholder.[84] The plant manufactured hexachlorophene, a principal by-product of which was 2,3,7,8-tetrachlorodibenzo-p-dioxin ("dioxin").[85]

In 1971, Ronald Mills, a shift supervisor, proposed to Bill Ray, the plant manager, that Mills independently contract to dispose of eighty-five 55-gallon drums filled with toxic wastes that were stored at the plant site.[86] Ray discussed this proposal with Lee, who prescribed the characteristics an appropriate site should possess.[87] Mills had already arranged to dispose of the wastes on a farm owned by James Denney.[88] Ray visited the site and reported his findings to Lee. Mills hired assistants to excavate a trench and to assist him in loading the drums, transporting them to the farm, and depositing them in the trench, which was then covered over.[89] The EPA investigated the site in 1979 and discovered that the soil in the trench was contaminated with dioxin. It cleaned up the site and brought suit for compensation.

In addressing the liability of the vice president, Lee, the district court acknowledged that corporate officers normally are not personally liable for the acts of the corporate entity,[90] but nonetheless found Lee liable both as a generator under section 107(a)(3)[91] and as an owner and operator under section 107(a)(1).[92] Lee argued that he could not be held

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81 579 F. Supp. 823 (W.D. Mo. 1984) (*NEPACCO I*).

82 *Id.* at 828.

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* at 830.

87 *Id.* Thus, the court found, "[t]here was credible evidence that Lee knew and approved of the proposed use of Mill's services and the disposal site." *Id.*

88 *Id.* The court record does not indicate whether the plant manager or Lee made the final decision to contract with Mills, nor does it indicate who authorized Mills to begin transporting the wastes.

89 *Id.* Mills was not represented by counsel at trial, and did not offer a defense to liability. *Id.* at 847.

90 *Id.*

91 *Id.*

92 *Id.* at 849. The court's discussion of Lee's liability under section 107(a)(1) is based more upon

individually liable because he did not own or possess the wastes within the meaning of CERCLA; rather, the wastes were owned by NEPACCO.[93] The court quickly dismissed his argument as it pertained to his liability as a generator, noting that the statutory language of section 107(a)(3) does not require that the person who arranged for the disposal actually own or possess the waste. Rather, section 107(a)(3) only requires participation in the arrangement for disposal.[94] Because Lee "had the responsibility to and did arrange for the disposal of the hazardous waste,"[95] the court found him liable as a generator within the meaning of section 107(a)(3).[96]

The district court's analysis of Lee's liability as an owner or operator under section 107(a)(1) reveals its fundamental confusion regarding the grounds upon which it was imposing liability. The court mingled a discussion of the statutory language of CERCLA with a discussion of traditional corporate law doctrine. The result is confusing at best, and misleading at worst. In considering the definition of "owner or operator" under the statute, the court concluded that CERCLA "literally reads that a person who owns interest [sic] in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste."[97] Because Lee was both a shareholder and a vice-president of NEPACCO, the district court concluded that he was liable as an owner and operator. The court followed this exercise in statutory interpretation with an observation that "[a]n employee of a corporation can be personally liable for activities over which he had direct control and supervision."[98] This is nothing more than a restatement of traditional corporate law doctrine. The court noted that Lee "owned and operated the NEPACCO plant" and was "actively involved in the planning and implementation of NEPACCO's disposal practices."[99] Thus, Lee was liable under section 107(a)(1) as an owner and operator of a hazardous waste facility.[100]

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his position as a managing shareholder than upon his position as an officer. *Id.* at 848-49. The court's analysis is discussed more fully at *infra* notes 97 & 224-27 and accompanying text.

93 579 F. Supp. at 847.

94 *Id. See* 42 U.S.C. § 9607(a)(3) (1988) (*see supra* note 42 for text of this section).

95 579 F. Supp. at 848.

96 *Id.*

97 *Id.* The court's conclusion is based upon its interpretation of section 101(20)(A), discussed *infra* notes 224-27 and accompanying text. The court stated:

> Defendant Lee had the capacity to control the disposal of hazardous waste at the NEPACCO plant; the power to direct the negotiations concerning the disposal of wastes at the Denney farm site; and the capacity to prevent and abate the damage caused by the disposal of hazardous wastes at the Denney farm site. Finally, Lee was a major stockholder in NEPACCO and actively participated in the management of NEPACCO in his capacity as vice-president.

579 F. Supp. at 849.

98 *Id.* at 848 n.29.

99 *Id.*

100 *Id.* at 849. The court stated further: "From the language of the statute either an owner or operator or both can be held liable. In some circumstances these parties may be the same or separate

The juxtaposition of the statutory and common law analyses suggests that the *NEPACCO I* court believed that the "active participation in management" necessary to hold Lee liable under section 107(a)(1) had to have been closely related to the unlawful disposal practices[101]—otherwise, the court's discussion of traditional doctrine is superfluous. Indeed, the facts revealed that Lee's participation in the CERCLA violation was such that it could have given rise to personal liability under traditional corporate law doctrine as well as under CERCLA's statutory provisions. Lee, as a vice-president of NEPACCO and as immediate supervisor of the Missouri facility, "was directly responsible for arranging the disposal and transport of the hazardous waste."[102] He had "direct knowledge and supervision"[103] of the contract with Mills and of the disposal site. Moreover, he had instructed Mills on the disposal site characteristics[104] and had "assisted in the selection" of the site.[105] All of these actions revealed sufficient personal participation by Lee in the CERCLA violation to warrant holding him individually liable under traditional corporate law doctrine.

On appeal, the Eighth Circuit, in an opinion commonly known as *NEPACCO II*,[106] overturned the district court's finding that Lee was liable as an owner and operator,[107] but affirmed Lee's liability as a generator, noting that CERCLA imposes strict liability upon "any person" who arranges for the disposal or transportation for disposal of hazardous substances.[108] The circuit court, like the district court, rejected Lee's contention that he could not be held individually liable under section

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and distinct persons." *Id.* at 849 n.29. The *NEPACCO I* court made no attempt to distinguish the factors that made Lee liable as an owner from the factors that made him liable as an operator. The court also held Michaels liable as an owner or operator, but this result was overturned on appeal. *See infra* notes 134-37 and accompanying text (discussing liability of Michaels).

101 The legislative history of CERCLA indicates that Congress intended such a standard to apply at least to operators. *See* H.R. REP. NO. 172, 96th Cong., 2d Sess., pt. I, at 37, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6160, 6182 ("In the case of a facility, an 'operator' is defined to be a person who is carrying out operational functions for the owner of the facility pursuant to an appropriate agreement.").

102 579 F. Supp. at 847.

103 *Id.*

104 *Id.*

105 *Id.*

106 United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986) (*NEPACCO II*), *cert. denied*, 484 U.S. 848 (1987).

107 The *NEPACCO II* court's reversal of Lee's liability as an owner or operator was based on the statutory definition of "facility." *See infra* notes 134-37 and accompanying text (discussing Lee's and Michaels' liability under section 107(a)(1)).

108 810 F.2d at 743. The district court considered the Eighth Circuit's opinion in Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976), to be analogous in defining the scope of "person" under CERCLA. *NEPACCO I*, 579 F. Supp. at 847-48. In determining whether a corporate owner-operator could constitute a "person in charge," the *Apex Oil* court ruled that because the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988), speaks of any person in charge, both the employee and the corporation could be held liable. *Apex Oil*, 530 F.2d at 1293.

107(a)(3) because the corporation, rather than he, owned or possessed the substances.[109] Instead, the court accepted the government's argument that Lee possessed the substances within the meaning of CERCLA because "Lee, as plant supervisor, actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of" the hazardous substances.[110]

The *NEPACCO II* court emphasized that Lee's actual, personal participation in the CERCLA violation, as opposed to his status as a corporate officer, gave rise to his individual liability.[111] Several district courts have adopted this standard of personal participation in evaluating the liability of corporate officers under CERCLA.[112]

For example, the district court in *United States v. Carolina Transformer Co.*[113] applied traditional doctrine in holding two individuals who served as directors and consecutive presidents of a corporation that released polychlorinated biphenyls (PCBs) into the environment personally liable for the corporation's CERCLA violation. The court noted that the individuals could be held liable "under the theory that a corporate officer may be held individually liable for the torts of a corporation where the corporate officer participates in the tortious activity."[114] The facts before the *Carolina Transformer* court clearly indicated that these two individuals personally supervised the activities leading to the contamination, knew about the CERCLA violation, and "willfully failed to correct it."[115] Accordingly, the court found them individually liable "under the

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109 810 F.2d at 743. The *NEPACCO II* court noted that CERCLA defines "person" as including both individuals and corporations, and does not exclude corporate officers or employees. *Id.* It further noted that "Congress could have limited the statutory definition of 'person' but chose not to do so." *Id.* The court reasoned that Congress must not have intended to limit the definition of persons arranging for the disposal of hazardous waste, for "construction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme." *Id.*

110 *Id.* The court stated that "[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme." *Id.* Requiring proof of actual ownership or physical possession would be inconsistent with the broad remedial purposes of CERCLA. *Id.*

111 *Id.* at 744 (citation omitted). The court stated:

> Lee argues that he cannot be held individually liable for NEPACCO's wrongful conduct because he acted solely as a corporate officer or employee on behalf of NEPACCO. The liability imposed upon Lee, however, was not derivative but personal. Liability was not premised solely upon Lee's status as a corporate officer or employee. Rather, Lee is individually liable under CERCLA § 107(a)(3) because he personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO's CERCLA violations.

Id. (citation omitted).

112 *See generally* notes 78-132 and accompanying text (discussing personal participation theory).

113 739 F. Supp. 1030 (E.D.N.C. 1989).

114 *Id.* at 1038.

115 *Id.* These individuals:

> owned and controlled Carolina Transformer. They were the company's presidents, sole shareholder, and directors. They were in charge of the day-to-day operations at Carolina Transformer, including personal supervision of transformer disassembly and dielectric fluid handling.

common law tort theory of individual liability."[116]

Although some courts, such as the *Carolina Transformer* court, reiterate traditional corporate law doctrine in applying the personal participation test,[117] others describe their holdings solely in terms of CERCLA's statutory language. Nonetheless, their opinions reveal an unspoken reliance upon traditional corporate law doctrine. For example, in *United States v. Bliss*,[118] the district court held Joseph P. Houlihan, Jr., the president and major shareholder of a corporation that owned a disposal site, personally liable under CERCLA as an owner or operator of a facility. The court noted that, as president, Houlihan had the "authority to control the disposal of hazardous waste and to prevent the damage caused by the disposal at the site."[119] As the court emphasized, however, Houlihan actually exercised that control by authorizing the transporter to dispose of the waste on the property and by assisting the transporter in unloading some of the waste.[120] The court found these actions sufficient to impose liability upon the president under section 107(a)(2) as a past owner or operator, noting that "[i]mposition of personal liability upon . . . a party who had authority to control the operations of the facility and the disposal of the waste at the . . . site . . . furthers the legislative intent to impose liability for response costs upon

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The evidence shows that as early as 1978 both [individuals] were aware of the PCB problem at the site, and yet they took no actions to correct the problem or change the work habits of employees. Moreover, they enlisted the aid of an engineer to help solve the PCB problem at the site. However, they failed to implement the plan in order to prevent damages.

Id. *See infra* notes 157-63 and accompanying text for a further discussion of this case.

116 739 F. Supp. at 1038. The court also held the two individuals liable under the statutory definitions of CERCLA. *See infra* notes 157-63 and accompanying text.

117 For example, in United States v. Wade, 577 F. Supp. 1326, 1330, 1341-42 (E.D. Pa. 1983), the district court rejected the argument of a corporate president that he could not be held personally liable for cleanup costs because all of his actions were taken in his capacity as an officer of the transport company, not as an individual. In response to his argument, the court cited the traditional rule that "[a] corporate officer may be held liable if he personally participates in the wrongful, injury-producing act." *Id.* at 1341. The court denied the government's motion for summary judgment because the president's denial of the allegation that he had participated in or directed the disposal of hazardous wastes raised a question of fact. *Id.* at 1342. The court did note that testimony regarding the placement of drums at the site by the president and negotiations between the president and the owner of the disposal site were not sufficient to establish that the president had participated in the wrongful act. *Id.* at 1341-42.

Similarly, in United States v. Mottolo, 629 F. Supp. 56 (D.N.H. 1984), the court noted that "[i]t is the general rule that an officer of a corporation is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority, and that such direct personal involvement by the officer is causally related to the alleged injury." *Id.* at 60 (citing Escude Cruz v. Ortho Pharmaceutical Co., 619 F.2d 902, 907 (1st Cir. 1980)). Because of the existence of questions of fact regarding the extent of the president's personal participation in the alleged CERCLA violation, the *Mottolo* court denied his motion to dismiss. *Id.*

118 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879 (E.D. Mo. 1988).

119 *Id.* at 20,883.

120 *Id.*

the parties responsible for creation of hazardous waste sites."[121] Despite this broad statement of liability, the *Bliss* court did not base its holding upon the officer's mere possession of control over operations and waste management. Rather, it looked at the officer's exercise of his control or authority—an analysis that collapses back into the personal participation theory.

Likewise, in *United States v. Conservation Chemical Co.*,[122] the district court held the president and shareholder of an industrial chemical waste disposal facility personally liable for cleanup costs. The president founded the corporation in 1960, was its president since its incorporation, and always owned at least 93 percent of the stock. He was originally the sole technical person, was primarily responsible for environmental controls, and acted as a chemical engineer for the corporation. He controlled the company's fiscal matters and all of the strategic business decisions.[123] He was a trained and experienced chemical engineer, personally designed the layout of the facility, and personally supervised its construction. He developed a number of the waste treatment processes used by the corporation and implemented processes suggested by others.[124]

The president's involvement with the corporation "as its founder, chief executive officer and majority stockholder,"[125] coupled with his "high degree of personal involvement in the operation and decision-making process"[126] of the corporation, supported the district court's decision to find him personally liable as a current owner or operator of a facility and as a person who owned and operated the facility at the time of disposal.[127] Again, the key to imposing individual liability on the president was his active, actual participation in the environmental violations.

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121 *Id. Cf.* United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987):

> Here, Lee, as plant supervisor, and Michaels, as the chief executive officer, had ultimate authority for decisions regarding disposal. Moreover, both Michaels and Lee exercised their authority when they met with IPC representatives to arrange for disposal of the waste. Thus, their individual acts placed them within the class of liable persons under section 107(a)(3) of CERCLA.

Id. at 1306.

122 628 F. Supp. 391 (W.D. Mo. 1986).

123 *Id.* at 416. The evidence elicited at trial clearly revealed the extent of the president's personal involvement in both the corporation and its waste disposal practices. He spent about one-half of his time at the facility in the early years of the corporation, and spent his remaining time on research and marketing directly relevant to the corporation. He carried out most of the normal corporate functions, including the execution of contracts, administration of corporate affairs, and the hiring and supervising of employees. The president visited the facility once every month or so during the six—or seven—year span in which the administrative operations of the facility were moved to a different state. Even after the administrative offices moved, the plant and administrative managers continued to report to the president. His communications with them included performance evaluations. *Id.* at 420.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

Similarly, the district court in *United States v. Ward*[128] held a corporate president and principal shareholder liable for arranging for the disposal or treatment of hazardous wastes under section 107(a)(3) as a generator,[129] stating that "[a] corporate officer of a company who exercises authority for the company's operations and participates in arranging for the disposal of hazardous wastes is liable"[130] for cleanup costs. The court cited a number of factors in support of its ruling, including the defendant's status as president, chief operating officer, director, and majority shareholder of the corporation, his personal participation in the negotiation of the contract with the transporter, and the personal benefit he received from the awarding of the contract to this particular transporter.[131]

The common thread running throughout these cases is the application, if not the articulation, of the traditional rule that "[a] corporate officer may be held liable if he personally participates in the wrongful, injury-producing act."[132] In every instance, the officers were held liable because of their direct participation in the environmental violation just as they would have been held liable had they directly participated in any other tort. One should not be led astray by the courts' concomitant discussions of the language of CERCLA; these cases involve nothing more than the application of traditional corporate law principles.

2. The Control Theory.—At first glance, some courts seem to have adopted a theory that bases personal liability solely upon the officer's ability to control or exercise authority over the corporation's activities—an approach that was hinted at in *NEPACCO I*. Although the *NEPACCO I* court applied a personal participation test in holding Lee

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128 618 F. Supp. 884 (E.D.N.C. 1985).

129 *Id.* at 895-96.

130 *Id.* at 894.

131 *Id.* Robert Ward, Jr. (Ward) was the president, chief operating officer, director, and majority shareholder of Ward Transformer Company (WTC). *Id.* His son owned the remaining shares. Ward was responsible for the day-to-day operations of the corporation, and was actively involved in the management and operation of the company until he turned the control of the corporation over to his son in 1980. *Id.* at 890.

Ward, his son, and Fred Tucker, a member of WTC's board of directors, entered into an oral agreement with Robert J. Burns for disposal of transformer insulating fluid containing polychlorinated biphenyls (PCBs) stored at WTC's facility. Burns, a long-time acquaintance and business associate of Ward, then owed Ward personally $55,000. The parties agreed that WTC would pay Burns $1.70 per gallon, plus freight costs, for removal of the oil. Later, Burns agreed to pay Ward 70 cents per gallon of oil removed as payment on the outstanding debt. Burns loaded the oil into a 750-gallon tank. He dumped the first load from the tank onto the Fort Bragg Military Reservation. He told Ward of his method of disposal. Ward did not report it to anyone and allowed Burns to continue removing oil from WTC. Later tanks were dumped along various roadways in North Carolina. WTC employees helped Burns and his son make alterations to the 750-gallon tank at the WTC site that would enable the driver of the truck to sit in the passenger compartment and open and close a valve to control the dumping of the contents. *Id.* at 890-91.

132 United States v. Wade, 577 F. Supp. 1326, 1341 (E.D. Pa. 1983) (citations omitted).

and Michaels individually liable, part of its analysis is suggestive more of a control test. The court listed several factors in support of its conclusion that Lee was liable as an owner and operator under section 107(a)(1), including his capacity to control hazardous waste control practices, his power to direct negotiations regarding disposal, and his capacity to prevent and abate damage resulting from disposal.[133] These factors focus more upon the officer's authority or ability to direct corporate activities than upon the officer's actual involvement in the unlawful activity.

The court's finding that Michaels, the president, could be held personally liable based upon a consideration of the same factors[134] further indicates that the *NEPACCO I* court may have intended to apply a test less stringent than the personal participation theory. The court acknowledged that Michaels was not present at the plant at the time of disposal and that the government had failed to show that he had prior knowledge of the illegal disposal plan and practices.[135] Nonetheless, the *NEPACCO I* court found him personally liable for cleanup costs based upon his ability to control corporate activities and policies.[136]

This disturbing facet of the *NEPACCO I* decision did not survive long. On appeal, the Eighth Circuit reversed the district court's holding that Lee and Michaels were liable as owners and operators under section 107(a)(1). The *NEPACCO II* court's decision was based upon an application of the statutory definitions, however, not upon a wholesale rejection of the district court's analysis of the basis of liability for corporate officers. The circuit court found that the Denney farm site, not the NEPACCO plant, was the "facility" for purposes of owner or operator liability under CERCLA. NEPACCO, Lee, and Michaels did not own or operate the farm site; therefore, they could not be held liable under section 107(a)(1) as "owners or operators" of a facility.[137]

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133 *NEPACCO I*, 579 F. Supp. at 849.

134 *Id.*

135 *Id.* This finding conflicts with the court's earlier finding that Michaels had been involved in planning and implementing the waste disposal practices. *See id.* at 848 n.29.

136 *Id.* at 849.

137 The Eighth Circuit's additional finding that both Lee and Michaels were individually liable under section 7003(a) of RCRA as "contributors" to hazardous waste sites, *NEPACCO II*, 810 F.2d at 745-56, is disturbing. The district court had not reached this issue because it had found that RCRA did not impose liability upon past non-negligent off-site generators. *NEPACCO I*, 579 F. Supp. at 837. Section 7003(a) of RCRA "imposes strict liability upon 'any person' who is contributing or who has contributed to the disposal of hazardous substances that may present an imminent and substantial endangerment to health or the environment." *NEPACCO II*, 810 F.2d at 745. RCRA, like CERCLA, defines "person" to include both individuals and corporations, and does not exclude corporate officers and employees. *See id.* at 745-46.

The Eighth Circuit found that the scope of individual liability under RCRA was similar to the scope of individual liability under CERCLA. *Id.* at 745. It held that NEPACCO had violated section 7003(a) of RCRA, and noted that "Lee and Michaels can be held individually liable if they were personally involved in or directly responsible for corporate acts in violation of RCRA." *Id.*

In the almost three years between the *NEPACCO I* and *NEPACCO II* decisions, several other opinions were handed down that strengthened and gave teeth to the *NEPACCO I* legacy.[138] Even so, careful analysis of these cases reveals that courts that have adopted this theory actually look to the officer's control over hazardous waste disposal practices, not control over general corporate activities. Operational control, or, as one court stated, participation in the "nuts-and-bolts, day-to-day production aspects of the business"[139] is key. Mere managerial control resulting from officer status does not suffice.

Only one appellate opinion has addressed this issue—*New York v. Shore Realty Corp.*,[140] decided in 1985 by the Second Circuit. The court held Donald LeoGrande, an officer and shareholder in Shore Realty Corporation, liable as an owner or operator of a hazardous waste disposal site pursuant to section 107(a)(1).[141] LeoGrande incorporated Shore Realty solely for the purpose of purchasing the disposal site, which he intended to use for condominium development.[142] He knew at the time the property was purchased that hazardous wastes were stored there, but Shore Realty nonetheless took title to the property in October, 1983.[143]

Lee had actually participated in the wrongful conduct because he had personally arranged for the transportation and disposal of the hazardous substances. *Id.* Michaels, on the other hand, was not personally involved in the actual decision to improperly transport and dispose of the wastes. *Id.* Nonetheless, the court held that "[a]s NEPACCO's corporate president and as a major NEPACCO shareholder, . . . Michaels was the individual in charge of and directly responsible for all of NEPACCO's operations, including those at the Verona plant, and he had the ultimate authority to control the disposal of NEPACCO's hazardous substances." *Id.* Michaels was thus held liable as a contributor under RCRA for his failure to exercise his authority.

Under traditional corporate doctrine, Lee could have been found individually liable because of his personal involvement in the RCRA violation. Michaels, on the other hand, would not have been liable because he had no such personal involvement. The *NEPACCO II* court based its finding that Michaels was liable solely upon his status as corporate president who was thus generally responsible for corporate affairs, even though he was over one thousand miles away during the period in which the violation took place.

Even more disturbing, the *NEPACCO II* court cited the Second Circuit's opinion in New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985), which involved a CERCLA violation. The *Shore Realty* opinion was guided, in part, by the *NEPACCO I* decision, which was partially overturned by the *NEPACCO II* court. In addition, the facts of *Shore Realty* do not suggest that mere status as a corporate officer is sufficient to support a finding of personal liability under CERCLA. *See infra* notes 140-49 and accompanying text (discussing *Shore Realty*).

138 *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (discussed *infra* notes 140-49 and accompanying text); United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987) (discussed *infra* notes 164-69 and accompanying text).

139 United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. 1985).

140 759 F.2d 1032 (2d Cir. 1985).

141 *Id.* at 1052.

142 *Id.* at 1038.

143 The prepurchase report of Shore Realty's environmental consultant indicated that the site was leaching hazardous substances into the groundwater and the nearby harbor, that the site was a "potential time bomb," *id.* at 1039, and that the costs of monitoring and cleaning up the site before development could begin would range between $650,000 and $1 million or more. *Id.* Shore Realty

During the three months it took to evict the tenants, nearly 90,000 additional gallons of hazardous chemicals were deposited on the site. Shore Realty did not prevent additional disposal, nor did it address the hundreds of thousands of gallons of hazardous waste already contained on the site in deteriorating tanks.

In holding LeoGrande personally liable as an "operator" under section 107(a)(1), the Second Circuit noted that the definition of " 'owner or operator' excludes 'a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility.' "[144] It found that the presence of such an exception "implies that an owning stockholder who manages the corporation, such as LeoGrande, is liable under CERCLA as an 'owner or operator.' "[145] In any event, the court considered LeoGrande's status as the person in charge of the facility to be sufficient to hold him liable as an "operator."[146]

This case arguably moves toward holding an individual personally liable based solely upon his or her status in the corporation. A complete reading of the case suggests, however, that this is not the result the court intended. In discussing LeoGrande's liability under state law for abatement of a nuisance, the court restated traditional corporate law, noting that "a corporate officer who controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation."[147] The court further declared that it did not need to consider whether LeoGrande was liable based merely on his status as an officer because it was "beyond dispute" that LeoGrande personally directed, sanctioned, and actively participated in the corporation's maintenance of the nuisance.[148]

The court could have resolved the CERCLA claim on the same grounds. The court specifically noted that LeoGrande made, directed, and controlled all corporate decisions and actions.[149] The court's clear implication was that LeoGrande had the authority to control the disposal of hazardous wastes, and that he had actually exercised that control in an unlawful manner. Although the court's broad language suggests that it might be possible to impose liability upon an individual based merely upon that individual's status as a corporate officer, the facts of the case do not support the conclusion that the court intended such a result. LeoGrande did not exercise mere general managerial control over the

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sought a waiver of liability for the disposal of hazardous waste stored at the site from the State Department of Environmental Conservation, but the waiver was denied.

144 *Id.* at 1052 (quoting 42 U.S.C. § 9601(20)(A) (1988)).

145 *Id.* For a discussion of the liability of a managing shareholder, see *infra* notes 220-27 and accompanying text.

146 759 F.2d at 1052.

147 *Id.*

148 *Id.*

149 *Id.*

corporation; he exercised actual, specific control over environmental matters.

Similarly, the opinions of several district courts that have adopted the control test suggest that control over waste disposal practices is essential to support a finding of personal liability. For example, in *United States v. Carolawn Co.*,[150] the district court denied a motion for judgment on the pleadings brought by two officers of a company that operated a hazardous waste storage and disposal site.[151] The court noted that "CERCLA contemplates personal liability of corporate officials . . . who are responsible for day-to-day operations of a hazardous waste disposal business."[152] The court concluded that, "to the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs incurred at the facility notwithstanding the corporate character of the business."[153]

The *Carolawn* court emphasized that its construction of CERCLA was "entirely consistent with the Fourth Circuit's construction of other federal statutes."[154] All three of the cases cited by the district court based individual liability of officers upon their personal participation or involvement in the tortious activity, not upon their ability to control or exercise authority over the general activities of the corporation.[155] Moreover, the two officers in *Carolawn* "were personally involved in the operation of the site as a facility at which hazardous substances were stored

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150 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699 (D.S.C. 1984).

151 Southeastern Pollution Control Company (SEPCO) owned a site, known as the Fort Lawn site, which it used as a hazardous waste treatment and disposal facility. SEPCO filed for bankruptcy, and the site was eventually sold to the Columbia Organic Chemical Company (COCC). On the same day, COCC transferred title to Henry Tischler, James McClure, and Max Gergel, all of whom were officers or representatives of COCC. These three then incorporated a new company, known as South Carolina Recycling and Disposal, Inc. (SCRDI). The three individuals owned, operated, and served as officers of SCRDI. They allowed hazardous substances to continue to be deposited at the Fort Lawn site. Tischler and McClure were personally involved in the operation of the site. Eighteen months later, the three sold the site to Carolawn Company, Inc. The government eventually cleaned up the site at a cost in excess of $304,000, and sought recompense from the parties. *Id.* at 20,699-700. Tischler and McClure brought a motion for judgment on the pleadings, which was denied.

152 *Id.* The court noted that section 101(21) defines "person" as including individuals. *Id.* at 20,700. In addition, the court found that section 101(20)(A), defining "owner or operator," also contemplates individual liability. The court relied upon the language of the exception to this section, stating that "[t]he use of the relative pronoun 'who' instead of 'which,' of the possessive pronoun 'his' rather than 'its,' and of the language 'participating in the management,' all connote individual, personal involvement." *Id.*

153 *Id.*

154 *Id.* (citing Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902 (lst Cir. 1980); L.C.L. Theatres, Inc. v. Columbia Pictures Indus., 619 F.2d 455 (5th Cir. 1980); Tillman v. Wheaton-Haven Recreation Assoc., 517 F.2d 1141 (4th Cir. 1975)).

155 As one court stated:

> The general rule, and the rule in this circuit, is that an officer of a corporation is "liable for torts in which he personally participated, whether or not he was acting within the scope of his au-

and disposed of and from which hazardous substances were released."[156]

Likewise, in *Carolina Transformer*,[157] the district court found Dewey Strother and his son, Kenneth Strother, individually liable as owners or operators under section 107(a)(1).[158] Dewey Strother purchased 100 percent of Carolina Transformer Company in 1962. He was a corporate director and president from 1962 to 1981, and chairman of the board from 1981 to 1984. He personally supervised the day-to-day operations of the corporation, including the disassembly of electric transformers and handling of the resulting PCB-contaminated oil that was the source of the CERCLA violation.[159]

Kenneth Strother was a director from 1973 to 1988, and was president from 1982 to 1984. He, too, was responsible for day-to-day operations of the corporation during his tenure as president, including day-to-day control over the handling and disposal of dielectric fluids containing PCBs.[160] Together, Kenneth and Dewey Strother decided the company would not contest the state and federal environmental complaints brought against it, nor would the company comply with the EPA order to clean up the contamination.[161]

The court determined first that both individuals could be held directly liable under CERCLA as "operators" of the facility, based upon the court's distillation of a number of factors from *NEPACCO I* establishing officer liability, including the individual's ability to discover the release in a timely fashion, the extent of the individual's power to direct the "mechanisms" that caused the release, and the extent of the individual's ability to prevent and abate the resultant harm.[162] The district court concluded that the "dominant consideration" in assessing personal liability against officers for CERCLA violations was their "significant participation in the running of the company, especially as it relates to waste disposal."[163] Again, the opinion clearly reveals that the district

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thority." What is required is some showing of direct personal involvement by the corporate officer in some decision or action which is causally related to plaintiff's injury.

Escude Cruz, 619 F.2d at 907 (citation omitted); *L.C.L. Theatres*, 619 F.2d at 457 (" 'An officer or any other agent of a corporation may be personally as responsible as the corporation itself for tortious acts when participating in the wrongdoing.' ") (citations omitted); *Tillman*, 517 F.2d at 1144 ("If a director does not personally participate in the corporation's tort, general corporation law does not subject him to liability simply by virtue of his office.").

156 14 Envtl. L. Rep. (Envtl. L. Inst.) at 20,699.

157 739 F. Supp. 1030 (E.D.N.C. 1989).

158 *Id.* at 1037. These individuals were also found liable under traditional tort doctrine. *See supra* notes 113-16 and accompanying text.

159 739 F. Supp. at 1037.

160 *Id.* at 1038.

161 *Id.*

162 *Id.* (citing United States v. Kayser-Roth Corp., 724 F. Supp. 15, 21 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (lst Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991)).

163 *Id.* at 1037 (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985); United States v. Northernaire Plating Co., 670 F. Supp. 742, 747 (W.D. Mich. 1987)). The court

court was not imposing individual liability upon these two officers merely because of their ability to exercise authority over the corporation's affairs. Rather, the facts show that these two officers were so intimately involved in the CERCLA violation that they legitimately could be said to have participated in the unlawful activity. They exercised control over the handling and disposal of hazardous waste and made the decisions regarding the corporation's environmental compliance.

In *United States v. Northernaire Plating Co.*,[164] the court held liable the president and sole shareholder of an electroplating company that contaminated a site with caustic acids, cyanide, and heavy metals.[165] The president personally managed the day-to-day operations of the company,[166] and admitted that he was responsible for the disposal of chemical wastes for the corporation.[167] The district court found him liable under CERCLA as a corporate officer who had responsibility for arranging for the disposal of hazardous wastes.[168] The president was not held liable based merely upon his status as a corporate officer, but rather was held liable "because of his role in directing the handling of hazardous substances."[169]

Holding a corporate officer liable based upon his or her control or authority linked with personal participation in the violation is consistent with traditional corporate law doctrine, and therefore presents no cause for concern. Decisions that might be construed as using this "control or authority" language to approach a standard of personal liability based solely upon the individual's status as a corporate officer are a different matter. At least three courts have issued opinions whose abbreviated fact

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also concluded that *NEPACCO I* established the following factors to be considered in determining whether imposition of officer liability under CERCLA was warranted:

> sizable stock ownership in the corporation, active participation in the management of the corporation, presence at and supervision of the operation of the facility, founded the company, capacity and general responsibility to control the disposal of hazardous waste at the facility, power to direct negotiations concerning the disposal of wastes, and capacity to prevent and abate the damage caused by the disposal of hazardous wastes.

Id. (citing *NEPACCO I*, 579 F. Supp. at 848-49).

164 670 F. Supp. 742 (W.D. Mich. 1987).

165 *Id.* at 744.

166 *Id.*

167 *Id.* at 747.

168 *Id.* (citing *NEPACCO I*, 579 F. Supp. at 847-48; New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985)).

169 *Id.* at 748. *Cf.* United States v. Medley, 17 Envtl. L. Rep. (Envtl. L. Inst.) 20,297 (D.S.C. 1986), where, in holding an owner of a facility individually liable for response costs as an "operator," the court stated: "[i]ndividuals who have control or authority over the activities of a facility from which a hazardous substance has been released or where there is a substantial threat of release or who participate in the management of such a facility are liable for response costs . . . ." *Id.* at 20,298 (citing United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,696 (D.S.C. 1984)). Despite this broad statement of liability, the court also specifically found that the individual defendant "exercised control or authority over waste disposal activities" and "actively participated in the management and day-to-day operation of the facility at the time" hazardous substances were disposed. *Id.*

discussions and legal analyses create the impression that the courts involved placed insufficient emphasis on the nature of the officers' participation in the CERCLA violations at issue.

In *Vermont v. Staco*,[170] the district court held two officers of the parent corporation of a wholly owned subsidiary that owned a treatment facility liable for releasing hazardous substances into the public sewage treatment system and into privately owned septic systems.[171] The court held that the individuals, "as owning and managing stockholders," were "personally liable in their respective executive capacities in the corporate structure."[172] The court provided some hints that the individuals participated in the management of the subsidiary,[173] but it never explicitly discussed their actual roles in the events leading to the environmental violation, nor did it explain its decision to impose liability upon officers of a parent corporation for the actions of a subsidiary.[174]

Although the court's oblique references to the relationship between the parent and subsidiary might permit an inference that the individuals involved did control the environmental practices of the subsidiary and were somehow personally involved in the violation, the court's failure to directly examine those issues is troublesome. By declining to discuss the facts that led to the imposition of individual liability upon the corporate officers, the *Staco* court created the impression that mere status as an

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170 684 F. Supp. 822 (D. Vt. 1988), *vacated in part*, No. 86-190 (D. Vt. Apr. 20, 1989) (1989 U.S. Dist. LEXIS 17341) (dismissing plaintiffs' claims under the Federal Water Pollution Control Act and RCRA for lack of jurisdiction).

171 The defendants in *Staco* included the violating corporation, Staco, Inc., which manufactured thermometers containing mercury; Keeper Corporation, which owned the real estate on which the hazardous releases occurred; Chase Instruments Corporation, which owned all of the stock in Staco, Inc. and Keeper Corporation; Chase Instrument Sales Corporation; Robert and I. Walter Munzer, who served as the president and chairman of the board and were shareholders of Chase Instrument Corporation from 1973 to the time of the suit; and Robert Sirkus, who managed and directed the operations of Staco, Inc. *Id.* at 831.

172 *Id.* at 832.

173 The court described the corporate defendants as "members of a family commercial enterprise," and noted that the individual defendants were charged "as the principal executive officers of the related companies." *Id.* at 825. The court quoted the following excerpt from the deposition of Sirkus: "We, the three of us, make decisions that relate to the managing businesses and the marketing businesses and the selling businesses and all the overall operations of the . . . company." *Id.* at 831-32 n.5. In discussing the individual defendants' liability under RCRA, the court stated: "As discussed under CERCLA, each individual defendant . . . was either personally involved in the corporate acts of Staco, or was in a position as a corporate officer or major stockholder, to have 'ultimate authority to control' the proper handling of hazardous substances at the Staco plant." *Id.* at 835 (citing *NEPACCO II*, 810 F.2d at 745). The court's analysis of CERCLA liability contained no such discussion. Moreover, the court's insinuation that status as a "major stockholder" is a sufficient basis for imposition of liability is simply wrong. *See infra* notes 209-27 and accompanying text (discussing liability of individual shareholders under CERCLA).

174 Although the opinion notes that the individuals were officers of the parent corporation, it does not indicate what their role in the subsidiary was, except to state that "as executive officers of Chase, [they] participated in the control and management of Staco." 684 F. Supp. at 831.

officer, rather than actual involvement in the violation, is sufficient to support imposition of CERCLA liability.

In *International Clinical Laboratories, Inc. v. Stevens*,[175] the court held the corporate president and principal shareholder of a corporation that deposited waste waters containing heavy metals onto the ground personally liable as an "operator" based upon his "overall management responsibility."[176] The opinion is very brief and reveals nothing about the extent of the defendant's actual involvement in the decisions leading to the contamination. Likewise, in *United States v. Mexico Feed & Seed Co.*,[177] the court held the president and majority shareholder of a company that operated a disposal facility personally liable for cleanup costs. The court stated that as president of the company, the individual was "in charge of and directly responsible for all" of the company's operations "and, hence, possessed ultimate authority to control the disposal of the hazardous substances."[178] The opinion provides no discussion of the president's actual involvement in the statutory violations.

The imprecise and incomplete analyses of *Staco*, *Stevens*, and *Mexico Feed* make it impossible to determine how these courts interpreted the scope of officer liability under CERCLA. The most disturbing aspect of these opinions is the willingness of all three courts to impose such broad liability upon corporate officers with so little discussion of the extent of the officers' roles in the CERCLA violations. The officers in all three cases may well have been personally involved in the CERCLA violations, but the courts' opinions leave that question unanswered. The courts' lack of attention to the facts of the cases before them suggests that they may have based CERCLA liability upon the officers' status within the corporations, as opposed to their personal participation in the CERCLA violations. If so, these cases would represent an erosion of traditional doctrine. Even if the courts did rely upon actual involvement in or control over the environmental practices leading to the violations, as opposed to mere status, their failure to plainly state so creates an unnecessary ambiguity in CERCLA case law that could, if adopted by future courts, lead to such an erosion.

The control test may appear to relax traditional liability standards somewhat by suggesting that something less than actual participation or involvement in the wrongdoing is sufficient to support imposition of personal liability upon corporate officers. In practice, however, courts have not applied the test in this manner. First, the control test, as applied by

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175 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,560 (E.D.N.Y. 1990).

176 *Id.* at 20,561.

177 764 F. Supp. 565 (E.D. Mo. 1991).

178 *Id.* at 571. The court thus concluded that the president was liable under CERCLA "as owner and operator at the time of the disposal of the hazardous waste . . . ." *Id.* The court cited *NEPACCO II*, 810 F.2d 726 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), and United States v. Conservation Chem. Co., 628 F. Supp. 391 (W.D. Mo. 1985), in support of its analysis.

the courts, focuses on operational control, i.e., control over actual hazardous waste disposal practices, not general managerial control over the corporation.[179] The control test does not, therefore, rely upon mere officer status in imposing liability.

Second, although the courts do evince a willingness to impose liability based upon an officer's failure to exercise his or her control or authority over environmental policies or practices, as opposed to imposing liability only for actual, active participation in the CERCLA violation, this practice is by no means an abrogation of traditional doctrine. Breach of a legal duty, through nonfeasance, as well as misfeasance or malfeasance, can give rise to liability under traditional doctrine.[180] Thus, to the extent that an officer has exercised control over hazardous waste disposal practices in a wrongful manner, or has failed to exercise authority delegated to him or her so that a harm results, imposition of liability on that officer is in keeping with traditional doctrine.

3. The Prevention Theory.—The fear that traditional doctrine creates disincentives for corporate officers to involve themselves in environmental decision-making was the impetus behind one district court's creation of a new standard for evaluating the personal liability of corporate officers under CERCLA—a standard which, if adopted by the rest of the federal courts, could enhance CERCLA's ability to accurately im-

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[179] This point was stressed in Riverside Market Dev. Corp. v. International Bldg. Prods., 931 F.2d 327 (5th Cir. 1991), where the court held that minimal active involvement in the corporation was insufficient to hold a chairman of the board and major shareholder liable as an operator under CERCLA. The defendant's involvement in the corporation consisted of a few brief visits to the corporation's facility, review of financial statements, and meetings with the officers.

In fact, no court has adopted *NEPACCO II*'s suggestion that mere managerial control may be sufficient to support individual liability for an environmental violation. *See supra* note 137 (discussing *NEPACCO II*'s finding that liability under RCRA can be based merely upon officer status).

[180] *See* 3A W. FLETCHER, *supra* note 17, § 1135, at 50 (Supp. 1990) ("Personal liability attaches, regardless of whether the breach was accomplished through malfeasance, misfeasance or nonfeasance.") (footnote omitted). In evaluating officers' individual liability for harm to third parties, the courts generally employ the following checklist: (1) does the corporation owe a duty to the injured party?; (2) did the corporation delegate that duty to the officer?; (3) did the officer breach that duty through personal fault (through misfeasance, malfeasance, or nonfeasance)?; and (4) was the third party's injury proximately caused by the officer's breach? *See* Canter v. Koehring Co., 283 So. 2d 716 (La. 1973):

> The breach occurs when the defendant has failed to discharge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances—whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.

Id. at 721 (*superceded by statute*). *See also* Kerrigan v. Errett, 256 N.W.2d 394, 397 (Iowa 1977) (citing *Canter*) (*superceded by statute* as stated in Thompson v. Bohlken, 312 N.W.2d 501 (Iowa 1981)); Schaefer v. D & J Produce, Inc., 62 Ohio App. 2d 53, 58-61, 403 N.E.2d 1015, 1020-21 (1978) (quoting *Canter*); Athas v. Hill, 300 Md. 133, 146-47, 476 A.2d 710, 717 (Md. App. 1984) (quoting *Canter*).

pose personal liability upon culpable corporate officers, while shielding nonculpable parties from personal liability. The prevention test, set forth by *Kelley v. ARCO Industries Corp.*[181] in 1989, attempts to comply with the fundamental dictates of traditional corporate law doctrine while creating an inducement for corporate officers to involve themselves in hazardous waste disposal issues.

The *ARCO* court acknowledged that CERCLA imposes a strict liability scheme, but found that strict liability was too harsh of a standard to apply to all corporate individuals. Rather, the court saw a need for "a more definitive standard" for imposing liability on corporate individuals.[182] Analysis of the case law led the court to the conclusion that the relevant factors in assessing the personal liability of a corporate individual are the individual's power to control the corporation's practices and policies and the individual's actual efforts in that regard.[183] The question to be answered is "whether the individual in a close corporation could have prevented or significantly abated the release of hazardous substances."[184] Because of "the seriousness of the potential liability," the test for the liability of corporate officers must be "heavily fact-specific, requiring an evaluation of the totality of the situation."[185]

In the absence of a clear articulation in CERCLA of how to distinguish between corporate actors, the *ARCO* court created its own test for evaluating the personal liability of corporate officers:

> This Court will look to evidence of an individual's authority to control, among other things, waste handling practices—evidence such as whether the individual holds the position of officer or director, especially where there is a co-existing management position; distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned. Weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal. Besides responsibility neglected, it is important to look at the positive efforts of one who took clear measures to avoid or abate the hazardous waste damage.[186]

The court stated that this test was different from the traditional practices of piercing the corporate veil and of holding a corporate officer personally liable for involvement in tortious activities.[187] Because the power of the individual to prevent the harm is crucial to the *ARCO* test, the court

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181 723 F. Supp. 1214 (W.D. Mich. 1989).

182 *Id.* at 1219.

183 *Id.*

184 *Id.* at 1220.

185 *Id.*

186 *Id.* at 1219.

187 *Id.* at 1220. The prevention test arose from the *ARCO* court's belief that:

> CERCLA's statutory scheme varies the configuration of traditional corporate principles which prevent individual liability absent a conclusion that an individual engaged in procedural irregu-

must analyze whether the individual had the power or authority to prevent the harm. In addition, under the prevention test, efforts to avoid or abate the harm will alleviate the individual's personal liability, rather than serve to prove the individual's participation.[188]

The *ARCO* court noted that its standard struck a middle ground between the more lax traditional tort liability standard and imposition of strict liability upon corporate individuals simply because of their status as officers.[189] The *ARCO* test does indeed articulate a liability standard more stringent than those articulated by courts applying traditional doctrine because it focuses on whether the officer could have prevented the harm, rather than upon actual participation in or formal control over the activity creating the harm. According to the *ARCO* court, this test "is different from the issue of personal knowledge, direct supervision, or active participation found in most ordinary torts by corporate actors."[190] Yet, the factors listed by the court in deciding whether the individual could have prevented the harm include "authority to control . . . waste handling practices,"[191] "responsibility undertaken for waste disposal practices,"[192] and "responsibility neglected."[193] These factors are not much different from those considered by courts following the control test discussed above; in fact, the prevention test can be viewed as a logical extension of the control test.

Although earlier cases had mentioned ability to prevent harm as a factor to be considered in assessing corporate officer liability,[194] *ARCO*

larities justifying a court in 'piercing of the corporate veil' or that an individual has had close, active involvement or direct supervision in the events leading to the alleged tortious harm.

Id. at 1218. After reviewing previous case law regarding individual officer liability under CERCLA, *id.* at 1218-19, the *ARCO* court concluded that under some circumstances a court could find an individual personally liable for CERCLA violations even where "strict traditional corporate principles" did not apply. *Id.* at 1219.

188 *Id.* at 1220. The court's concern on this point was justified, as earlier cases had suggested that personal liability could be imposed based upon the individual's efforts to prevent or abate the harm. *See, e.g., NEPACCO I*, 579 F. Supp. at 849 (citing defendant's awareness of environmental dangers and concern about preventing environmental harm as factors leading to his liability as an owner or operator); Colorado v. Idarado Mining Co., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578, 20,578-79 (D. Colo. 1987) ("Under the definition of 'owner or operator' adoped [sic] in *NEPACCO*, [the defendant's] knowledge of and continuing involvement in efforts to address the environmental dangers . . . would justify" holding the defendant liable.), *rev'd on other grounds*, 916 F.2d 1486 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991).

189 723 F. Supp. at 1220.

190 *Id.*

191 *Id.* at 1219.

192 *Id.*

193 *Id.*

194 *See, e.g.*, United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1037 (E.D.N.C. 1989) (discussing extent of individual's ability to prevent and abate the harm); United States v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879, 20,883 (E.D. Mo. 1988) (president "had the authority to control the disposal of hazardous waste and to prevent the damage caused by the disposal at the site"); *NEPACCO I*, 579 F. Supp. at 849 (vice-president "had the capacity to prevent and abate the damage caused by the disposal of hazardous wastes at the . . . site"); *cf.* United States v. Pollution

was the first case actually to articulate a test based upon this element. The prevention test furthers CERCLA's remedial purposes by encouraging individuals to take increased responsibility for environmental practices as their authority within the corporation increases.[195] In contrast, the traditional personal participation test, in the *ARCO* court's view, encourages corporate officers to turn a blind eye to the hazardous waste disposal policies.[196]

Corporate officers should not be concerned that a court applying the *ARCO* test would find them personally liable for the CERCLA violations of their corporations simply because of their status within the corporate hierarchy.[197] The *ARCO* test provides a safe harbor for those individuals who attempt, albeit unsuccessfully, to prevent or alleviate the harm, thereby providing a direct incentive for individuals to undertake preventative measures. Although *ARCO* has expanded the outer boundaries of officer liability, this expansion is relatively minor, is entirely consistent with the current state of corporate law doctrine, and promotes the legislative purposes underlying CERCLA.

III. INDIVIDUAL SHAREHOLDER AND PARENT CORPORATION LIABILITY

A. Traditional Doctrine: Limited Liability

As discussed above, one of the basic tenets of corporate law is limited liability.[198] Owners of a corporation are, in many ways, simply in-

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Abatement Servs., Inc., 763 F.2d 133, 134 (2d Cir.) (in deciding liability under RHA, court noted "[t]he individual defendants, by reason of their respective positions and activities in the Corporation, and by reason of their activities, had the responsibility and the authority either to prevent, in the first instance, or promptly to correct the violations complained of, and they failed to do so"), *cert. denied*, 474 U.S. 1037 (1985).

195 723 F. Supp. at 1220. The court went on to state: "This standard will encourage increased responsibility for two reasons: First, as power grows, the ability to control decisions about waste disposal increases; and second, as one's stake in the corporation increases, the potential for benefiting from less expensive (and less careful) waste disposal practices increases as well." *Id.* at 1220 n.3.

196 *Id.* at 1220 (The prevention test is "a better standard than one which measures only the most direct knowledge or involvement in waste disposal activity, because it encourages responsible conduct instead of causing high level corporate individuals 'not to see' and 'to avoid getting involved with waste disposal at their facilities.' ").

197 Although only one other court has adopted the test to date, this paucity of adoptions is more likely related to the newness of the opinion, and not its substance. *See* Quadion Corp. v. Mache, 738 F. Supp. 270, 274-75 (N.D. Ill. 1990). The Western District of Michigan has restated the test on two occasions. *See* Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1542-44 (W.D. Mich. 1989); Kelley v. Thomas Solvent Co., 727 F. Supp. 1554, 1560-62 (W.D. Mich. 1989).

198 As the Fifth Circuit noted:

> Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation's debts. Creditors of the corporation have recourse only against the corporation itself, not against its parent company or shareholders. It is on this assumption that 'large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.'

United States v. Jon-T Chems., Inc., 768 F.2d 686, 690 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011

vestors.[199] Theoretically, the maximum liability exposure corporate owners have is their contribution to capital.[200] No other personal asset is at risk. The law regards the corporation as a legal entity "separate and apart" from its shareholders, officers, and directors,[201] and its independent existence will be disregarded only "in the most unusual circumstances."[202]

Nonetheless, the courts will pierce the corporate veil[203] if the dictates of equity so require.[204] For example, courts will disregard the cor-

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(1986) (citations omitted). *See also supra* notes 13-16 and accompanying text (discussing limited liability of corporate owners).

199 One commentator has noted that investors may be "wise to forgo active participation in corporate governance, because they can protect their interests at less expense by selling their shares in enterprises that are inefficiently managed and switching their resources to better-managed companies. This principle of investor behavior has been called the 'Wall Street rule.' " Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REF. 117, 144-45 (1988).

However, shareholders in closely held corporations typically do not follow the same behavior pattern of avoiding active participation in corporate affairs:

> Unlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and does not desire to assume the responsibilities of management, the shareholder in a close corporation considers himself or herself as a co-owner of the business and wants the privileges and powers that go with ownership. . . . [P]roviding for employment may have been the principal reason why the shareholder participated in organizing the corporation. Even if shareholders in a close corporation anticipate an ultimate profit from the sale of shares, they usually expect (or perhaps should expect) to receive any immediate return in the form of salaries as officers or employees of the corporation rather than in the form of dividends on their stock.

1 F. O'NEAL & R. THOMPSON, *supra* note 75, § 1.07, at 25.

200 *See* Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974); 1 W. FLETCHER, *supra* note 17, § 14, at 464 ("[T]he stockholders are not personally liable for the debts of the corporation. The corporation, and it alone, is liable. A stockholder stands to lose what he has dedicated to the corporate enterprise and nothing more.").

201 1 W. FLETCHER, *supra* note 17, § 25, at 513.

202 Carpenters' Dist. Council v. W.O. Kessel Co., 487 F. Supp. 54, 57 (W.D. Pa. 1980); 1 W. FLETCHER, *supra* note 17, § 41.10, at 614-15 ("The standards for the application of alter ego principles are high, and the imposition of liability notwithstanding the corporate shield is to be exercised reluctantly and cautiously. Some courts speak of disregard of the corporate entity as requiring exceptional circumstances.") (footnotes omitted).

In Ramsey v. Adams, 4 Kan. App. 2d 184, 603 P.2d 1025 (1979), the court listed several factors that would support the piercing of a corporate veil:

> (1) undercapitalization of a one-man corporation, (2) failure to observe corporate formalities, (3) nonpayment of dividends, (4) siphoning of corporate funds by the dominant stockholder, (5) nonfunctioning of other officers or directors, (6) absence of corporate records, (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders, and (8) the use of the corporate entity in promoting injustice or fraud.

Id. at 186-87, 603 P.2d at 1028. *See also* Labadie Coal Co. v. Black, 672 F.2d 92, 97-98 (D.C. Cir. 1982) (listing factors relevant in determining whether corporate veil should be pierced); Dudley v. Smith, 504 F.2d 979, 982 (5th Cir. 1974) (same).

203 *See* L. SOLOMON, D. SCHWARTZ & J. BAUMAN, CORPORATIONS, LAW AND POLICY 241 (3d ed. 1986) ("Where justice requires, courts occasionally disregard the corporate entity and allow the plaintiffs to reach the assets of the shareholders. This result is metaphorically described as 'piercing the corporate veil.' ").

204 *See, e.g., Krivo*, 483 F.2d at 1102 ("[C]ourts do not hesitate to ignore the corporate form in

porate form where it is shown that the corporation was formed or used for an illegal, fraudulent, or unjust purpose.[205] In addition, where the shareholders ignore the corporate form and use it as a mere instrument to conduct their own affairs, the courts can pierce the corporate veil under the "alter ego" theory.[206] Generally, courts apply a two-pronged test to determine whether piercing is appropriate under this theory. The test requires: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual [shareholders] no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[207] A showing of

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those cases where the corporate device has been misused by its owners."); Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940) ("Corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong or protect fraud."); Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983, 987 (Del. Ch. 1987) ("The protection offered by the corporate form, however, is not absolute; equity has long acted to extend a corporate liability to those in control of the corporation in appropriate circumstances."); Walkovszky v. Carlton, 18 N.Y.2d 414, 417, 223 N.E.2d 6, 8, 276 N.Y.S.2d 585, 587 (1966) ("[W]henever anyone uses control of the corporation to further his own rather than the corporation's business, he will be liable for the corporation's acts . . . ."). The relationship between the theory of limited liability and the theory of piercing the corporate veil has confused many. *See Jon-T Chems., Inc.*, 768 F.2d at 691 (the theories of limited liability and piercing the corporate veil present a "legal quagmire"); Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) ("There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.").

205 *See Jon-T Chems., Inc.*, 768 F.2d at 691 ("If . . . a corporation is established for a fraudulent purpose or is used to commit an illegal act, or if its shareholders drain the corporation's assets, limited liability may not apply."); 1 W. FLETCHER, *supra* note 17, § 41, at 603 ("In short, the corporate veil may be pierced upon a showing of improper conduct or that the corporation was either formed or used for some illegal, fraudulent or unjust purpose."). Fraud, illegality, misuse of the corporate form, and other culpable conduct achieved early recognition as grounds for piercing the corporate veil. *See, e.g.*, United States v. Milwaukee Refrigerator Transit Co., 142 F. 247 (C.C.E.D. Wis. 1905):

> If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

Id. at 255. Contemporary courts continue to recognize this rule. *See Jon-T Chems., Inc.*, 768 F.2d at 691 ("While limited liability remains the norm in American corporation law, certain equitable exceptions to the doctrine have developed. The most common exception is for fraud."); McKibben v. Mohawk Oil Co., 667 P.2d 1223, 1229 (Alaska 1983) ("parent corporation may be liable for the wrongful conduct of its subsidiary when the parent uses a separate corporate form 'to defeat public convenience, justify wrong, commit fraud, or defend crime' ") (quoting Jackson v. General Elec. Co., 514 P.2d 1170, 1172-73 (Alaska 1973)); *Irwin & Leighton, Inc.*, 532 A.2d at 987 ("The paradigm instance [for piercing the corporate veil] involves the use of a corporate form to perpetrate a fraud.").

206 *See* 1 W. FLETCHER, *supra* note 17, § 41.10, at 615 ("The doctrine of alter ego fastens liability on the individual who uses a corporation merely as an instrumentality to conduct his or her own personal business, and such liability arises from fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation."). The doctrine goes under several other names as well, such as the "instrumentality" or "identity" doctrine. *See* P. BLUMBERG, THE LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW § 6.01, at 111 (1987); 1 W. FLETCHER, *supra* note 17, § 43.10, at 759; Barber, *supra* note 14, at 377.

207 Autonotriz del Golfode California v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957). *See*

domination and control of the corporation by the shareholder may satisfy the first prong.[208]

B. Individual Shareholder Liability Under CERCLA

Courts seeking to hold individual shareholders personally liable for the CERCLA violations of the corporations in which they own stock have relied upon traditional veil-piercing doctrine and judicial interpretation of the statutory provisions of CERCLA. Regardless of the theory employed, mere status as a shareholder is not sufficient to support imposition of individual liability. Although the courts have often noted an individual defendant's status as a shareholder in discussing his or her liability, these individuals were held liable as the result of actions taken in their roles as officers or employees.[209] Their shareholder status was merely incidental to the determination of liability. In no instance has a court imposed liability for cleanup costs on a shareholder who was not intimately involved in the environmental violation as an officer or employee of the corporation.[210]

1. Piercing the Corporate Veil.—To date, only one court has purported to pierce the corporate veil to impose liability on an individual shareholder. In *United States v. Mottolo*,[211] the individual defendant, Richard Mottolo, had originally operated a waste disposal site as a sole proprietorship.[212] As the owner of a sole proprietorship is personally liable for the torts committed by the proprietorship,[213] the court had no

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also 1 W. FLETCHER, *supra* note 17, § 41.10, at 615 (discussing the "alter ego" doctrine and noting that application of the theory is appropriate only where adherence "to the doctrine of corporate entity would promote injustice or protect fraud") (footnotes omitted).

208 1 W. FLETCHER, *supra* note 17, § 41.10, at 616 (noting that first prong of the test requires a showing of "control, not merely majority or complete stock control, but complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own"); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 854-55 (1982) ("The first prong may be satisfied by a showing of domination and control of the corporation, which occurs most often in the context of a parent-subsidiary relationship or of a closely held corporation.") (footnotes omitted).

209 *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989); United States v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879 (E.D. Mo. 1988); United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987); United States v. Ward, 628 F. Supp. 884 (E.D.N.C. 1985); United States v. Conservation Chem. Co., 628 F. Supp. 391 (W.D. Mo. 1986); *NEPACCO I*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

210 *See supra* notes 66-197 and accompanying text (discussing corporate officer liability under CERCLA).

211 695 F. Supp. 615 (D.N.H. 1988).

212 Mottolo admitted that he owned the property on which hazardous materials were deposited at the time of disposal and that his unincorporated sole proprietorship operated the facility. *Id.* at 623.

213 *Id.* (citing H. HENN & J. ALEXANDER, *supra* note 13, § 18, at 58).

difficulty in finding Mottolo individually liable as a site operator in his capacity as the owner of the business.[214]

In addition, Mottolo admitted that he had incorporated his business in 1980 in an effort to "escape potential personal liability by using the corporate entity as a shield."[215] This effort proved futile. As the *Mottolo* court noted, CERCLA's goal of making those responsible for contamination pay the costs of cleanup would be frustrated if a nonincorporated polluter could avoid liability merely by incorporating.[216] The *Mottolo* court did not premise Mottolo's personal liability merely upon his status as a shareholder. Rather, his active involvement in the events giving rise to the violation, from which he attempted to shield himself by virtue of the corporate form, subjected him to liability.

Although *Mottolo* involved a closely-held corporation, theoretically, the veil of any corporation can be pierced. In reality, however, large publicly-traded corporations are unlikely to violate the tests used to gauge the appropriateness of piercing the corporate veil.[217] As a result, courts apparently have never pierced the veil of a publicly traded corporation to reach the individual shareholders.[218] Experience suggests, therefore, that individuals who own stock in large corporations involved in hazardous

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214 *Id.*

215 *Id.* at 624.

216 *Id.* The court went on to note that "the absence of explicit statutory language addressing the effect of incorporation, the Act's strict liability scheme, and the broad and encompassing categories of potentially responsible parties ineluctably lead the Court to the conclusion that CERCLA places no importance on the corporate form." *Id.* The *Mottolo* court found that even under the "more rigorous standard" of the common law alter ego theory, the resulting corporation could not escape the liabilities of its unincorporated predecessor. *Id.* The " 'substantial identity in terms of corporate ownership, management, business purpose, operation, equipment, customers, and supervision,' " as well as the "[c]ontinuity of the work force," compelled the court to treat the two businesses as alter egos. *Id.* (citation omitted). The court stated:

> After incorporation, Mottolo remained as general manager. No outsiders acquired management responsibilities or proprietary rights, and Mottolo and his wife remained as sole owners of the business, owning one hundred percent of [the corporation's] stock. Substantially all of [the proprietorship's] assets were transferred to the new entity. The business made no personnel changes. Existing accounts were serviced in the same manner, using the same equipment, and operating out of the same truck transfer station. Even the name of the new corporate entity was deliberately chosen to be similar to the old so that goodwill generated by customer identification of the company name would continue.

Id.

217 *See supra* notes 203-08 and accompanying text (discussing piercing of corporate veil). It is highly unlikely, for example, that a large number of unrelated shareholders would act in concert to use the corporate form as an alter ego or to perpetrate a fraud.

218 *See* 1 F. O'NEAL & R. THOMPSON, *supra* note 75, § 1.10, at 44 ("[A] piercing of the veil question almost never arises except in corporations with only a few shareholders.") (footnote omitted); Barber, *supra* note 14, at 372 ("In theory, the piercing doctrine applies to publicly held and closely held or family corporations. A review of the decisional law, however, shows no case in which the shareholders of a corporation whose stock was publicly traded or widely held were found personally liable for the obligations of the corporation.") (footnote omitted); Easterbrook & Fischel, *supra* note 204, at 109 & n.37 (noting that "[a]lmost every case" of piercing has involved a close corporation, and that "[w]e say 'almost every' only because we have not examined them all").

waste activities are in little danger of being held individually liable for CERCLA violations simply by virtue of their stock ownership.

Even in a closely held corporation, piercing is an unusual step. In a situation where the equities would allow piercing, the facts likely would support a finding of direct statutory liability under CERCLA as well. To the extent that a court may hold individuals liable based upon their active involvement in the business generally, and their personal participation in the CERCLA violation specifically, it need not resort to piercing the corporate veil.[219]

2. Direct Statutory Liability.—In evaluating the liability of shareholders under CERCLA, the primary question is whether the shareholder can be said to be an "owner or operator" of the facility within the meaning of section 107(a)(1).[220] However, shareholders are not, and have never been interpreted to be, "owners" within the meaning of this phrase simply because of their status as shareholders. Shareholders are investors in the corporation engaging in the hazardous waste activities; the corporation itself is the "owner" of the facility.

If the indirect ownership interest of a shareholder in the assets of a corporation were a sufficient basis for treating a shareholder as an "owner" under CERCLA, Congress would have effectively overridden the state law protection of the corporate form in the environmental area. It is unlikely that Congress intended to take such a drastic step through the subtle use of the word "owner." Indeed, no court has suggested that shareholders are strictly liable as "owners" for all CERCLA violations committed by their corporations.

In addition, as a practical matter, it is impossible for an individual acting solely in his or her capacity as a shareholder to be an "operator" of a facility. Shareholders merely hold ownership interests in the corporation, collect distributions, elect directors, and vote on major corporate

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219 Indeed, most courts find imposition of direct liability to be a more palpable and palatable basis of liability than the imposition of derivative liability through piercing the corporate veil. Courts are notoriously reluctant to disregard the corporate form. *See, e.g., In re* County Green Ltd. Partnership, 604 F.2d 289, 292 (4th Cir. 1979) ("We first note the general rule that the decision to pierce a corporate veil and expose those behind the corporation to liability is one that is to be taken reluctantly and cautiously."); Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967) ("[A]ny court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception."), *cert. denied*, 390 U.S. 988 (1968); Bankers Life & Casualty Co. v. Kirtley, 338 F.2d 1006, 1013 (8th Cir. 1964) ("the corporate entity will be disregarded only under exceptional circumstances") (citation omitted). It is not surprising, therefore, that courts have been hesitant to use piercing to hold individual shareholders of closely-held corporations liable for CERCLA violations. Unfortunately, courts have created unnecessary confusion in this area because they have failed to articulate carefully their alternative grounds for finding individual shareholders liable. Nevertheless, courts have not exceeded the traditional limits of corporate law in imposing liability on individual shareholders for CERCLA violations.

220 *See* 42 U.S.C. § 9607(a)(1) (1988) (*see supra* note 42 for text of this section).

actions.[221] None of these normal activities of a shareholder should rise to the level of participation required of an "operator" under CERCLA.

An individual should not have direct statutory liability under CERCLA because of his or her status as a shareholder, and that is indeed the result courts have reached. The case law in this area, however, has created significant confusion. First, although an individual may be liable under CERCLA as either an owner *or* an operator, courts typically connect the terms as a single phrase—"owner or operator"—and fail to distinguish between the grounds supporting the imposition of liability upon the two categories of potentially responsible parties.[222] Second, courts often refer to an individual's status as a shareholder while discussing liability for acts committed in the individual's role as an officer or employee of the corporation.[223] The symmetry between the concepts of owner/operator and shareholder/officer creates the false impression that shareholder status is an important, or even sufficient, element in the finding of liability.

Thus, for example, courts often state that a shareholder who participates in the management of a corporation is liable as an "owner or operator."[224] This interpretation of "owner or operator" seems to have had its genesis in *NEPACCO I*,[225] where the court concluded that such a construction furthered congressional intent that those responsible for hazardous waste contamination pay the costs of cleaning it up.[226] The *NEPACCO I* court found that allowing a defendant who was both a shareholder and an officer to be shielded by the corporate veil "would

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221 *See generally* H. HENN & J. ALEXANDER, *supra* note 13, ch. 9(D) (discussing rights and duties of shareholders).

222 *See, e.g., supra* note 100 (discussing Lee's liability as an "owner or operator" in *NEPACCO I*).

223 *See supra* note 209 (listing cases discussing individual shareholder liability).

224 *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) ("[A]n owning stockholder who manages the corporation . . . is liable under CERCLA as an 'owner or operator.' " (citing United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699, 20,700 (D.S.C. 1984); *NEPACCO I*, 579 F. Supp. at 847-48)); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D Pa. 1985) ("Courts have generally concluded that the exemption from liability gives rise to an inference that an individual who owns stock in a corporation and who actively participates in its management can be held liable for clean-up costs incurred as a result of improper disposal by the corporation.").

225 579 F. Supp. at 848. Section 101(20)(A) specifically excludes from the definition of "owner or operator" any person "who, without participating in the management of . . . a facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C. § 9601(20)(A) (1988) (*see supra* note 48 for text of this section). According to many courts, the necessary converse of this so-called "secured creditor exemption" is that a shareholder who does participate in the management of a corporation is liable as an "owner or operator." *See supra* note 224. The *NEPACCO I* court looked at the language of section 101(20)(A) and concluded: "The statute literally reads that a person who owns interest [sic] in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste." 579 F. Supp. at 848. The court's reading of the statute, however, was not literal but was largely interpretive.

226 579 F. Supp. at 848. *See also supra* notes 40-41 and accompanying text (discussing objectives of CERCLA).

frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA]."[227]

In fact, there is no evidence of a congressional purpose to impose CERCLA liability on shareholders. Courts that have held individual shareholders liable as "owners or operators" have simply evaluated the involvement of the shareholders in their roles as officers under the officer liability tests discussed in Part I. In effect, courts have used the phrase "owner or operator," as it relates to individuals, in a way that subordinates the individual's status as a shareholder to his or her ability to control or manage the corporation's waste disposal activities as an officer. Mere participation in management does not appear to be enough; indeed, no court has held a shareholder liable who was not liable in his or her capacity as an officer. The individual's position as a shareholder should be irrelevant to the imposition of liability; rather, the individual's participation in the CERCLA violation through his or her role as an officer is key.

C. Parent Corporation Liability Under CERCLA

In considering the liability of parent corporations for the environmental torts of their subsidiaries, the issue is often whether the applicable standard of liability derives from common law principles of corporate law or from direct application of the statutory definitions of CERCLA.[228] One view maintains that a court can only hold a parent corporation liable where the facts support a piercing of the corporate veil;[229] the second states that the parent can be held directly liable under CERCLA provided that it exercises sufficient control over the subsidiary.[230]

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227 *NEPACCO I*, 579 F. Supp. at 848-49 (citing Apex Oil Co. v. United States, 530 F.2d 1291, 1293 (8th Cir. 1976)).

228 Some courts analyze a parent corporation's liability for a subsidiary's tort in terms of whether the subsidiary was formed as a sham. *See, e.g.*, Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990) ("Veil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate a fraud or avoid personal liability."), *cert. denied*, 111 S. Ct. 1017 (1991). However, in most cases, the key factor in determining whether to pierce the corporate veil and hold the parent liable is the level of control the parent exercised over the subsidiary. *See supra* notes 203-08 and accompanying text (discussing "piercing of corporate veil").

229 *See infra* notes 231-54 and accompanying text (discussing parent corporation liability under "veil-piercing" theory).

230 *See infra* notes 255-97 and accompanying text (discussing parent corporation liability under the language of CERCLA). *See also* Aronovsky & Fuller, *Liability of Parent Corporations for Hazardous Substance Releases under CERCLA*, 24 U.S.F. L. REV. 421, 464 (1990) ("The control/knowledge standard for direct liability should supplement the equitable doctrine of piercing the corporate veil . . . ."); Kezsbom, Satula & Goldman, *"Successor" and "Parent" Liability for Superfund Clean up Costs: The Evolving State of the Law*, 10 VA. ENVTL. L. REV. 45, 74 (1990) ("As in most cases, it should be expected that the specific conduct of the parties including, in particular, their waste disposal practices and attitude toward compliance, the extent of the parent's actual involve-

A careful reading of the case law discloses that, regardless of whether corporate law doctrine or statutory liability standards are employed, the results are the same. The courts have not found parent corporations liable for the CERCLA violations of their subsidiaries merely by virtue of their ownership of stock. In all cases in which a parent corporation was held liable for its subsidiary's violations, regardless of the theory employed, the parent corporation actively participated in the events leading to the violation.

1. Piercing the Corporate Veil.—Courts generally recognize parent and subsidiary corporations as separate legal entities, even where the parent is the sole owner of the subsidiary.[231] Yet, the courts will pierce the corporate veil of the subsidiary to hold the parent liable for the actions of the subsidiary if the subsidiary was formed to perpetrate a fraud or if the parent is found to have dominated the subsidiary.[232] Parent corporations are not held strictly liable for corporate acts simply because they own shares of stock in the subsidiary. On the contrary, their liability generally accrues only where they actively control or dominate the offending subsidiary. Under those circumstances, traditional corporate law doctrine makes both parent and subsidiary liable for the subsidiary's wrongdoing. Factors used to determine domination include stock ownership (although 100 percent ownership is not conclusive), identity of officers and directors, financing of the corporation, responsibility for day-to-day

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ment in the affairs of the subsidiary, and the ability of the subsidiary to make independent decisions will remain factors that will impact the court's actual decision."); Note, *Piercing the Corporate Veil Under CERCLA: To Control or Not to Control - Which is the Answer?*, 59 CIN. L. REV. 975, 1000 (1991) ("a court evaluation should include something more than just looking at normal relationships between a parent and its subsidiary" before imposing liability on parent corporations for CERCLA violations of the subsidiary); Note, *The Corporate Entity: Is There Life After CERCLA?*, 7 COOLEY L. REV. 463, 487 (1990) (issue in cases of parent corporation liability is one of control); Note, *To Pierce or Not to Pierce?* When *is the Question: Developing A Federal Rule of Decision for Piercing the Corporate Veil Under CERCLA*, 68 WASH. U.L.Q. 733, 751 (1990) ("For clarity Congress should alter the statute's owner/operator language to include shareholders who participate in the management of a facility's operations.") (citations omitted). *Cf.* Dent, *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151, 160 (1991) ("The kind of participation in a CERCLA violation necessary to establish direct liability may differ little from the kind of involvment in the subsidiary's affairs necessary to pierce the veil."); Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)*, 52 OHIO ST. L.J. 133, 139-40 (1991) (discussing the "pervasive control" test for piercing the corporate veil in the CERCLA context).

231 United States v. Jon-T Chems., Inc., 768 F.2d 686, 691 (5th Cir. 1985) ("one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate veil"), *cert. denied*, 475 U.S. 1011 (1986); 1 W. FLETCHER, *supra* note 17, § 25, at 513 (notwithstanding the relationship between a parent and a subsidiary, "each is deemed to have an independent existence").

232 For example, in McKibben v. Mohawk Oil Co., 667 P.2d 1223 (Alaska 1983), the Alaska Supreme Court pierced the corporate veil to hold a parent corporation liable for the actions of its subsidiary. The court quoted from its earlier decision in Jackson v. General Elec. Co., 514 P.2d 1170, 1173 (Alaska 1973), where it adopted the following factors from POWELL, PARENT AND SUB-

operations, arrangements for payment of salaries and expenses, and the

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SIDIARY CORPORATIONS § 6, at 9 (1931), to support disregard of the corporate form in parent-subsidiary relationships:

(a) The parent corporation owns all or most of the capital stock of the subsidiary.
(b) The parent and subsidiary corporations have common directors or officers.
(c) The parent corporation finances the subsidiary.
(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
(e) The subsidiary has grossly inadequate capital.
(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.
(i) The parent corporation uses the property of the subsidiary as its own.
(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.
(k) The formal legal requirements of the subsidiary are not observed.

McKibben, 667 P.2d at 1230 (quoting *Jackson*, 514 P.2d at 1173). The *McKibben* court also stated that "[i]t is not necessary that all eleven of these factors be found in order to pierce the corporate veil." *Id.* (citing *Jackson*, 514 P.2d at 1173).

The court in Amfac Foods, Inc. v. International Sys. & Controls Corp., 52 Or. App. 907, 630 P.2d 868 (1981), *rev'd*, 294 Or. 94, 654 P.2d 1092 (1982), also described piercing the corporate veil in the parent-subsidiary context:

> There are, however, at least two situations where the piercing of the corporate veil is allowed and a parent company may be held liable: 1) where the parent company perpetrates a fraud on or causes a severe injustice to another party through control of its subsidiary (the so-called "alter-ego theory"); and 2) where the parent directs the business activities of the subsidiary to such a degree that the latter becomes the agent of the parent.

52 Or. App. at 914, 630 P.2d at 874 (citations omitted); *see also* United States v. Jon-T Chems., Inc., 768 F.2d 686 (5th Cir. 1985) (parent liable for farm subsidies fraudulently obtained by subsidiary), *cert. denied*, 475 U.S. 1011 (1986); Milgo Elec. Corp. v. United Business Communications, Inc., 623 F.2d 645 (10th Cir.) (parent liable for patent infringement by subsidiary), *cert. denied*, 449 U.S. 1066 (1980); Sabine Towing & Transp. Co. v. Merit Ventures, Inc., 575 F. Supp. 1442 (E.D. Tex. 1983) (parent liable for subsidiary's breach of a maritime agreement); Anderson v. Kennebec River Pulp & Paper Co., 433 A.2d 752 (Me. 1981) (veil pierced to allow attachment of parent corporation's property); Herman v. Mobile Homes Corp., 317 Mich. 233, 26 N.W.2d 757 (1947) (parent liable for subsidiary's breach of contract). In some states, the corporate veil may be pierced without any finding of actual fraud or culpable intent. In Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974), the court stated: "Alabama emphatically rejects actual fraud as a necessary predicate for disregarding the corporate form, holding instead that courts may decline to recognize corporate existence whenever recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes and [would] produce injustices or inequitable consequences.' " *Id.* at 1106 (citation omitted) (bracket in *Krivo*); Phoenix Canada Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1084 (D. Del. 1987) (discussing agency theory of parent liability; determining factor is level of control a parent exercises over its subsidiary), *aff'd in part, rev'd in part*, 842 F.2d 1466 (3d Cir.), *cert. denied*, 468 U.S. 908 (1988). *See also* 1 W. FLETCHER, *supra* note 17, § 41.30:

> In jurisdictions where neither fraud nor an intent to defraud need be shown as a prerequisite to disregarding the corporate entity, it is sufficient if recognizing the separate corporate existence would bring about an inequitable result; a strong showing by the plaintiff that the shareholders and the corporation are indistinguishable may also be required.

Id. at 665 (footnotes omitted).

In addition to state-made rules, federal courts may apply federal common law in certain circumstances. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979) ("This Court has con-

origin of the subsidiary's business and assets.[233] No one factor is determinative. Rather, the court must examine the overall relationship between the parent and the subsidiary.[234]

The district court in *United States v. Nicolet, Inc.*[235] addressed the question of whether the corporate veil could be pierced and a parent corporation held liable for response costs incurred as a result of the activities of its subsidiary. In *Nicolet*, the government attempted to recover $2.5 million in response costs to clean up a " 'mountain' of asbestos containing material."[236] T&N plc (T&N) was a majority stockholder (60 percent) in Keasbey & Mattison Company (Keasbey) from 1934 to 1938 and the sole stockholder from 1938 to 1967, when Keasbey was dissolved. Keasbey owned and operated a facility and two adjoining disposal sites from 1873 to 1962. Nicolet, Inc. bought the facility and sites in 1962 and was the owner at the time of the lawsuit. The government brought suit against Nicolet, which in turn filed a third-party suit against T&N.[237]

In denying T&N's motion for summary judgment,[238] the court attempted to clarify any potential confusion regarding which of the several theories of liability asserted by the government it was applying against the parent corporation.[239] In its discussion of the government's veil-piercing theory, the court created the following federal rule of decision for determining when a corporate veil can be pierced in a CERCLA case:

> Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may

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sistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs."); Anderson v. Abbott, 321 U.S. 349, 365 (1944) ("The policy underlying a federal statute may not be defeated by . . . an assertion of state power. . . . [N]o State may endow its corporate creatures with the power to place themselves above the Congress of the United States . . . .") (citations omitted); United States v. Pisani, 646 F.2d 83, 85-89 (3d Cir. 1981) (applying *Kimbell* to formulate a federal rule of decision to pierce the corporate veil and recover Medicare overpayments).

233 *Phoenix*, 658 F. Supp. at 1084-85 (noting factors to be applied to agency theory); Fish v. East, 114 F.2d 177, 191 (10th Cir. 1940) (noting factors to be applied to "instrumentality" (i.e., alter ego) theory). *See also* 1 W. FLETCHER, *supra* note 17, § 43, at 730 (setting forth a "laundry list" of factors to be considered).

234 *Phoenix*, 658 F. Supp. at 1084-85. *See also* 1 W. FLETCHER, *supra* note 17, § 43, at 730 (noting "no one talismanic fact will justify with impunity piercing the corporate veil").

235 712 F. Supp. 1193 (E.D. Pa. 1989).

236 *Id.* at 1196.

237 *Id.* at 1195-96.

238 *Id.* at 1200. T&N moved to dismiss the complaint. The court, however, construed the motion as a motion for summary judgment because matters outside of the pleadings were presented and considered by the court. *Id.* at 1199.

239 *Id.* at 1200.

be disregarded.[240]

The complaint had alleged that the subsidiary was the former owner and operator of the site, that the parent was first the majority, and then the sole stockholder, that the parent actively participated in the management of the operations at the site while asbestos was being disposed of, that the parent was familiar with the subsidiary's disposal practices, could control disposal and its resultant releases, and could have abated damages, and that the parent benefitted from the subsidiary's actions.[241] These allegations, if proven, would imply that the parent could be held liable for the CERCLA violations of the subsidiary. No extension of traditional corporate law doctrine would be necessary to reach such a result.

In 1987, the district court in *In re Acushnet River & New Bedford Harbor*[242] addressed the question of whether the court should pierce the corporate veil of Aerovox, Inc., a wholly-owned subsidiary of RTE Corporation (RTE), to subject RTE to service of process in Massachusetts as the alter ego of Aerovox. The parent corporation, RTE, did not otherwise have the minimum contacts necessary to justify the jurisdiction of the forum state.

In analyzing the jurisdiction issue, the court expressly rejected the government's argument that mere ownership of stock, even ownership of 100 percent of the stock, is, in and of itself, sufficient to bring the parent corporation within the ambit of CERCLA liability for violations of its subsidiary.[243] The court went on to find that imposition of "CERCLA liability on parent corporations for no reason other than the fact that they did not ignore the performance of their subsidiary" would work such a fundamental change in the law, it could come only from Congress, not the courts.[244]

The *Acushnet* court refused to pierce the subsidiary's corporate veil to subject the parent to jurisdiction in Massachusetts. The court looked in vain for "suggestions of pervasive control by RTE over Aerovox's hazardous waste disposal policies, or for an indication that RTE treat[ed] Aerovox as a mere instrumentality with regard to the hazardous waste of RTE."[245] One of RTE's primary purposes "in forming the subsidiary to purchase the assets of Aerovox Industries was to avoid liability for previ-

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240 *Id.* at 1202.

241 *Id.* at 1196-97.

242 675 F. Supp. 22 (D. Mass. 1987).

243 Moreover, the court stated that:

> [u]nder traditional principles, a corporation which wants to put a waste site or past generation site to productive use can do so by creating a well capitalized, nonfraudulent, separate corporate subsidiary. The ability to work through the subsidiary justifies the initial investment, which will delimit the extent of the risk. Under the sovereigns' proposed rule, a corporation which wanted to reclaim and make productive a waste site could not do so without risking all its corporate assets if it appeared to be more than passively interested in the performance of its subsidiary.

Id. at 32.

244 *Id.*

245 *Id.* at 33-34.

ous PCB contamination."[246] The court found this purpose, without more, insufficient to support a piercing of the corporate veil.[247]

In 1990, the Fifth Circuit became the first appellate court to address the issue of the liability of a parent corporation for the CERCLA violations of its subsidiary. In *Joslyn Manufacturing Co. v. T.L. James & Co.*,[248] the court held that a parent corporation could not be held liable

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246 *Id.* at 34.

247 *Id.* The court held that there was nothing wrong with avoiding liability through the corporate form. To invoke liability, there must also be "evidence of undercapitalization, pervasive control, fraud," or other criteria, such as intermingling of property or failure to observe corporate formalities. *Id.* The court listed the following factors as relevant to the inquiry of whether the corporate veil should be pierced:

> These factors include, in approximate descending order of importance, (1) inadequate capitalization in light of the purposes for which the corporation was organized, (2) extensive or pervasive control by the shareholder or shareholders, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) nonfunctioning officers or directors.

Id. at 33. The court found that although the parent corporation influenced the philosophy and management of its subsidiary, the subsidiary was not so extensively controlled so as to be "deemed its agent for purposes of acquiring personal jurisdiction." *Id.* at 35.

Other district courts have similarly examined evidence of the parent corporation's control over the subsidiary in determining whether jurisdiction could be exercised over the parent in a state where, but for the location of the subsidiary, the court would not otherwise have jurisdiction. In City of New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986), the court determined that it could exercise jurisdiction over the parent corporation of defunct companies accused of CERCLA violations. *Id.* at 620-21. The *Exxon* court cited four factors "to consider in deciding whether the activities of a subsidiary should be imputed to a parent for the purpose of establishing jurisdiction . . . ." *Id.* at 620. The factors are: (1) "common ownership;" (2) "financial dependency of the subsidiary on the parent;" (3) "interference by the parent in the selection and assignment of the subsidiary's personnel and failure to observe corporate formalities;" and (4) "the degree of control exercised over the marketing and operational policies of the subsidiary." *Id.* (citing Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117 (2d Cir. 1984)).

In Wehner v. Syntex Agribusiness, Inc., 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,346 (E.D. Mo. 1985), the plaintiff similarly contended that the court had jurisdiction over the parent corporation because the subsidiary was subject to the court's jurisdiction. *Id.* at 20,347. The court stated that "[t]here is a presumption of corporate separateness that exists unless . . . the parent so controls the activities of the subsidiary that the latter is only a shell for the former." *Id.* In upholding the presumption of corporate separateness, the court noted that the subsidiary "makes its own decisions regarding its business goals, . . . the product it manufactures[,] . . . raises its own capital, [and] maintains and keeps separate books of account and financial records." *Id.* The activities of the parent in approving the subsidiary's executive officers, guaranteeing loans incurred by the subsidiary, and permitting the subsidiary's employees to participate in its savings plans were insufficient to justify disregard of the subsidiary's separate corporate form. *Id. See also* Adams v. Republic Steel Corp., 621 F. Supp. 370, 374-75 (W.D. Tenn. 1985) ("Piercing of the corporate veil in order to find diversity jurisdiction should be limited to cases in which the 'corporate separation is fictitious, or, . . . the parent has held the subsidiary out as its agent, or . . . the parent has exercised an undue degree of control over the subsidiary.' ") (citation omitted). *Cf.* Cain, *Shareholder Liability Under Superfund: Corporate Veil or Vale of Tears?*, 17 J. OF LEGIS. 1, 10 (1990) (noting that under certain approaches "the standard for liability (no piercing) is lower than the standard for jurisdiction, where piercing is required.").

248 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991). The *Joslyn* court stated that the Second Circuit had extended CERCLA liability to parent corporations in New York v. Shore

under CERCLA absent circumstances warranting piercing of the corporate veil. The court reasoned that CERCLA itself does not include parent corporations in the definition of owner or operator and that the legislative history does not reveal that Congress intended such an exception to the general corporate rule of limited liability.[249]

The Fifth Circuit held that, pursuant to its traditional corporate law test for piercing the corporate veil, the parent corporation did not control its subsidiary and therefore should not be held liable for its subsidiary's CERCLA violations.[250] In reaching this result, the court focused on a rather narrow definition of veil piercing, stating that "[v]eil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate a fraud or avoid personal liability."[251] In the absence of " 'total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation,' "[252] piercing is inappropriate.

The court then held that the facts before it indicated that the parent and subsidiary had operated independently of each other. The operations of the parent and subsidiary were completely separate. The subsidiary kept its own books and records, held frequent shareholders' and directors' meetings, owned its own property, and kept its daily operations separate from that of the parent.[253] The subsidiary was not merely a bogus shell for the parent, nor was the parent in control of the subsidiary.

Realty Corp., 759 F.2d 1032 (2d Cir. 1985). *See Joslyn*, 893 F.2d at 82. *Shore Realty* did not involve a parent corporation. *See supra* notes 140-43 and accompanying text (discussing facts of *Shore Realty*). Neither did the other case cited by the *Joslyn* court—*Mottolo*, 695 F. Supp. 615 (D.N.H. 1988) (discussed *supra* notes 211-16 and accompanying text).

249 893 F.2d at 82-83.

250 *Id.* at 83. The court noted that the following factors, which it had set out in an earlier decision, were the appropriate ones to consider in evaluating the issue of "control" in a parent/subsidiary relationship:

(1) the parent and the subsidiary have common stock ownership;
(2) the parent and the subsidiary have common directors or officers;
(3) the parent and the subsidiary have common business departments;
(4) the parent and the subsidiary file consolidated financial statements and tax returns;
(5) the parent finances the subsidiary;
(6) the parent caused the incorporation of the subsidiary;
(7) the subsidiary operates with grossly inadequate capital;
(8) the parent pays the salaries and other expenses of the subsidiary;
(9) the subsidiary receives no business except that given to it by the parent;
(10) the parent uses the subsidiary's property as its own;
(11) the daily operations of the two corporations are not kept separate; and
(12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.

United States v. Jon-T Chems., Inc., 768 F.2d 686, 691-92 (5th Cir. 1985) (cited with approval in *Joslyn*, 893 F.2d at 83), *cert. denied*, 475 U.S. 1011 (1986).

251 893 F.2d at 83.

252 *Id.* at 83-84 (quoting Krivo Indus. Supply Co. v. National Distillers & Chem. Co., 483 F.2d 1098, 1106 (5th Cir. 1973)).

253 *Id.* at 83.

Therefore, the parent was not held accountable for the acts of its subsidiary.[254]

2. Direct Statutory Liability.—Most concern has been expressed over a parent corporation's potential direct liability under CERCLA. Commentators fear that the actions of several courts in holding parent corporations directly liable under CERCLA for their subsidiaries' environmental violations is severely eroding the age-old premise of corporate law granting shareholders limited liability for corporate actions.[255] Yet, courts' imposition of direct liability under CERCLA is not as far-reaching as it might appear at first glance. In fact, this basis of liability is strikingly similar to the corporate law theory of veil piercing discussed above. Before a parent corporation will be held liable for a subsidiary's wrongdoing, it must be found to have exerted substantial control over the activities of the subsidiary that led to the CERCLA violation. Mere ownership of stock has not been equated with "ownership" of the offending facility as defined by CERCLA.[256]

Courts have considered a number of grounds for imposing direct statutory liability upon parent corporations. *Nicolet*,[257] for example, raised three alternative grounds of direct liability, two of which are relevant to this inquiry.[258] The first of these theories was based upon the decisions of earlier courts that had held individual shareholders liable as owners or operators based upon their active participation in management.[259] Because both individuals and corporations are included within CERCLA's definition of "person,"[260] the *Nicolet* court could find "no basis, under CERCLA" for distinguishing between the bases of liability of individual and corporate shareholders.[261] Thus, the court concluded, "if an individual stockholder can be liable under CERCLA for his corporation's disposal, a corporation which holds stock in another corporation

254 *Id.* at 84.

255 *See, e.g.*, O'Hara, *supra* note 7, at 2 (CERCLA "has brought about a dramatic change in the common law rule of limited shareholder liability."); Comment, *Consequences, supra* note 7, at 677 ("In the past few years, environmental legislation has eroded a traditional incentive for incorporation—limited liability."); Comment, *Threat, supra* note 5, at 598 (concluding that CERCLA ignores traditional rules limiting shareholder liability).

256 *Cf.* State Dep't of Envtl. Protection v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983) (the court's analysis of direct liability imposed upon the parent corporation for its subsidiary's violation of the New Jersey Spill Compensation and Control Act, N.J. Stat. Ann. §§ 58:10-23.11 to 10-23.11z (West 1982 & Supp. 1991), is strikingly similar to traditional agency analysis).

257 712 F. Supp. 1193 (E.D. Pa. 1989) (discussed *supra* notes 235-41 and accompanying text).

258 The third theory dealt with the liability as a former owner or operator of a person who held indicia of ownership to protect a security interest and participated in management in accordance with section 101(20). *See* 42 U.S.C. § 9601(20) (1988). This provision essentially deals with the liability of mortgagees, a topic beyond the scope of this Article. *See Nicolet*, 712 F. Supp. at 1204-05.

259 *See* 712 F. Supp. at 1203 (citations omitted); *see supra* notes 209-27 and accompanying text (liability of individual shareholders under CERCLA).

260 42 U.S.C. § 9601(21) (1988) (*see supra* note 47 for text of this section).

261 712 F. Supp. at 1203.

(e.g., a subsidiary) and actively participates in its management can be held liable for cleanup costs incurred as a result of that corporation's disposal."[262]

This statement, taken at face value, could imply an erosion of traditional corporate law doctrine, for a parent corporation necessarily exercises some control over a subsidiary's management and operations. As indicated above, however, no individual shareholder has ever been held personally liable based solely upon his or her status as a shareholder; rather, some involvement in the corporation's activities and hazardous waste practices is required.[263] The same should be true of parent corporations. In fact, if the government's allegations in *Nicolet* were true, the parent not only actively participated in management generally, but actively participated in operations at the site while asbestos was being disposed of, was familiar with the subsidiary's disposal practices, and could control disposal.[264]

The second theory recognized by the *Nicolet* court appears to be based upon the control theory applicable to corporate officers.[265] The court agreed with the government's argument that a parent corporation could be held directly liable as a former owner or operator based upon its familiarity with the subsidiary's waste disposal practices, its capacity to control the disposal and subsequent releases, its ability to abate damages, and its position to benefit from the subsidiary's waste disposal practices.[266] Mere control over the general operations of the subsidiary does not appear to satisfy the control test.

In ruling that both theories survived defendants' motion to dismiss, the *Nicolet* court did not find it necessary to articulate what it perceived the difference between the two theories to be. Other courts that have addressed this issue have provided clearer analysis.

For example, in 1986, the district court in *Idaho v. Bunker Hill Co.*[267] held Bunker Hill Company's parent corporation, Gulf Resources & Chemical Corporation (Gulf), liable under CERCLA as an owner or operator of a hazardous waste site. In determining whether CERCLA imposed direct liability on the parent as an owner or operator of the Bunker Hill facility, the court found the dispositive factor to be the parent's control over the subsidiary. The court adopted the same definition of "owner or operator" used by the *NEPACCO I* court in the individual

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262 *Id.*

263 *See supra* notes 209-27 and accompanying text (discussing liability of individual shareholders under CERCLA).

264 712 F. Supp. at 1202.

265 *See supra* notes 133-80 and accompanying text (discussing the control theory).

266 712 F. Supp. at 1203-04. These are, of course, the same factors the court considered relevant to the veil-piercing issue. *See supra* notes 240-41 and accompanying text (discussing the *Nicolet* court's analysis of veil piercing).

267 635 F. Supp. 665 (D. Idaho), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

shareholder context: "The statute literally reads that a person who owns interest [sic] in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste."[268] The *Bunker Hill* court found that Gulf was:

> intimately familiar with hazardous waste disposal and releases at the Bunker Hill facility; had the capacity to control such disposal and releases; and had the capacity, if not total reserved authority, to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and releases of hazardous wastes at the facility.[269]

Bunker Hill was not permitted to spend more than $500 on pollution matters without Gulf's approval and was undercapitalized with only $1,100.[270] Moreover, any capital expenditure by Bunker Hill required Gulf's approval, and any management decision or transaction by Bunker Hill could be overridden by Gulf.[271]

The court held that Gulf fell within the scope of CERCLA liability because the evidence demonstrated that Gulf possessed the control and authority of an owner or operator. The court added a note of caution, stating: "The court is mindful that in adopting the above test, care must be taken so that 'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator."[272] The court, however, did not distinguish the activities measured in its test from those that would constitute "normal" corporate shareholder involvement.

A subsequent case, *Colorado v. Idarado Mining Co.*,[273] also employed the *NEPACCO I* definition of "owner or operator," but included additional, more specific factors in its analysis. Newmont Mining Corporation (Newmont) was the major shareholder of Idarado Mining Company (Idarado), the company that owned and operated the Idarado Mine. Newmont was one of the original founders of Idarado and had held more than eighty percent of the company's stock for twenty-five years. The majority of Idarado's officers were also officers of Newmont. Specifically, one of Idarado's vice-presidents was also a Newmont vice-president, and his salary was paid entirely by Newmont. Idarado paid Newmont a fee in exchange for consultation services and management advice on a wide range of management issues, including employee policies applied to Idarado and Newmont employees. Newmont also provided advice to Idarado on environmental issues and directly participated in attempts to correct the mine's environmental problems. Newmont commissioned engineering reports on the mine's continuing

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268 *NEPACCO I*, 579 F. Supp. at 848.

269 635 F. Supp. at 672-73.

270 *Id.* at 670.

271 *Id.* at 672.

272 *Id.*

273 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578 (D. Colo. 1987), *rev'd on other grounds*, 916 F.2d 1486 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991).

pollution problems and used another wholly-owned subsidiary to provide Idarado with management personnel and other employees.[274]

In applying the *NEPACCO I* test for "owner or operator,"[275] the court considered these factors:

> the percentage of the subsidiary's stock owned by the parent, whether and to what extent the parent controls the subsidiary's marketing, whether the parent has or exercises authority to execute contracts on behalf of the subsidiary and whether the parent controls selection, supervision, transfer and similar aspects of employment for those normally employed by the subsidiary.[276]

The court noted that Newmont was aware of the environmental problems caused by the mine as early as 1944, and found that Newmont's "knowledge of and continuing involvement in efforts to address"[277] the mine's hazardous pollution problem justified categorizing Newmont as an owner or operator of the site. Newmont negotiated contracts for Idarado, and "exercised pervasive control"[278] over the mine's operations. The court concluded that Newmont was "so intimately involved in the operation of Idarado"[279] that imposing liability upon Newmont as an owner or operator of the mine under CERCLA was warranted.

At first glance, the most troubling case on this issue is the 1988 opinion of the district court in *Vermont v. Staco, Inc.*,[280] discussed in Part II. The *Staco* court did not reveal whether the parent corporation's liability was based merely upon the ownership of stock or upon stock ownership coupled with extensive participation in the management of the subsidiary. In finding the subsidiary, Staco, the parent, Chase, and a second subsidiary, Keeper Corporation,[281] within the ambit of liability imposed by CERCLA, the district court stated that section 107(a)(1) " 'unequivocally imposes strict liability on the current owners of a facility from which there is a release, or threat of release, without regard to causation.' "[282] The district court did not provide any facts regarding the extent of Chase's involvement with Staco's operations. Moreover,

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274 *Id.* at 20,578-79.

275 *See supra* notes 97-100 and accompanying text (discussing *NEPACCO I* test for "owner or operator" status).

276 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20,578. For reasons that are unclear, the court cited United States v. Conservation Chem. Co., 628 F. Supp. 391, 416-20 (W.D. Mo. 1986), in support of this list of factors. *Conservation Chemical* did not address the liability of parent corporations. *See supra* notes 122-27 and accompanying text (discussing *Conservation Chemical*).

277 18 Envtl. L. Rep. (Envtl. L. Inst.) at 20,578-79.

278 *Id.* at 20,579.

279 *Id.*

280 684 F. Supp. 822 (D. Vt. 1988), *vacated in part*, No. 86-190 (D. Vt. Apr. 20, 1989) (1989 U.S. Dist. LEXIS 17341) (dismissing plaintiffs' claims under the Federal Water Pollution Control Act and RCRA for lack of jurisdiction).

281 Keeper Corporation owned the real estate on which the release occurred and was a wholly-owned subsidiary of Chase. *Id.* at 831.

282 *Id.* (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985)).

adding to the confusion, the court referred to the offending facility as the "Staco/Chase facility."[283] It appears, therefore, that the parent's liability may have been premised on actual management of the facility rather than mere stock ownership.

This conclusion is further buttressed by the involvement of the executive officers, I. Walter and Robert Munzer, in the operation of Staco. These two individuals did not sit idly by; rather, "as executive officers of Chase, [they] participated in the control and management of Staco."[284] A third individual defendant testified that the three of them "participated in the management and control of Staco operations during the time in suit."[285] Thus, although not clearly stated by the court, it seems reasonable to conclude that Chase's liability was premised on its extensive participation through its officers in the management of Staco.[286] Imposition of liability, in this context, would be in accordance with traditional corporate law doctrine[287] as it would be based on domination of the subsidiary and not mere stock ownership.[288]

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283 *Id.*

284 *Id.*

285 *Id.* In his deposition, Sirkus stated: "We, the three of us, make decisions that relate to the managing businesses and the marketing businesses and the selling businesses and all the overall operations of the [Staco/Chase] company." *Id.* at n.5 (quoting Deposition of Robert Sirkus, June 11, 1984, at 12) (brackets in court's opinion).

286 *See, e.g.*, United States v. Jon-T Chems., Inc., 768 F.2d 686, 691-92 (5th Cir. 1985) (discussing factors used in determining when a subsidiary is the alter ego of its parent), *cert. denied*, 475 U.S. 1011 (1986). *See supra* note 250 for a discussion of these factors.

287 The district court's ruling regarding RCRA liability is similarly vague. The court stated that "Chase Instruments Corporation, the parent in the corporate structure, had authority to control Staco's operations." 684 F. Supp. at 836. Again, it is not clear whether the parent's liability under RCRA was premised solely upon Chase's stock ownership or upon the control exercised by Chase through the Munzers. In discussing RCRA, the court referred to the facility as the "Staco/Chase plant complex." *Id.* at 837. Furthermore, corporate defendant Chase Instrument Sales Corporation (Chase Sales) was not held liable. Chase Sales was "not shown to be a responsible person who has contributed to the handling or disposal of hazardous waste under the Act." *Id.* at 836. It had not been held liable as an "owner or operator" under CERCLA either. *Id.* at 834. The court did not discuss why this company, which was described merely as a "member[] of a family commercial enterprise that included the operation and ownership of the Staco site," was not held liable. *Id.* at 825. The plaintiff's claim under RCRA was later dismissed for lack of jurisdiction in Vermont v. Staco, No. 86-190 (D. Vt. Apr. 20, 1989) (1989 U.S. Dist. LEXIS 17341).

288 *See, e.g.*, United States v. McGraw-Edison Co., 718 F. Supp. 154 (W.D.N.Y. 1989), where the United States contended that the defendant, Case & Sons Cutlery Co. (Case) was a potentially responsible party under CERCLA because it held 49% of the stock of Alcas Cutlery Corporation (Alcas). The EPA had identified the Alcas facility as a source of trichloroethylene contamination. Case moved for summary judgment on the ground that it was merely a minority shareholder of Alcas at the time of the alleged contamination and therefore could not be an owner or operator of the facility as a matter of law. *Id.* at 157. In response, the government argued that "Case may have exercised a sufficient degree of control over Alcas' operations to allow the court to find Case responsible under" section 107(a)(2). *Id.* The court denied the motion for summary judgment because "several issues of material fact as to the actual extent of Case's involvement in the management and operations of Alcas at the time of the alleged disposal" remained. *Id.*

In denying defendant's motion for summary judgment in United States v. Allied Chem. Corp.,

In *United States v. Kayser-Roth Corp.*,[289] the First Circuit more clearly addressed "the issue of whether a parent corporation may be held directly liable as an operator"[290] under CERCLA. Kayser-Roth owned 100 percent of the shares of Stamina Mills, Inc., which operated a textile plant where a trichloroethylene (TCE) spill occurred. The court held that Kayser-Roth was liable for response costs as an operator of the offending plant.[291] In distinguishing the facts of this case from the facts of *Joslyn*, the court noted that the *Joslyn* court was concerned with whether stock ownership of the offending corporation would require a finding that the parent corporation was an owner, rather than an operator, for purposes of CERCLA.[292] The parent corporation in *Joslyn*, unlike the parent corporation in *Kayser-Roth*, did not participate in the activities of its subsidiary and thus could not have been found to have operated the subsidiary's facility.[293]

In contrast, the *Kayser-Roth* court framed the issue in terms of direct liability of the parent corporation for its own activities.[294] Kayser-Roth was found to be an operator of the facility because it "exerted practical total influence and control over Stamina Mills' operations."[295]

Nos. 83-5896 & 83-5898 (N.D. Cal. June 27, 1990) (1990 U.S. Dist. LEXIS 11695), the court noted that the courts have applied two different theories "for imposing CERCLA liability on parent corporations and individual shareholders:" (1) the doctrine of piercing the corporate veil; and (2) direct liability under CERCLA. *Id.* The court did not decide which theory was applicable, noting instead that material factual issues existed regarding the parent's knowledge and control of the hazardous waste practices of the subsidiary under both theories.

289 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

290 *Id.* at 26.

291 *Id.* at 27.

292 *Id.*

293 *See supra* notes 248-54 and accompanying text (discussing *Joslyn*).

294 910 F.2d at 27.

295 *Id.* (quoting United States v. Kayser-Roth Corp., 724 F. Supp. 15, 18 (D.R.I. 1989)). The facts supporting such control included: (1) its total monetary control including collection of accounts payable; (2) its restriction on Stamina Mills' financial budget; (3) its directive that subsidiary-governmental contact, including environmental matters, be funnelled directly through Kayser-Roth; (4) its requirement that Stamina Mills' leasing, buying, or selling of real estate first be approved by Kayser-Roth; (5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5,000; and (6) its placement of Kayser-Roth personnel in almost all of Stamina Mills' director and officer positions, as a means of ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out. *Id.*

The circuit court's opinion in *Kayser-Roth* contains a troublesome footnote. The court stated:

> Although indicia of ability to control decisions about hazardous waste are indicative of the type of control necessary to hold a parent corporation liable as an operator, we do not think the presence of such indicia is essential, assuming there are other indicia of pervasive control necessary to prove operator status.

Id. at 27 n.8. This statement is merely dicta, however, because Kayser-Roth did in fact control decisions regarding hazardous waste. The court needlessly broadened the scope of its holding and failed to provide any real guidance as to what the "other indicia of pervasive control necessary to prove operator status" are.

The *Kayser-Roth* test was recently followed by Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345 (D.N.J. 1991), where the court similarly held that the parent corporation would be liable for the

Moreover, Kayser-Roth's "control included environmental matters including the approval of the installation of the cleaning system that used the TCE."[296] The court was careful to note that it is "not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary."[297] Rather, at a minimum, the parent must be actively involved in the subsidiary's activities.

3. Veil Piercing v. Direct Statutory Liability: Reconciling Joslyn *and* Kayser-Roth.—Although there appears to be a conflict between the Fifth Circuit's opinion in *Joslyn* and the First Circuit's opinion in *Kayser-Roth*, the decisions can be reconciled. In neither case was the appellate court willing to impose liability based simply upon stock ownership. In *Joslyn*, the court analyzed the problem using the corporate law theory of veil piercing and found that because the parent and subsidiary were two distinct corporate entities, the parent could not be held liable.[298] The parent was not actively involved in the activities of its subsidiary. The companies at all times operated as separate entities and the parent was in no way involved with the environmental offense. Under such circumstances, corporate law veil-piercing theory would prevent a finding of liability.[299]

In contrast, Kayser-Roth was intimately involved with the affairs of its subsidiary.[300] Although the *Kayser-Roth* court did not couch its findings in terms of veil-piercing analysis, if it had, it likely would have reached the same conclusion. In order to pierce the corporate veil, a court need not find that the corporation was formed for an unlawful purpose. Rather, it should determine whether the affairs of the two corporations are so intertwined that the parent is virtually in control of the subsidiary. If such a finding is made, the court can reasonably hold the parent liable for activities of the subsidiary because the parent is in fact responsible for those activities.

Similarly, the *Joslyn* court could have reached its result using the

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activities of the subsidiary "if it exercised control over or actively participated in the subsidiary's activities." *Id.* at 354. *Mobay* involved the potential liability of a parent corporation for the cleanup of waste generated by its subsidiary's manufacture of organic pigments for paint. Plaintiff's motion for summary judgment was denied because of remaining material issues of fact regarding the extent of the parent's active participation in the management and control of the subsidiary.

Several other district courts have also noted the applicability of the control test in determining whether a parent could be held liable for environmental hazards created by its subsidiary. *See, e.g.*, United States v. Allied Chem. Corp., Nos. 83-5896 & 83-5898 (N.D. Cal. June 27, 1990) (1990 U.S. Dist. LEXIS 11695); United States v. McGraw-Edison Co., 718 F. Supp. 154 (W.D.N.Y. 1989); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384 (N.D. Ill. 1988); City of New York v. Exxon Corp., 633 F. Supp. 609 (S.D.N.Y. 1986).

296 *Kayser-Roth*, 910 F.2d at 27 (footnote omitted).

297 *Id.*

298 *See supra* notes 250-54 and accompanying text.

299 *See supra* notes 231-34 and accompanying text.

300 *Kayser-Roth*, 910 F.2d at 27.

direct statutory liability analysis of *Kayser-Roth*. The focus of direct statutory liability, according to *Kayser-Roth*, is the parent's control over the operations of the subsidiary. This element of control was missing in *Joslyn*. Thus, the parent corporation in *Joslyn* would not have been liable for the CERCLA violations of its subsidiary even under the direct statutory liability rationale of *Kayser-Roth*.

As these cases demonstrate, the liability of a parent corporation is the same regardless of whether liability is premised on traditional corporate law or direct statutory liability under CERCLA. Liability is not grounded in the parent's status, but rather in its direct control over the subsidiary and the wrongdoing. In cases in which parent corporations have been held liable under CERCLA, the parents have exercised control over the activities leading to the CERCLA violations. Analysis of the case law simply does not support a conclusion that the courts are eroding traditional corporate liability rules regarding parent corporations in the CERCLA context.

IV. Successor Corporation Liability

A. Traditional Doctrine

Common law principles of successor corporation liability were developed to determine the extent of a successor's liability for the debts and obligations of its predecessor. The general rule, applicable in contract or tort, is that in the absence of a statute, if one corporation consolidates or merges with another, the resulting corporation is liable for all debts and liabilities of the predecessor, unless specific provisions have been made for avoiding such responsibility.[301]

Generally, the mere purchase or acquisition of another company's assets does not render the purchaser or acquirer liable for all debts and liabilities of the seller.[302] There are, however, at least six exceptions to this general rule. According to the four traditional exceptions, the corporation acquiring the assets of another may be liable for the obligations of the seller if: (1) the purchaser expressly or impliedly agreed to assume such obligations; (2) the transaction amounts to a consolidation or a merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape liability for such debts.[303]

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301 15 W. Fletcher, *supra* note 17, § 7117 (in case of consolidation, new corporation assumes debts and liabilities of old corporation); *id.* § 7121 (in case of merger, new corporation assumes debts and liabilities of old corporation).

302 *See id.* § 7122, at 231 ("The general rule, which is well settled, is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor.").

303 *Id.* (footnotes omitted). Commentators have debated the wisdom of applying the doctrine of successor liability in the merger and acquisition context to CERCLA cases. *See, e.g.*, Comment, *CERCLA Liability for Successor Corporations Revisited*, 41 Mercer L. Rev. 1027 (1990) (rejecting

The two modern exceptions also subject the acquiring corporation to liability where: (1) the purchaser continues the manufacture of the same product line of the selling corporation; or (2) the purchaser continues the enterprise of the seller.[304]

B. Successor Corporation Liability Under CERCLA

Although CERCLA holds past and present owners and operators of a vessel or facility[305] strictly liable for cleanup costs, it contains no express provision for successor corporation liability.[306] Conversely, there is no express exclusion for such liability. In light of CERCLA's broad definition of "facility" as any place where a hazardous substance comes to be located,[307] corporations that merge with existing owners or operators may be held liable for violations occurring or continuing after the merger or consolidation takes place.[308] Such a corporation may thus become an owner or operator of the facility, and strictly liable for cleanup costs.[309]

The more difficult question is whether the successor should be held liable for past CERCLA violations of the predecessor even if the successor does not acquire the offending facility or does not engage in the activities that led to the CERCLA violations. Several courts have determined

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the expansion of the product-line theory into the "continuation of the enterprise" doctrine and arguing that the express scheme of the CERCLA statute is sufficient to find such liability); Note, *EPA's Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78 (1986-87) (arguing that the EPA's policy of expanding corporate successor liability is "unjustified") [hereinafter Note, *EPA*]; Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding to An Uncertain Legal Standard*, 68 TEX. L. REV. 1237 (1990) (arguing that expansion of successor liability beyond traditional exceptions is undesirable).

304 *See infra* notes 386-409 and accompanying text (discussing product-line and modern continuation of enterprise theories).

305 *See* 42 U.S.C. § 9607(a)(1) and (2) (1988) (*see supra* note 42 for text of this section).

306 Successor corporation liability in environmental cases was first established in 1979 in Oner II, Inc. v. EPA, 597 F.2d 184 (9th Cir. 1974). The EPA had assessed fines against Del Chemical for violation of the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA). Oner II, Inc. was later formed to acquire the assets of Del. Although the asset purchase agreement provided that Oner II would assume Del's trade liabilities, nothing was stated regarding the fines. After the asset acquisition, Del remained as a corporate shell. *Id.* at 185-86. The Ninth Circuit held Oner II, Inc., liable as a successor under FIFRA, stating that "[t]he EPA's authority to extend liability to successor corporations stems from the purpose of the statute it administers, which is to regulate pesticides to protect the national environment. The agency may pursue the objectives of the Act by imposing successor liability where it will facilitate enforcement of the Act." *Id.* at 186 (citations omitted).

307 42 U.S.C. § 9601(9) (1988). *See supra* notes 50-52 (discussing definition of a "facility").

308 For the leading case establishing liability for successor corporations in the merger context, see Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (discussed *infra* notes 317-23 and accompanying text). *See also* Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991) (discussed *infra* note 324); United States v. Crown Roll Leaf, Inc., 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,262 (D.N.J. 1988) (discussed *infra* note 322).

309 *See* Varnum & Achterman, *Toxic Waste Liability: A Risk in Acquisitions*, NAT'L L.J., Oct. 28, 1985, at 15, col. 1; Note, *Landowner Liability and Toxic Waste: Application of CERCLA in* United States v. Monsanto, 34 S.D.L. REV. 392, 405 (1989).

that such corporations may be held accountable for CERCLA violations of their predecessors.[310] For example, in *Smith Land & Improvement Corp. v. Celotex Corp.*,[311] the Third Circuit found that although CERCLA does not specifically require courts to impose liability on successor corporations, successor liability does further CERCLA's goals: "Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost.... We believe it in line with the thrust of the legislation to permit—if not require—successor liability under traditional concepts."[312]

The *Smith Land* court also recognized a need for national uniformity in application of the successor corporation liability doctrine under CERCLA.[313] The court warned that narrow state statutes should not be used to determine successor liability.[314] Rather, "[t]he general doctrine of successor liability in operation in most states should guide the court's decision...."[315] Federal courts are increasingly following the rationale of *Smith Land* and holding successors liable for the environmental torts of their predecessors based upon either the general rules of successor corporation liability or upon the traditional exceptions to successor non-liability. Yet, contrary to the warning of the *Smith Land* court, there is no uniform federal rule for imposing successor liability under CERCLA. Rather, some courts appear to apply the rule established by the particular state in which the property is located.[316]

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310 *See* notes 305-409 and accompanying text (discussing successor corporation liability for CERCLA violations).

311 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

312 *Id.* at 92 (citation omitted). CERCLA is not the only federal statute under which the courts have imposed successor liability in the absence of a clear legislative directive. For example, the doctrine of successor liability has been recently held to apply in the context of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)) (ERISA). In Upholsterers' Int'l Union Pension Fund v. Artistic Furniture, 920 F.2d 1323 (7th Cir. 1990), the court found that a purchaser of assets could be held liable for the seller's pension fund contributions. *Id.* at 1327. ERISA, like CERCLA, does not specifically state that successor corporations are liable for the debts and obligations of their predecessors.

313 *Smith Land*, 851 F.2d at 92. *Cf.* Comment, *Environmental Law—CERCLA Liability—The Doctrine of Corporate Successor Liability is Appropriate in Contribution Claims Under CERCLA but Caveat Emptor is not Available as a Defense to the Seller of Property in an Action Seeking Contribution for Clean-Up Costs:* Smith Land & Improvement Corp. v. Celotex Corp., 851 F. 2d 86 (3d Cir. 1988), 20 RUTGERS L.J. 823, 824 (1989) (criticizing the courts for not setting forth clear guidelines).

314 *Id.*

315 *Id.*

316 *See, e.g.*, Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) ("[T]he traditional rules of successor liability in operation in most states should govern" in an asset sale.); United States v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879, 20,882 (E.D. Mo. 1988) (finding that imposition of Missouri successor corporation law would further CERCLA's objectives); Squire, Ingram & Frost, *supra* note 3, at 896 (courts generally determine "that the rule applied in the interested state is sufficiently representative of the general rule to be accepted as a guide for the rule of decision in the instant case").

The relevant inquiry, for purposes of this Article, is whether the scope of successor corporation liability for CERCLA violations is broader than successor corporation liability in other tort contexts. A careful review of the case law suggests that it is not. In considering whether a successor corporation is exposed to liability for the past CERCLA violations of its predecessor, courts simply apply the doctrine of successor corporation liability as it has evolved in other tort contexts. The federal courts' application of these rules in the environmental arena has not eroded general corporate law principles.

1. Mergers and Acquisitions.—Courts have applied traditional rules of corporate successor liability in the CERCLA context where corporations have merged or consolidated. In *Smith Land*, the plaintiff, purchaser of land containing asbestos waste, contended that the defendants, corporate successors to the Philip Carey Company (Carey), which had created the waste, should be held liable for their predecessor's violations.[317] Carey had sold the land to plaintiff's predecessor.[318] The defendants never owned or operated the offending facility.[319] The record indicated that the reorganizations involved had been statutory mergers or consolidations, not asset sales nor de facto mergers.[320] The court referred to the general rules of successor corporation liability, noting that when two corporations merge or consolidate pursuant to a statute, debts and liabilities become the responsibility of the surviving or new company.[321] However, when "one corporation buys all of the assets of another, the successor will not be saddled with the seller's liability except under certain conditions."[322] Ultimately, the court remanded the case, allowing the plaintiff to explore the defendants' corporate reorganizations in greater detail.[323] Nonetheless, the *Smith Land* court set the stage for application of successor corporate liability rules under CERCLA.[324]

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317 *Smith Land*, 851 F.2d at 88.

318 *Id.*

319 *Id.* at 90.

320 *Id.* at 91.

321 *Id.*

322 *Id.* (citations omitted). Likewise, the court in United States v. Crown Roll Leaf, Inc., 19 Envtl. L. Rep. (Envtl. L. Inst.) 20,262, 20,265 (D.N.J. 1988), stated that the doctrine of corporate successor liability applies in the CERCLA context to the corporation resulting from a merger. *Crown Roll Leaf* concerned the successor corporation's liability for failure to respond to an EPA information request regarding transportation of hazardous waste generated by its predecessor.

323 *Smith Land*, 851 F.2d at 92.

324 *Accord* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991) ("We reach the same result as the Third Circuit in *Smith Land* (CERCLA makes a successor corporation liable where there has been a formal merger) . . . ."); Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260, 1262 (9th Cir. 1990) (agreeing with *Smith Land*'s conclusion that Congress intended successor

2. Asset Acquisitions.—Traditionally, entities purchasing assets are not held accountable for liabilities of their sellers.[325] However, as discussed above, this simple proposition is replete with exceptions.[326] Courts have stated that the asset acquisition rule and its exceptions apply in the CERCLA context.[327] Thus, purchasing corporations may be held liable for the CERCLA violations of selling corporations in cases involving assumption of obligations, de facto mergers and consolidations, and fraud, and where the purchasing corporation was found to be a mere continuation of the seller.[328] Moreover, some courts have stated that the two modern exceptions, the product-line and the continuation of enterprise theories, are applicable to CERCLA cases.

(a) The Traditional Exceptions.

(i) Assumption of Obligations.—CERCLA liabilities are subject to transfer by contract.[329] If a corporation purchasing the assets of another corporation explicitly or implicitly assumes the CERCLA liabilities of

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liability to apply in CERCLA cases); GRM Indus., Inc. v. Wickes Mfg. Co., 749 F. Supp. 810, 814-15 (W.D. Mich. 1990) (successor liability is consistent with CERCLA's objectives).

The district court in Anspec Co. v. Johnson Controls, Inc., 734 F. Supp. 793 (E.D. Mich. 1989), *rev'd*, 922 F.2d 1240 (6th Cir. 1991), held that CERCLA does not apply to successor corporations because the statute explicitly limits liability to transporters, generators, and past and present owners or operators. *Id.* at 795. The Sixth Circuit disagreed. In reversing the lower court's decision, the court of appeals adopted *Smith Land*'s holding that CERCLA "makes a successor corporation liable where there has been a formal merger." 922 F.2d at 1245. The court also cited Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260 (9th Cir. 1990), which held that CERCLA would hold a successor corporation liable in a de facto merger. However, the Sixth Circuit disagreed with *Smith Land* regarding the necessity of adopting a uniform federal common law of successor liability, and instead applied Michigan state law of corporate successor liability. 922 F.2d at 1245.

325 *See* 15 W. FLETCHER, *supra* note 17, § 7122, at 231 (*see supra* note 302 for text of this section).

326 *See supra* notes 303-04 and accompanying text (listing exceptions to asset acquisition rule).

327 *See, e.g.*, Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); GRM Indus., Inc. v. Wickes Mfg. Co., 749 F. Supp. 810, 814 (W.D. Mich. 1990); *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 (D. Mass. 1989); Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1457 (W.D. Mich. 1988). *See also* Little, *Towards Respect for Corporate Separateness in Defining the Reach of CERCLA Liability*, 44 SW. L.J. 1499, 1507 (1991) ("Courts, almost uniformly, use the common law test applicable to asset purchasers to determine the existence of CERCLA liability."); Note, *Successors Beware: Expanding the Liability Net Under CERCLA Section 9607(a) Through Application of Exceptions to the Traditional Common-Law Doctrine of Successor Nonliability in Asset Acquisitions*, 29 WASHBURN L.J. 442, 445 (1990) (courts are applying successor corporation doctrine to CERCLA cases).

328 *See, e.g., In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1015-19 (D. Mass. 1989) (applied four-factor de facto merger test); Ametek, Inc. v. Pioneer Salt & Chem. Co., 709 F. Supp. 556, 559-60 (E.D. Pa. 1988) (court did not analyze de facto merger test's applicability to the facts of the case); United States v. Bliss, 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879, 20,882 (E.D. Mo. 1988) (applied continuation of selling corporation exception); Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1458-59 (W.D. Mich. 1988) (applied continuation of selling corporation exception); *see also* Squire, Ingram & Frost, *supra* note 3, at 899 ("Under CERCLA . . . the courts have adopted the general rule . . . together with its four traditional exceptions.") (footnote omitted).

329 *See* Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 355 (D.N.J. 1991) (citing 42 U.S.C.

the seller, it will succeed to those liabilities.[330] The difficult cases involve whether contractual language that does not explicitly mention environmental liabilities should be interpreted as implicitly including an assumption of CERCLA obligations.

For example, in *Mobay Corp. v. Allied-Signal, Inc.*,[331] the court considered whether the purchasing corporation implicitly assumed the seller's CERCLA obligations according to a contractual provision that stated that the purchaser would indemnify the seller from certain obligations,[332] even though the contract itself predated the enactment of CERCLA. The court interpreted this clause, from the context of the contract, as an assumption of personal injury and property damage claims, and not as an assumption of environmental claims.[333] Although the court did not expect the parties to have foreseen the enactment of CERCLA, the court was unable to interpret the contract as transferring CERCLA liability in the absence of a clear provision allocating response costs to one of the parties.[334] The court noted that the contract contained no mention of environmental-type liabilities and thus could not be

§ 9607(e)(1) (1988); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1989); Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988)).

330 *See, e.g.*, City of Richmond v. Madison Mgt. Group, Inc., 918 F.2d 438, 450 (4th Cir. 1990) (In rejecting defendant's assertion that insufficient evidence existed to support the jury finding of implicit assumption of liabilities, the court noted that "[i]t is well established that, 'where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor.' However, the purchaser of assets can assume such liability either expressly or by implication.") (citations omitted); Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 343 (8th Cir. 1988) (recognizing the rule that successor corporations are liable "where the purchaser expressly or impliedly agrees to assume such debts," but finding that "[t]he unequivocal disclaimer of liability, coupled with the explicit language of the bankruptcy court's order, make it clear that [the successor corporation] did not expressly or impliedly assume any liabilities"); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1462 (9th Cir. 1986) (settlement and release agreement released seller from all claims by buyer "based upon, arising out of or in any way relating to the Purchase Agremeent"); Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 309-10 (3d Cir.) (assumption of liabilities clause found to be broad enough to include unknown or contingent liabilities; thus, successor found to have assumed predecessor's liability for pollution), *cert. denied*, 474 U.S. 980 (1985). *See generally* Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); GRM Indus., Inc. v. Wickes Mfg. Co., 749 F. Supp. 810, 814 (W.D. Mich. 1990); *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 (D. Mass. 1989); Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1457 (W.D. Mich. 1988).

331 761 F. Supp. 345 (D.N.J. 1991).

332 *Id.* at 355. The contract provided that the purchaser would indemnify the seller from:

> all obligations and liabilities relating to the Haledon Plant or Haledon Products arising out of claims made, or suits brought, on or after the Closing Date for (i) injury, sickness, disease or death of any person, or (ii) any damages to any property, in either case which is ultimately determined by the finder of fact to have resulted from any condition existing, substance consumed or discharged, product manufactured or action taken or omitted . . . on or after the Closing Date, whether or not such cause existed prior to the Closing Date.

Id.

333 *Id.* at 357-58.

334 *Id.* at 358.

treated as an assumption of later CERCLA obligations.[335]

In deciding whether the contract provided for an implicit assumption of CERCLA liabilities, the *Mobay* court reviewed a number of other cases addressing the issue. The court noted that a contract stating that the purchase of a business "as is" had been found not to absolve the seller of CERCLA liability.[336] Yet, according to *Mobay*, a clause in a contract waiving all "liabilities of *any* type whatsoever" would be construed as a waiver of environmental obligations.[337] Thus, whether liabilities have been implicitly assumed in CERCLA cases is a fact-specific determination. The results of these cases depend upon whether, after examination of the language of the contract, the buyer can be said to have contractually assumed the environmental liabilities of its predecessor.[338]

(ii) De Facto Merger or Consolidation.—If the asset purchase is a de facto merger or consolidation, the purchaser may be held liable for the debts and liabilities of the seller as if it were an actual merger.[339] De facto merger status generally may be imposed on a purchasing corporation if: (1) there is a continuity of shareholders such that the shareholders of the seller become the shareholders of the buyer; (2) there is continuity of the business enterprise, including continuity of management, location, employees, and assets; (3) the seller dissolves as soon as possible after the transfer; and (4) the buyer assumes all liabilities and obligations necessary to continue the seller's business with little or no interruption.[340] Some of the requirements for a de facto merger have

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335 *Id.*

336 *Id.* at 355-56.

337 *Id.* at 358 n.15 (emphasis in original).

338 *See also* FMC Corp. v. Northern Pump Co., 668 F. Supp. 1285, 1292 (D. Minn. 1987) (court found the language of the release unambiguously released seller from future causes of action), *appeal dismissed*, 871 F.2d 1091 (8th Cir. 1988); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1012 (D.S.C. 1984) (pursuant to the contract, the buyers assumed "*all* liabilities, of whatever kind, whether they existed at the time of the sale, or arose thereafter") (emphasis in original), *aff'd in part, vacated in part sub nom.*, United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

339 *See* Nielsen, *Liability of Successor Corporations*, 32 FED'N INS. COUNS. Q. 63, 68 (1981) ("Another exception to the rule of nonassumption of liability is the equitable doctrine of de facto merger, which produces the same automatic assumption of liabilities as a statutory merger even though the transaction purports to be a sale of assets.") (footnotes omitted).

340 Shannon v. Samuel Langston Co., 379 F. Supp. 797, 801 (W.D. Mich. 1974); *see also* 15 W. FLETCHER, *supra* note 17, § 7045.10, at 35 ("Under the de facto merger doctrine, there is a continuity of the selling corporation evidenced by such things as the same management, personnel, assets, location and stockholders."); Nielsen, *supra* note 339, at 68 (citing *Shannon*); Squire, Ingram & Frost, *supra* note 3, at 889 (elements to be considered in finding a de facto merger are: (1) continuation of the enterprise; (2) continuation of shareholders because purchaser pays with own stock; (3) seller dissolves as soon as possible; and (4) purchaser assumes seller's obligations which are ordinarily necessary for the uninterrupted normal business operations of the seller corporation) (citing Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 310 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1457-58 (11th Cir. 1985); Keller v. Clark Equip. Co., 715 F.2d 1280, 1291 (8th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); Atlas

been relaxed in various jurisdictions,[341] while other jurisdictions have strengthened the requirements.[342]

In *In re Acushnet River & New Bedford Harbor*[343] and *Louisiana-Pacific Corp. v. ASARCO, Inc.*,[344] the courts applied the traditional four-factor de facto merger test in the CERCLA context.[345] The successor corporation in *Acushnet* was found liable for its predecessor's environmental torts in a stock-for-assets exchange because: (1) there was continuity of shareholders (even though the seller received shares of the buyer's parent corporation rather than shares of the buyer);[346] (2) there was continuity of enterprise (the buyer continued to manufacture some of the seller's products, products continued to bear the seller's name, certain officers and employees of the seller became officers and employees of the buyer, and the physical facilities of the seller were used);[347] (3) the seller dissolved immediately after the transaction;[348] and (4) the buyer

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Tool Co. v. Commissioner, 614 F.2d 860, 870-71 (3d Cir.), *cert. denied*, 449 U.S. 836 (1980)); Note, *EPA, supra* note 303, at 87.

341 *See Bud Antle*, 758 F.2d at 1457-58. For example, in Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974), the court deleted the historical requirement of substantial identity of ownership in de facto merger situations, holding that the manufacturing entity need merely continue the physical plant, employees, supervisors, and products of the predecessor corporation in order to be liable for the predecessor's torts. *See also* Nielsen, *supra* note 339, at 72; Note, *EPA, supra* note 303, at 88. Furthermore, the Third Circuit eliminated the requirement that the predecessor corporation be completely dissolved before the successor will be held liable. Nielsen, *supra* note 339, at 71 n.51. In Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975), the court held that successors could be held liable in some cases where the predecessor corporation still existed, especially in those situations where the predecessor continues merely as a shell corporation because public policy requires that responsibility be placed on that party best able to spread the loss effectively throughout society. *See* Nielsen, *supra* note 339, at 71 n.51 (citing *Knapp*, 506 F.2d at 369).

342 *See, e.g.*, Terry v. Penn Cent. Corp., 668 F.2d 188, 193 (3d Cir. 1981) ("[T]he de facto merger doctrine has rarely been invoked by the Pennsylvania courts."); Suarez v. Sherman Gin Co., 697 S.W.2d 17, 20 (Tex. App. 1985) (Texas public policy is "opposed to the doctrine.").

343 712 F. Supp. 1010 (D. Mass. 1989).

344 909 F.2d 1260 (9th Cir. 1990).

345 *Acushnet*, 712 F. Supp. at 1019. The factors considered by the *Acushnet* court were:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
>
> (4) The purchasing corporation assumes those obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Id. at 1015. The *Louisiana-Pacific* court applied the same factors. 909 F.2d at 1264 (citing *Acushnet*).

346 *Id.* at 1016-17.

347 *Id.* at 1015-16.

348 *Id.* at 1017. The seller was revived by the Secretary of State three years later "for the limited purpose of defending this litigation." *Id.* at 1018. The court further noted that the tax treatment of the transaction as a tax-free reorganization also supported its finding of a de facto merger. *Id.* The

agreed to assume all of the seller's obligations necessary to continue business operations (although the buyer explicitly disclaimed any liability for its predecessor's use or disposal of PCBs).[349] The *Louisiana-Pacific* court applied the same four-part test but did not find the successor corporation liable because of a lack of continuity of shareholders between the successor and predecessor corporations.[350] Neither court articulated any reason to vary the traditional test in CERCLA cases.

(iii) Mere Continuation of Selling Corporation.—A company that is merely a continuation of its predecessor does not escape the debts and liabilities of the constituent company.[351] For example, where a transaction is simply a recapitalization, a name change, or a reincorporation, the successor corporation is liable for debts of its predecessor.[352] Courts similarly may consider the transfer of assets to be a mere continuation if consideration was inadequate or if the successor continues the business of its predecessor and the predecessor dissolves immediately after the transfer.[353]

Several courts have considered the continuation of the selling corporation exception in the CERCLA context. Although the tests these courts have applied vary somewhat because of differences in state law, the tests are the same ones applied in general corporate law contexts. In *United States v. Bliss*,[354] for example, the federal district court determined that the doctrine of successor corporation liability did apply to CERCLA actions and looked to Missouri law to hold a successor corporation of an unincorporated waste transportation company liable for CERCLA violations.[355] The court noted that:

> Under Missouri law, a corporation may be held liable as a successor

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purpose of this provision of the tax laws is " 'to permit changes in corporate structure that are primarily changes in form similar to statutory mergers.' " *Id.* (citation omitted).

349 *Id.* at 1016.

350 *Louisiana-Pacific*, 909 F.2d at 1264.

351 *See* 15 W. FLETCHER, *supra* note 17, § 7124.10, at 292 ("[T]he underlying theory of the exception is that, if as [sic] corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability.") (footnote omitted).

352 *See* Nielsen, *supra* note 339, at 69. *See also* Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985) (courts can consider, among other things, continuity of assets and general business operations, and retention of the same name in determining if the continuation exception applies to hold the successor corporation liable); Cyr v. B. Offen & Co., 501 F.2d 1145, 1152-53 (1st Cir. 1974) (factors that courts can consider in determining whether there is a continuing enterprise include continuity of assets and general business operations, and retention of name).

353 One commentator states that:

> [a] few decisions have also stated that a mere continuation could be found if there was inadequate consideration. Other courts have found mere continuations in the presence of such factors as continuity of management, directors, business operations, and shareholders between buyer and seller and the dissolution of the seller shortly after the transfer has occurred.

Nielsen, *supra* note 339, at 69 (footnotes omitted).

354 20 Envtl. L. Rep. (Envtl. L. Inst.) 20,879 (E.D. Mo. 1988).

355 *Id.* at 20,882.

> for the debts and liabilities of the transferor corporation only when (1) the purchasing corporation expressly or impliedly agrees to assume the seller's debts; (2) the transaction amounts to a consolidation or merger of the corporations; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape liability.[356]

In a previous action, the Missouri Supreme Court found the incorporated entity, Jerry-Russell Bliss, Inc., to be a mere continuation of its unincorporated predecessor[357] because the same persons who owned, operated, and were employed by the predecessor became officers, directors, and sole shareholders of the successor; the business operations, offices, and trucks of the predecessor became part of the successor; and the successor retained the employees and customers of the predecessor.[358] Furthermore, the successor represented itself to be a continuation of its predecessor by advertising "that it had been in business for over forty years."[359] The federal district court thus held Jerry-Russell Bliss, Inc. liable under CERCLA as a successor corporation.[360]

The district court in *Kelley v. Thomas Solvent Co.*[361] also held a successor corporation liable under the mere continuation of the selling corporation exception.[362] The *Thomas Solvent* court relied on the "oft-cited factors"[363] used to establish successor liability in *Tucker v. Paxson Machine Co.*[364] That test employs just three factors: (1) continuity of shareholders; (2) continuity of directors; and (3) continuity of officers.[365] The *Thomas Solvent* court found all three factors present[366] and that, further, the successor spinoff companies "operated substantially the same business in products and services"[367] as their predecessor. The court thus held the successor corporations liable for the environmental torts committed by their predecessor, noting that the successors benefitted from the polluting practices of the predecessor.[368]

The mere continuation of selling corporation exception was similarly applied by the court in *United States v. Carolina Transformer Co.*[369]

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356 *Id.* (citations omitted).

357 *Id.* The issue of successor liability had been finally adjudicated by the Missouri Supreme Court in Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgt. Comm'n, 702 S.W.2d 77 (Mo. 1985).

358 702 S.W.2d at 83.

359 *Id.*

360 20 Envtl. L. Rep. at 20,882.

361 725 F. Supp. 1446 (W.D. Mich. 1988).

362 *Id.* at 1458-59.

363 *Id.* at 1458.

364 645 F.2d 620, 625-26 (8th Cir. 1981).

365 *Id. Tucker* involved the liability of a successor corporation for a defect in a machine manufactured by its predecessor. *Id.* at 621.

366 725 F. Supp. at 1458.

367 *Id.*

368 *Id.* at 1459.

369 739 F. Supp. 1030 (E.D.N.C. 1989).

The predecessor corporation, Carolina Transformer Company, transferred most of its assets to its successor, FayTranCo, after its exposure to CERCLA liability for PCB contamination of wells became apparent.[370] The court held that a successor corporation could be held liable where there was a "substantial continuity" between the successor and its predecessor.[371] According to the court, " '[s]ubstantial continuity' is determined by the following factors: Whether the business of both employers was the same, whether the employees of the new company were doing the same job, and whether the new company produced the same product for essentially the same customers."[372]

FayTranCo met the substantial continuity test. FayTranCo continued Carolina Transformer's business operations, employed its former employees for the same jobs, retained its former customers, and honored its contracts and warranty obligations.[373] Both companies had the same directors, officers, and employees.[374] Although Carolina Transformer's sole shareholder owned no stock in FayTranCo, his children were the sole shareholders and he maintained control of FayTranCo.[375] FayTranCo was thus held jointly and severally liable for response costs.[376]

(iv) Fraud.—Federal courts uniformly recognize that the fourth traditional exception—holding a purchaser liable for its seller's obligations if the transaction was entered into fraudulently to escape liability[377]—also applies in the CERCLA context.[378] The courts generally have not needed to decide whether a successor corporation is liable for its predecessor's CERCLA violations under this exception because in instances where fraud was alleged, there was generally another basis for establishing liability.

For example, in *Kelley v. Thomas Solvent Co.*,[379] the defendants admitted that one of their motives for creating the spinoff corporations was to avoid environmental liability related to groundwater contamination.[380] The defendants' deliberate attempt "to put assets out of the

370 *Id.* at 1034-35.
371 *Id.* at 1039.
372 *Id.*
373 *Id.*
374 *Id.*
375 *Id.*
376 *Id.*
377 *See* 15 W. FLETCHER, *supra* note 17, § 7122, at 231 (a transaction that is fraudulent in fact is an exception to the general rule of nonliability).
378 *See, e.g.*, Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); GRM Indus., Inc. v. Wickes Mfg. Co., 749 F. Supp. 810, 814 (W.D. Mich. 1990); *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 (D. Mass. 1989); Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1457 (W.D. Mich. 1988); United States v. Bliss, 20 Envtl. L. Rep. 20,879, 20,882 (E.D. Mo. 1988).
379 725 F. Supp. 1446 (W.D. Mich. 1988).
380 *Id.* at 1454-55.

reach of creditors"[381] met the standard of intent to defraud[382] for purposes of the Michigan Fraudulent Conveyances Act,[383] and presumably would have met the standard for purposes of successor liability. The court, however, found the successors liable under the mere continuation of selling corporation exception,[384] and therefore did not need to consider whether the fraud exception applied.[385]

(b) The Modern Exceptions.—As noted above, some courts have imposed successor corporation liability in two additional contexts. These rules are commonly known as the product-line exception[386] and the continuation of enterprise theory.[387] The product-line exception was created by the California Supreme Court in *Ray v. Alad Corp.*[388] The court held that "a party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired."[389] The court justified imposition of strict liability for three reasons: (1) the plaintiff's remedies against the original manufacturer were destroyed by the successor's acquisition; (2) the successor had the ability to assume the original manufacturer's risk-spreading role; and (3) the successor enjoyed the original manufacturer's goodwill through continued business operations, so it should also assume responsibility for its predecessor's defective products.[390] In so ruling, the court rejected the continuity of ownership requirement for holding the successor liable for defective products.[391]

In *Ramirez v. Amsted Industries, Inc.*,[392] the New Jersey Supreme Court also adopted the product-line theory. It reasoned that the more a successor corporation resembled its predecessor, the greater the justifica-

381 *Id.* at 1455.

382 *Id.*

383 MICH. COMP. LAWS ANN. § 566.17 (West 1967).

384 725 F. Supp. at 1457-59.

385 *See also* United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989). Although *Carolina Transformer* was decided under the continuation of predecessor exception, this case might also have been considered under the fraud exception. The facts supported the conclusion that the asset transfer to the successor corporation was a fraudulent attempt to divest the predecessor of its assets. *Id.* at 1035. The predecessor was exposed to CERCLA liability for the PCB contamination of wells. *Id.* at 1034.

386 Few states recognize the exception. *See* 15 W. FLETCHER, *supra* note 17, § 7123.07 (discussing the product-line exception).

387 *See id.* § 7123.06 (discussing the continuity of enterprise exception).

388 19 Cal.3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

389 *Id.* at 34, 560 P.2d at 11, 136 Cal. Rptr. at 579.

390 *Id.* at 32, 560 P.2d at 9, 136 Cal. Rptr. at 577.

391 *See* Nielsen, *supra* note 339, at 73 ("[T]he *Ray* court rejected continuity of ownership as a requirement for imposing products liability on successor corporations.").

392 86 N.J. 332, 431 A.2d 811 (1981).

tion for holding it liable for the predecessor's torts.[393] Public policy requires that a successor corporation receiving substantial benefits from continuing the predecessor's manufacturing enterprise also bear the burden of its operating costs.[394]

The second modern exception, the continuation of enterprise theory, was introduced by the Michigan Supreme Court in an asset purchase context in *Turner v. Bituminous Casualty Co.*[395] This court held the purchasing corporation strictly liable for its seller's defective products because the purchaser continued the fundamental business enterprise of the seller.[396] The purchasing corporation was held strictly liable for the seller's torts even though there was no continuity of stockholders. The relevant inquiry, according to the *Turner* court, was whether there was "continuity between the transferee and transferor corporations."[397]

Federal courts have begun to recognize the modern exceptions in the CERCLA context. In *United States v. Distler*,[398] the court considered whether the purchasing corporation might be held liable for its predecessor's CERCLA violations pursuant to the continuation of enterprise exception.[399] In denying the successor's motion to dismiss the gov-

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393 *Id.* at 343, 346, 431 A.2d at 822, 825.

394 *Id.* at 343, 431 A.2d at 822. *See also* Dawejko v. Jorgensen Steel Co., 290 Pa. Super. 15, 434 A.2d 106 (1981) (product-line exception adopted in Pennsylvania). *But see* Wallace v. Dorsey Trailers S.E., Inc., 849 F.2d 341, 344 (8th Cir. 1988) (declined to expand exceptions to Missouri rule of successor nonliability beyond the four traditional exceptions); Andrews v. John E. Smith's Sons Co., 369 So. 2d 781 (Ala. 1979) (rejected product-line exception because Alabama's products liability law is based on negligence, not strict liability).

395 397 Mich. 406, 244 N.W.2d 873 (1976).

396 *Id.* at 416, 244 N.W.2d at 883; *see* Laswell, *supra* note 4, at 21 (discussing *Turner*); Nielsen, *supra* note 339, at 73 ("The *Turner* court clearly rejected the requirement of continuity of ownership as a condition for holding successor corporations liable for the defective products of their predecessors. Instead, the court applied the theory of enterprise liability.") (footnotes omitted).

397 *Turner*, 397 Mich. at 416, 244 N.W.2d at 883. The Michigan court cited four reasons for holding the buyer liable:

> 1) There was basic continuity of the enterprise of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations, and even the [predecessor's] name.
>
> 2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation.
>
> 3) The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of normal business operations of the seller corporation.
>
> 4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.

Id. at 416-17, 244 N.W.2d at 883-84. *See also* Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985) (jury instruction on continuation of enterprise theory upheld); Korzetz v. Amsted Indus., Inc., 472 F. Supp. 136 (E.D. Mich. 1979) (applying the *Turner* test); Andrews v. John E. Smith's Sons Co., 369 So. 2d 781 (Ala. 1979) (adopting the reasoning of *Turner* but finding theory inapplicable because it was not raised in the complaint); Nielsen, *supra* note 339, at 73 (noting that "[t]he specific test used in *Turner* is unclear" but that one of the criteria mentioned was "the continuity of the product line, management, and assets of the predecessor").

398 741 F. Supp. 637 (W.D. Ky. 1990) (as amended *nunc pro tunc*).

399 *Id.* at 642-43. *But see* Note, *Cover Your Assets! Expanding Successor Liability Under*

ernment's claim of successor corporation liability, the court found that the successor may have succeeded to its predecessor's CERCLA liability.[400] The factors delineated by the *Distler* court included whether the successor:

> (1) retains the same employees; (2) retains the same supervisory personnel; (3) retains the same production facilities in the same location; (4) continues producing the same products; (5) retains the same name; (6) maintains continuity of assets and general business operations; and (7) whether the successor holds itself out to the public as the continuation of the previous corporation.[401]

The court in *United States v. Western Processing Co.*[402] likewise considered the applicability of the modern exceptions in ruling on a pretrial motion and did not foreclose the potential applicability of either the product-line or the continuation of enterprise exceptions to CERCLA cases.[403] The *Western Processing* court used factors similar to those articulated in *Distler* in applying the continuation of enterprise exception.[404] The factors are the same as those considered by courts addressing successor corporation liability in the context of products

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CERCLA: United States v. Distler, 56 MO. L. REV. 427 (1991) (arguing against the *Distler* court's application of the continuation of enterprise exception).

400 741 F. Supp. at 643.

401 *Id.* at 642-43. The court in United States v. Mexico Feed & Seed Co., 764 F.Supp. 565 (E.D. Mo. 1991), applied the *Distler* factors in holding a successor corporation liable for cleanup costs. *Id.* at 572-73. The *Mexico Feed* court noted that because the successor corporation "retained the same employees and management, operated out of the same physical facilities and continued the same waste-hauling business, held itself out to the public as the same company, and retained virtually all of the operating assets," its failure to retain the same office and board members was insufficient to relieve it of liability. *Id.* at 573.

402 751 F. Supp. 902 (W.D. Wash. 1990).

403 *Id.* at 905.

404 *Id.* The factors delineated by the *Western Processing* court are:

> (1) continuity of employees, supervisory personnel and physical location;
> (2) production of the same product;
> (3) retention of the same name;
> (4) continuity of general business operations;
> (5) purchaser holding itself out as a continuation of the seller.

Id. (citation omitted). The product-line theory was noted and easily disposed of in *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 n.5 (D. Mass. 1989), where the court found that Massachusetts does not recognize the doctrine. *See also* Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260, 1266 (9th Cir. 1990) (court found it unnecessary to decide whether to adopt the continuation of enterprise exception under CERCLA); Sylvester Bros. Dev. Co. v. Burlington N.R.R., No. 4-88-692 (D. Minn. Sept. 11, 1990) (1990 U.S. Dist. LEXIS 15115) (court declined to adopt continuation of enterprise exception); Fox, *Corporate Successors Under Strict Liability: A General Economic Theory and the Case of CERCLA*, 26 WAKE FOREST L. REV. 183, 213 (1991) (arguing, from an economic perspective, against applying the modern exceptions in CERCLA cases); Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 TEX. L. REV. 1237 (1990) (arguing against application of the modern exceptions to CERCLA cases).

liability.[405]

The EPA has similarly argued that the continuation of enterprise exception applies to CERCLA cases,[406] citing public policy considerations and the legislative history of CERCLA in support of its position.[407] Moreover, the Department of Justice has been said to support the EPA's theory of creating broader successor corporation liability based on two separate policy objectives. First, " 'Congress intended to shift the costs of remedying the problems created at waste sites away from the public to industries that were responsible for creating dangerous conditions or that profited from activities at the sites.' "[408] The Department of Justice has been further quoted as stating that adoption of expansive successor corporation liability rules "will force purchasing corporations to evaluate their predecessor's environmental practices, thereby advancing the statutory goal that businesses internalize the costs of responsibly disposing of hazardous substances."[409]

V. CONCLUSION

Contrary to the fears expressed by many, courts have not dismissed general principles of corporate law doctrine in deciding cases against corporate actors for CERCLA violations. Admittedly, the analysis employed by courts has not emphasized corporate law doctrine, but the results courts have reached are largely consistent with that doctrine. Generally, corporate actors have been held liable under CERCLA only

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405 The *Distler* court cited, *inter alia*, Turner v. Bituminous Casualty Co., 397 Mich. 406, 244 N.W.2d 873 (1976), in support of these factors. *Distler*, 741 F. Supp. at 643.

406 *See EPA Memorandum, supra* note 10, at 13-16.

407 *Id.* at 15. For a critique of the EPA's position, see Note, *EPA*, *supra* note 303, at 94-107 (arguing that the EPA's policy of holding a successor corporation liable for environmental torts of its predecessor if the successor acquires the assets of the predecessor and continues substantially the same business operations as the predecessor is an expansion of liability that is not explicitly covered by the statute, not justified by public policy or the legislative history of CERCLA, and is a significant departure from the traditional rule of corporate successor liability; further arguing that the majority of the states adhere to the traditional rule and not to the "product line" exception the EPA supports and that the EPA does not address several important limitations of the product line theory). *See also* Comment, *CERCLA Liability for Successor Corporations Revisited*, 41 MERCER L. REV. 1027, 1039 (1990) (arguing against the EPA's position). *But see* Comment, *Successor Corporation Liability for Improper Disposal of Hazardous Waste*, 7 W. NEW ENG. L. REV. 909 (1985) (arguing that a company buying assets of a corporation that produced hazardous wastes should be held liable, drawing on recent product liability cases); Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300, 1332-34 (1990) (supporting the EPA's position).

408 Squire, Ingram & Frost, *supra* note 3, at 906 (quoting Memorandum of Points and Authorities of the United States in Opposition to Motion of Chemical & Pigment Company for Partial Summary Judgment and in Support of Cross-Motion of United States for Partial Summary Judgment, at 20, United States v. Allied Chemical Corp., Nos. C-83-5898JPV, C-83-5896JPV (N.D. Cal. May 27, 1987) (filed Mar. 12, 1987) [hereinafter *DOJ Memorandum*].

409 Squire, Ingram & Frost, *supra* note 3, at 906 (citing *DOJ Memorandum*, *supra* note 408, at 21-22).

in situations where they also could have been held liable under traditional corporate law doctrine.

When faced with a corporate actor whose clearly egregious and wrongful behavior has resulted in environmental contamination, courts have not hesitated to impose liability for cleanup costs upon that actor. Thus far, however, the cases presented to the courts have been easy ones, involving, for example, a corporate officer who assisted in the burial of drums of dioxin on a farm,[410] a parent corporation that undercapitalized a subsidiary engaged in waste disposal,[411] or a corporation that transferred the bulk of its assets to a successor in an attempt to escape liability for PCB contamination of residential wells.[412]

This is not to say whether the policies underlying CERCLA might justify an expansion of the potential liability of corporate actors in a more difficult case where the actor's involvement in the statutory violation is more attenuated. To date, however, courts have not been presented with situations in which expansion is necessary. Expansion of liability exposure would require comprehensive analysis of all potential ramifications. Neither the courts nor the legislature have undertaken that analysis, nor have the circumstances presented to them warranted their doing so.

Analysis of the current scope of CERCLA liability requires not merely an examination of the courts' discussions of CERCLA's language, but an examination of the fact patterns of the cases in which these discussions appear. Despite their sometimes expansive language, courts generally have not held corporate officers, individual shareholders, or parent corporations responsible for cleanup costs based solely upon their status, nor have they held successor corporations liable in instances where traditional corporate doctrine would not. The decisions reveal that the existence of a wrongful act, and the actor's involvement in it, is still key to imposition of liability. The results of the cases do not justify fears that courts have eroded traditional corporate law doctrine in the CERCLA arena.

410 *See supra* notes 80-111 and accompanying text (discussing United States v. NEPACCO, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987)).

411 *See supra* notes 267-72 and accompanying text (discussing Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987)).

412 *See supra* notes 369-76 and accompanying text (discussing United States v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989)).