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Direct Liability for Hazardous Substance Cleanups under CERCLA: A Comprehensive Approach

Michael P. Healy

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DIRECT LIABILITY FOR HAZARDOUS SUBSTANCE CLEANUPS UNDER CERCLA: A COMPREHENSIVE APPROACH

*Michael P. Healy**

In enacting the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA), Congress intended to impose liability for hazardous substance cleanups on all parties responsible for a site's use and contamination. However, in implementing the CERCLA liability scheme, courts have issued opinions offering unclear and misguided explanations of their decisions. The author suggests that, to properly assure CERCLA's proper operation, the basis for the imposition of liability must be clarified. To this end, the author examines the prescribed liability for individuals, parent corporations and secured creditors and explains the appropriate grounds for the responsibility of each.

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* Assistant Professor, University of Kentucky College of Law. B.A. 1978, Williams College; J.D. 1984, University of Pennsylvania. The author was an attorney in the Appellate Section of the Environment and Natural Resources Division, United States Department of Justice, until July 1990. The views expressed in this article are the views of the author and do not reflect the views of the Department of Justice. The author thanks Jeffrey Kehne for reviewing and commenting on the article.

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As the federal law of hazardous substance cleanups enters its second decade with a newly reauthorized statute¹ and with estimated hazardous substance cleanup costs rivalling the costs of bailing out the nation's savings and loan institutions,² a comprehensive survey of the direct liability imposed by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)³ is warranted. In particular, the survey should focus upon the exact scope of the direct liability scheme imposed by Congress and the extent to which that liability scheme is being implemented and reinforced by the courts.⁴

This article provides a detailed analysis of direct liability for the cleanup of hazardous substances under CERCLA. Following a brief overview of the statute, the article discusses the broad liability scheme that Congress intended to establish by assessing both the terms of the statute and its legislative history.⁵ The article then identifies the role that Congress intended for the courts to play in

1. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat. 1388, 1388-319 (1990) (to be codified at 42 U.S.C. § 9611(a)). The Act reauthorizes the statute until September 30, 1994 and provides \$5.1 billion in funding for the three-year reauthorization period. *Id.* Before this legislation was enacted, the authorization period for hazardous substance cleanup legislation had been scheduled to end on December 31, 1991. See H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 320-21 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3413-14.

2. Compare OFFICE OF TECHNOLOGY ASSESSMENT ("OTA"), ASSESSING CONTRACTOR USE IN SUPERFUND 1 (1989), reprinted in 17 CHEM. WASTE LITIG. REP. 715 (1989) (estimating that "perhaps \$500 billion in cleanup costs fac[e] American society over at least 50 years," excluding the costs of cleaning up Department of Energy facilities) (footnote omitted) with *The S. & L. Cleanup Advances - Slowly*, N.Y. TIMES, Aug. 13, 1990, at A14 ("The [savings and loan] bailout has turned out to be more difficult and vastly more expensive than anyone anticipated. The final bill is now projected at \$160 billion, plus twice as much again in interest.").

3. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1988 & Supp. 1989), as amended by Act of Nov. 5, 1990, 42 U.S.C.A. § 9611 (West Supp. 1991)). CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

4. Direct liability refers to liability that results from a person's own conduct; in contrast with derivative liability and successor liability which arise from one's formal relationship with whose own conduct has resulted in liability.

5. One court has stated that "CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history." *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985). This characterization is due partly to CERCLA's passage as compromise legislation after only limited debate following the 1980 elections. *Id.* Nevertheless, as this article discusses, the legislative history of CERCLA, and also of SARA, is critical to understanding and enforcing the liability scheme for hazardous substance disposal activities and for recovering the huge costs of hazardous substance cleanups.

construing the statute and developing the liability scheme. Finally, the article examines how the courts have, thus far, applied the liability scheme established by Congress. This final step progresses from consideration of the early court decisions addressing the straightforward question of direct liability of individuals through an analysis of the more recent decisions adjudicating the troublesome questions of direct liability of parent corporations and lender institutions. From this review of the statutory scheme and its application, the article concludes that judicial determinations of liability would be more defensible and more effective if they were more fully grounded on Congress' new scheme of comprehensive liability for hazardous substance disposal activities.

I. CERCLA AND ITS LIABILITY SCHEME

Congress enacted CERCLA in 1980 primarily to enhance the authority of the federal Environmental Protection Agency ("EPA") by giving it the ability to respond effectively to problems posed by the release of hazardous substances, pollutants, and contaminants.⁶ Several well-publicized incidents of improper disposal of large amounts of hazardous substances which caused serious public health problems sparked interest in and support for this legislation. Among these incidents were Love Canal in New York,⁷ the "Valley of the Drums" in Kentucky,⁸ and the James River kepone dis-

6. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 2, at 17 (1980), reprinted in 2 SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) PUBLIC LAW 96-510, at 118 (Comm. Print 1983) [hereinafter CERCLA HISTORY].

7. "Love Canal" has become synonymous with toxic waste disaster. In 1978, a neighborhood in New York was discovered to be contaminated by chemicals leaking from an old toxic waste dump site. President Carter declared the neighborhood a disaster area. See S. REP. NO. 848, 96th Cong., 2d Sess. 8-10 (1980), reprinted in 1 CERCLA HISTORY, supra note 6, at 315-17; *Chemical Firm Held Liable for Cleanup of Love Canal*, L.A. TIMES, Feb 23, 1988, at 2; E.J. Dionne, Jr., *The Love Canal Legacy: Lawsuits and Bitterness*, N.Y. TIMES, Sept. 7, 1981, at B2; Robert D. McFadden, *Love Canal: A Look Back*, N.Y. TIMES, Oct. 30, 1984, at B6; Kathy Trost, *Love Canal: Despite Warning Signs, Some Residents Stay On*, WASH. POST, June 23, 1980, at A1.

8. The contents of 17,000 rusting drums were found seeping into land water near Louisville, Kentucky, and toxic waste was discovered in streams flowing into the Ohio River. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 18 (1980), reprinted in 2 CERCLA HISTORY, supra note 6, at 49; Maryann Bird, *Issue and Debate Battle of Toxic Dumps: Who Pays for Cleanup?*, N.Y. TIMES, July 11, 1980, at B4; Bill Richards, *U.S. to Sue Hazardous Waste Dumping*, WASH. POST, Feb. 3, 1979, at 2; David F. Salisbury, *Superfund Set to Start Cleaning Up Abandoned Hazardous Waste Sites*, CHRISTIAN SCI-

charges in Virginia.⁹ In the face of these environmental disasters, Congress concluded that then-existing statutory authorities were inadequate because they did not allow for an immediate and large-scale response to the dangers posed by hazardous waste sites, particularly abandoned sites.¹⁰

A. An Overview of the Statute

CERCLA specifically authorizes the EPA to take "response" actions to abate any actual or threatened release of a hazardous substance.¹¹ In addition to authorizing cleanup actions by the

ENCE MONITOR, Dec. 8, 1980, at 7.

9. In 1977, it was discovered that Allied Chemical Co. had secretly and illegally discharged kepone, an ant and roach poison, into the James River at Hopewell, Virginia. A federal grand jury indicted the company, which was later fined \$5,000,000 for the dumping. See S. Rep. No. 848, *supra* note 7, at 7, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 314; Douglas B. Feaver, *Hopewell Fined for Pollution*, WASH. POST, Dec. 16, 1981, at A29; Michael Isikoff, *Virginia Agencies Seek to Ease Kepone Rules*, WASH. POST, June 20, 1982, at B1; Sandra Sugawara, *Group Asks E.P.A. Sanctions*, WASH. POST, Aug. 29, 1984, at A1; Sandra Sugawara, *Virginia's James River Still is Choked With Pesticide*, L.A. TIMES, Oct. 25, 1985, at 4.

10. Congress intended to replace the "patchwork" approach to cleanup derived from the Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992k), and other statutes with a comprehensive scheme. S. REP. NO. 848, *supra* note 7, at 11-12, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 318. See also 126 CONG. REC. H26,338 (1980) (statement of Rep. Florio) ("Existing statutes are inadequate to cope with the inactive waste site problem. Both funds and emergency response authority to clean up problem chemical dumps are lacking under current law."), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 228; 126 CONG. REC. H26,358 (1980) (statement of Rep. Rodino) (discussing the inadequacy of RCRA), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 284.

Congress nevertheless believed that RCRA could have been implemented more aggressively to ameliorate some of the problems posed by inadequate waste disposal and abandoned sites, and it concluded that the EPA had failed to exercise properly the authority established under RCRA when faced with obvious health hazards posed by abandoned waste sites. See H.R. REP. NO. 1016, pt. 1, *supra* note 8, at 21-22, reprinted in 2 CERCLA HISTORY, *supra* note 6, at 52-53. For further discussion of RCRA, see *infra* notes 54-58 and accompanying text.

11. 42 U.S.C. § 9604(a)(1). Response actions fall into either of two categories: "removal" actions, 42 U.S.C. § 9601(23), which are short-term actions to prevent or mitigate damage to human health or the environment as a result of the release or threatened release of a hazardous substance, and "remedial" actions, 42 U.S.C. § 9601(24), which may include a variety of cleanup activities aimed at a long-term, permanent remedy at the site. Although removal actions may be undertaken at any site, the National Oil and Hazardous Substances Pollution Contingency Plan [hereinafter National Contingency Plan or NCP] provides that remedial actions financed by the Superfund may take place only at sites listed on the National Priorities List ("NPL"). National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8845 (1990) (to be codified at 40 C.F.R. § 300.425(b)(1)). Sites listed on the NPL are those that pose the greatest threat to public

EPA, CERCLA provides funds via the Hazardous Substance Superfund to pay for federal response actions.¹² CERCLA also provides that the federal government may bring cost-recovery actions pursuant to section 107¹³ to recover from responsible parties monies expended for cleanup, thereby creating a means to replenish the fund.¹⁴ The statute supplements these federal response actions by authorizing an owner or operator of a facility¹⁵ or another par-

health and the environment. *See, e.g.*, *Eagle-Picher Industries, Inc. v. United States EPA*, 822 F.2d 132 (D.C. Cir. 1987) (noting that when the EPA has followed correct procedures and placed a site on the NPL, such listing is reasonable and lawful).

The NCP also guides the EPA's conduct of federal response actions — both removal and remedial; CERCLA requires response actions to be "consistent with" the NCP. 42 U.S.C. § 9604(a)(1)(B). *See also* 42 U.S.C. § 9605(a)(10) (response actions "shall, to the greatest extent possible, be in accordance with [NCP]"). In addition, when the government sues under § 107 to recover the costs of a federal response, responsible parties are liable for "all costs of removal or remedial action . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A).

12. *See* 26 U.S.C. § 9507. When enacted, CERCLA included § 221 (originally codified at 42 U.S.C. § 9631), which established the Hazardous Substance Response Trust Fund. SARA changed the formal name of this fund to the Hazardous Substance Superfund. SARA, § 517(a) (codified at 26 U.S.C. § 9507(a)).

13. 42 U.S.C. § 9607(a)(4)(A).

14. CERCLA also authorizes the EPA, pursuant to § 106, to order that private cleanups be undertaken in certain circumstances. *See* 42 U.S.C. § 9606(a). The relationship between the identity of parties liable for response costs under 42 U.S.C. § 9607 and of parties that may be subject to an administrative order to cleanup under 42 U.S.C. § 9606 has been characterized as "intriguing" by one writer. 1 DONALD W. STEVER, *LAW OF CHEMICAL REGULATION AND HAZARDOUS WASTE* § 6.05[2][c] (1990). Because courts and the EPA have adopted varying positions on the identity of the parties within the two sections, the nature of the relationship remains uncertain. *See id.*

Decisions identifying the scope of direct liability under § 107 are nevertheless likely to affect the willingness of private parties to conduct cleanups pursuant to a § 106 order. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3), provides that the United States may recover punitive damages in an amount up to three times the response costs incurred by the Superfund from "any person who is liable for a release or threat of a release of a hazardous substance" and who "fails without sufficient cause" to perform a response action as directed in a § 106 order. *Id.* Liability for a release or a threat of a release will, of course, be determined by application of § 107, 42 U.S.C. § 9607. *See, e.g.*, *Solid State Circuits, Inc. v. United States EPA*, 812 F.2d 383, 388 (8th Cir. 1987) (construing the scope of EPA discretion in ordering cleanups pursuant to § 106).

15. 42 U.S.C. § 9601(9) defines "facility" as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

The term "facility" has been "construed very broadly to include 'virtually any place at

ty that would be liable for cleanup costs to proceed with a response action at a facility from which hazardous substances have been released.¹⁶ When a private party incurs response costs by performing any cleanup or response action, that party may bring an action in federal court seeking to recover from responsible parties the funds it has expended in cleaning up the site.¹⁷

Section 107(a) of CERCLA¹⁸ establishes four broad classes of "person[s]" or responsible parties who are liable for the costs of cleaning up hazardous substances when either the government, state or federal, or a private party brings a cost recovery action. The first and second classes are composed of the present and some past owners and operators of hazardous substance facilities and sites.¹⁹ The third class, commonly referred to as generators, consists of persons who arranged for the disposal or treatment of hazardous substances.²⁰ The fourth class encompasses persons who have transported hazardous substances and have selected the disposal facility.²¹ In delineating these four groups, Congress defined "person[s]" very broadly to include not only individuals, but also corporations, joint ventures, firms, associations and commercial entities.²²

which hazardous wastes have been dumped or otherwise disposed of." *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (quoting *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985)), *cert. denied*, 484 U.S. 848 (1987).

16. 42 U.S.C. § 9601(22) defines a "release" to be any discharge of hazardous substances into the environment, subject to several exceptions.

17. 42 U.S.C. § 9607(a)(4)(B). *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989) ("The statute specifically provides for a private right of action."); *Cadillac Fairview/Calif., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 693 (9th Cir. 1988) (finding that 42 U.S.C. § 9607 "expressly creates a private claim against any person who owned or operated a facility at the time hazardous substances were disposed of at the facility for recovery of necessary costs of responding to the hazardous substances . . . incurred consistent with the national recovery [sic] plan") (citations omitted); National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8858 (1990) (describing the cost recovery actions that may be brought by a private party under Section 107(a)) (to be codified at 40 C.F.R. § 300.700). *See also* 42 U.S.C. § 9613(f) (providing for contribution actions by private parties that have expended funds for cleanups).

The costs that may be recovered by a private party in a cost recovery action are "other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

18. 42 U.S.C. § 9607(a).

19. *Id.* § 9607(a)(1)-(2).

20. *Id.* § 9607(a)(3).

21. *Id.* § 9607(a)(4).

22. *Id.* § 9601(21).

It is now well settled that responsible parties are strictly liable under CERCLA.²³ Moreover, each responsible party within each of the four statutory classes is jointly and severally liable when indivisible harm results from the release or threatened release of a hazardous substance.²⁴

B. The Principal Purposes of CERCLA Liability

The CERCLA liability scheme can only be understood in the context of the statute's fundamental purpose. Congress enacted CERCLA in late 1980, after several years of legislative effort, in response to findings that more than 2,000 sites, many abandoned, had been used for the disposal of hazardous substances and posed a threat both to the public health and to the environment.²⁵

23. See, e.g., *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (holding current owners of a development strictly liable under CERCLA); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (holding the corporate property owner, its officers and its stockholders strictly liable); see also 42 U.S.C. § 9601(32) (referencing the standard of liability in 33 U.S.C. § 1321, which prohibits the discharge of oil or hazardous substances into navigable waters). For a discussion of the CERCLA definition of "liable" and "liability" and its reference to the standard of liability imposed by the Clean Water Act, see *infra* text accompanying notes 71-76.

24. See, e.g., *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989) (hazardous waste generators jointly and severally liable where harm was indivisible), *cert. denied*, 110 S. Ct. 1115 (1990); *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988) (joint and several liability mandated where the parties failed to establish a reasonable basis for apportioning liability), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810-11 (S.D. Ohio 1983) ("[W]here two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.").

25. S. REP. NO. 848, *supra* note 7, at 2, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 309. The approximately 2,000 sites that Congress then viewed as posing a present threat to public health were a subset of a much larger number of hazardous waste sites. See H.R. REP. 1016, pt. 1, *supra* note 8, at 18, reprinted in 2 CERCLA HISTORY, *supra* note 6, at 49 (noting the existence of 30,000 to 50,000 hazardous waste sites).

Congress also discussed other indicia of the scope of the problem it intended to address by enacting CERCLA. The Senate committee considering the legislation noted an Office of Technology Assessment report finding that approximately 347 billion gallons of chemicals classified as hazardous were produced in 1979 and that the annual growth rate for production of those chemicals was 7.6 percent. S. REP. 848, *supra* note 7, at 3, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 310. The committee observed that "[t]he problem is much broader than those incidents involving disposal of hazardous substances;" it extends to "the closely related problems of (accidental) spills and other releases of dangerous chemicals which can have an equally devastating effect on the environment and public health." *Id.* at 5, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 312. Indeed, Senator Culver, introducing hearings on the bill in 1979, stated that the problem of accidental spills and abandoned waste sites was "clearly enormous." *Hazardous and Toxic Waste Disposal: Administration Testimony to the Subcommittees on Environmental Pollu-*

CERCLA's paramount goal is to facilitate cleanup of hazardous substances through Superfund-financed and privately-financed response actions.²⁶

1. Facilitating Cleanups by Replenishing the Fund and Encouraging Private Response Actions

In view of the "tremendous" scope of the problems posed by unsound disposal of hazardous substances,²⁷ the EPA had estimated that cleanup of the 1200 to 2000 most dangerous sites would cost between \$13.1 billion and \$22.1 billion.²⁸ Indeed, more recent cost estimates are substantially higher.²⁹ Congress estab-

tion and Resource Protection, Committee on Environment and Public Works, U.S. Senate (June 20, 1979) [hereinafter Administration Testimony], reprinted in 1 CERCLA HISTORY, supra note 6, at 56. Statistics offered by administration officials confirmed this assessment: "[d]uring the [previous] 5 years, there [had] been about 11,000 oilspills [sic] per year in the United States, totaling about 17 million gallons per year [A]n analysis of the data sources available indicates that about 3,500 incidents per year involving chemicals have the potential of releasing significant quantities of hazardous substances onto land or water." Id. at 6 (statement of Thomas C. Jorling, Asst. Administrator, Water and Waste Management, EPA), reprinted in 1 CERCLA HISTORY, supra note 6, at 60.

Some in Congress criticized the EPA study's estimates of the scope of the hazardous waste problem. See H.R. REP. 1016, pt. 1, *supra* note 6, at 70 (dissenting views of Reps. Stockman and Loeffler), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 101.

26. Several cases have indicated that the purpose of CERCLA is to provide the federal government with a method of financing the cleanup of hazardous waste. See, e.g., *Monsanto Co.*, 858 F.2d at 167 n.8, 170 n.18; *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-06 (S.D. Ohio 1983); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982). At the time he signed CERCLA into law, President Carter stated that the statute was part of an effort to "beg[i]n a massive and needed cleanup of hazardous wastes in our country, a problem that had been neglected for decades or even generations." Remarks on Signing H.R. 7020 into Law, 16 WEEKLY COMP. PRES. DOC. 2797, 2798 (Dec. 15, 1980), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 48.

27. S. REP. NO. 848, *supra* note 7, at 2, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 309. The Senate was not alone in its characterization of the daunting problem of remediation. Others offered similar assessments. See *Administration Testimony, supra* note 25, at 32 (statement of EPA Asst. Administrator Jorling) ("releases of hazardous waste from abandoned and inactive disposal sites . . . confront[] [us] with perhaps the most serious environmental problem facing the Nation today"), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 86; see also 126 CONG. REC. 26,337, reprinted in 2 CERCLA HISTORY, *supra* note 6, at 226 (statement of Rep. Florio) (hazardous waste disposal sites present "the number one environmental challenge facing us in this decade").

28. See *United States v. Wade*, 577 F. Supp. 1326, 1338 n.11 (E.D. Pa. 1983) (citing H.R. REP. 1016 for EPA cost estimates at the time of CERCLA's passage).

29. Recent estimates of costs vary, but the total estimated costs are consistently astronomical. In 1989, the OTA estimated the cost of a less than comprehensive cleanup to be "perhaps \$500 billion," a significant increase from its \$300 billion estimate just four years

lished the Superfund to finance response actions pursued by the federal government at those sites posing the greatest threat to public health and the environment. Even though CERCLA limited the sites that the government could clean using Superfund monies,³⁰ lawmakers understood at the time the Act was debated and passed that the \$1.6 billion initially authorized by CERCLA³¹ would be insufficient.³² In 1980, CERCLA provided funding at only "the

earlier. OTA, *supra* note 2, at 1, *reprinted in* 17 CHEM. WASTE LITIG. REP. 715 (1989).

A report issued by EPA Administrator William Reilly in June 1990 includes the following outlook:

Based on everything that is known about the situation, the only possible conclusion to be made is that the Superfund program will be around for many, many years and it will be quite expensive. EPA estimates that the cost of construction at current National Priorities List [NPL] sites is likely to be \$30 billion, assuming that half the work will be done directly by the Fund and half by responsible parties. It will probably take about 13 years to begin construction on just the sites that are currently on the list, and the Agency expects to add sites to the inventory at the rate of about 75 to 100 per year.

EPA, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM 3 (June 1990), *reprinted in* 18 CHEM WASTE LITIG. REP. 406 (1990).

An earlier congressional study estimates that the amount of federal funds needed to cleanup sites listed on the NPL would "rang[e] from about \$16.7 to \$23.8 billion, far in excess of the available \$8.5 billion [appropriated in SARA]." *Department of Housing and Urban Development: Independent Agencies Appropriations for 1989, Part 4: Environmental Protection Agency: Hearings Before the House Comm. on Appropriations, 100th Cong., 2d Sess. 179, 182 (1988)* (report of R.W. Vandergrift, Jr. and Graham W. Van Note, Committee Surveys and Investigations Staff, "Status of the Environmental Protection Agency's Superfund Program"), *reprinted in* Practising Law Institute, Practical Approaches To Reduce Environmental Cleanup Costs 409 (1988). See also FREDERICK R. ANDERSON et al., ENVIRONMENTAL PROTECTION: LAW AND POLICY 614 (1990) (citing Standard and Poor report for the insurance industry estimating the "total eventual cost at \$700 billion").

30. See *supra* note 11 and accompanying text. See also S. REP. NO. 848, *supra* note 7, at 17-18 (CERCLA's proposed funding "will permit government response only to the most significant releases"), *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 324-25.

31. See 126 CONG. REC. 31,964 (statement of Rep. Florio), *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 777. A tax on chemical and petrochemical businesses provided this initial funding. See *infra* notes 132-38 and accompanying text.

A total of approximately \$15 billion has been authorized for the Superfund to date. In addition to CERCLA's \$1.6 billion for the original five-year authorization period, SARA authorized funding of about \$8.5 billion over a subsequent five-year period. H.R. CONF. REP. NO. 962, *supra* note 1, at 320-21, *reprinted in* 1986 U.S.C.C.A.N. 3413-14. The recent three-year CERCLA reauthorization provides an additional \$5.1 billion in funding. Omnibus Budget Reconciliation Act of 1990, § 6301, 104 Stat. at 1388-319 (to be codified at 42 U.S.C. § 9611(a)).

32. In commenting on the level of funding proposed for CERCLA, the Senate Report states that government "response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment." S. REP. NO. 848, *supra* note 7, at 17, *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 324. See also

absolute minimum necessary to begin a responsible effort."³³ As a result, the CERCLA liability scheme, mandating recovery of response costs from responsible parties, was necessary to replenish the Superfund.³⁴

Wade, 577 F. Supp. at 1336 n.10 (stating that the amount of the Superfund authorized by CERCLA was "inadequate").

33. 126 CONG. REC. 26,346 (statement of Rep. Rostenkowski), *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 252. Representative Rostenkowski noted that the amount of money authorized in CERCLA was estimated to be sufficient to finance the cleanup of "only the 250 most critical sites." *Id.* See also *id.* at 26,348 (statement of Rep. Downey) ("The \$1.2 billion [proposed for CERCLA] is a start. It is not adequate, but I think it represents a reasonable beginning."), *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 258.

Congress' understanding that CERCLA provided substantially less funding than the amount actually needed to address the problem of hazardous waste cleanup is also apparent in the fact that Congress accorded the executive substantial discretion in developing priorities for cleanups. See S. REP. NO. 848, *supra* note 7, at 57 ("In order to achieve the maximum protection of public health, welfare and the environment with the limited resources of the Fund, the President may have to balance the need for a capital-intensive remedy at one site or facility against the need to respond to other releases, discharges or disposal."), *reprinted in 1 CERCLA HISTORY*, *supra* note 6, at 364.

34. See 126 CONG. REC. 31,978, *reprinted in 1 CERCLA HISTORY*, *supra* note 6, at 813. During the final floor debate on CERCLA, Rep. Jeffords stated that:

[b]y utilizing the revolving fund to clean up releases and compensate governments for the loss of natural resources, this bill creates the means for a timely response to crucial health and environmental problems. This bill would establish liability rules to govern payment into the fund by those persons responsible for causing the release of hazardous waste, replenishing the fund for future cleanup and resource compensation payments to governments.

Id. The importance of the federal standard imposing liability and allowing recoupment of funds expended for cleaning up sites was discussed by House members in connection with an amendment that would have provided the states with cleanup authority and would have limited the liability of polluters. See 126 CONG. REC. 26,757-26,799, *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 295-328. The House rejected that amendment. *Id.*

This purpose of the CERCLA liability scheme has been recognized in litigation. See *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("CERCLA should be given a broad and liberal construction" to give effect to Congress' intent "that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal").

CERCLA is subject to substantial criticism as a result of the federal government's failure to make progress toward the law's goal of replenishing the superfund through the recovery of costs from responsible parties. See Marzulla, Roger J., *Superfund 1991: How Insurance Funds Can Help Clean Up the Nation's Hazardous Waste*, 4 *Toxics L. Rep.* (BNA) 685 (1989). Marzulla, a former Assistant Attorney General, states that:

in the past two years (far and away the most active years of the superfund program), the government has recovered less than 3 percent of the \$4.3 billion spent. By . . . 1991, more than \$10 billion will have been spent, with recoveries likely to be about half a billion dollars. One might well assert that a cost recovery system that fails to recover 95 percent of its expenditures cannot

In addition to the replenishment effect, Congress intended that the CERCLA liability scheme encourage other parties to pursue cleanups not financed by Superfund. CERCLA allows private parties and states who proceed with cleanups to seek recovery for those response costs in actions brought under Section 107.³⁵ Congress understood that its goal of ensuring the cleanup of hazardous substance facilities would depend upon response actions undertaken by private, responsible parties.³⁶ Indeed, private response actions may be less costly than government cleanups and may permit the EPA to focus its efforts and resources on the facilities where releases pose the greatest threat to human health and the environment.³⁷ Accordingly, proper construction of the liability provisions will have a substantial impact on the willingness of private parties to pursue cleanups on their own and will ensure that the limited

be properly be called a self replenishing fund, although half a billion dollars in recoveries should not be overlooked entirely.

Id. at 688 (footnotes omitted).

35. See *supra* notes 15-24 and accompanying text.

36. See 126 CONG. REC. 26,761 (statement of Rep. Florio) ("If there is no liability provision, they will not have any incentive whatsoever to go forward on a voluntary basis and clean up those sites."), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 305; S. REP. NO. 848, *supra* note 7, at 96 (June 5, 1980, letter from Pres. Carter stating that the proposed CERCLA liability scheme is a "most powerful incentive" to "encourage responsible parties to undertake cleanup activities themselves"), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 403. See also *Cadillac Fairview/Calif., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) (stating that CERCLA is intended to promote private cleanups); *Solid State Circuits, Inc. v. United States Environmental Protection Agency*, 812 F.2d 383, 388 (8th Cir. 1987) ("Since Superfund money is limited, Congress clearly intended private parties to assume clean-up responsibility.").

Congress amended CERCLA in 1986 to further facilitate private cleanups. SARA added § 122(a), 42 U.S.C. sec. 9622(a), which provides specific authority for EPA to enter into agreements with private parties authorizing those parties to perform response actions. That provision states: "Whenever practicable and in the public interest[] . . . the [EPA] shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation." *Id.* See also *National Oil and Hazardous Substances Pollution Contingency Plan*, 55 Fed. Reg. at 8668 ("SARA adds to CERCLA a number of provisions that are intended to facilitate responsible party conduct of response actions.").

37. See, Note, *Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1496-97 (1986) (private response actions "encourage cleanup by private parties while reducing the drain on federal resources") (footnote omitted). See generally Richard C. Belthoff Jr., *Private Cost Recovery Actions Under Section 107 of CERCLA*, 11 COL. J. ENVTL. L. 141 (1986) (discussing implementation of private cleanups and cost recovery actions); Neil Orloff, *Private Enforcement of Superfund*, 1 NAT. RESOURCES & ENV'T 29 (1986) (examining private causes of action under CERCLA); Mark J. White, Comment, *Private Response-Cost Recovery Actions Under CERCLA*, 34 U. KAN. L. REV. 109 (1985) (offering a broad overview of CERCLA actions).

sums appropriated to the Superfund are not used unnecessarily.³⁸

In sum, CERCLA's paramount objective of facilitating the cleanup of hazardous waste sites that pose a threat to public health or the environment is tied directly to the availability of funds in the Superfund and to the readiness of private parties to undertake response actions. Advancing that policy depends on the construction and application of the liability standard established by the Act.

2. Establishing a New Standard of Care for Hazardous Substance Disposal Activities

In enacting CERCLA, Congress also intended to "create a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm."³⁹ Congress imposed this new, uniform standard of care on those actors most able to protect against the risks presented by inadequate disposal.⁴⁰ Moreover, Congress believed that, even though hazardous

38. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1082 (1st Cir. 1986) ("the liability provisions of section 107 are an essential part of the structure established by CERCLA because the resources of the Fund alone are simply insufficient to provide an adequate remedy to the national problem of hazardous waste disposal") (citations omitted); *Barnet Aluminum Corp. v. Reilly*, 730 F. Supp. 771, 774 (W.D. Ky. 1990) (in deciding whether they will conduct a portion of a remedial action, potentially responsible parties must "assess[] their chances in a future law suit" that will determine their liability), *aff'd*, 927 F.2d 289 (6th Cir. 1991); see also *supra* note 14 (discussing how the scope of liability under section 107 is likely to affect the willingness of private parties to respond to section 106 orders).

39. S. REP. NO. 848, *supra* note 7, at 14, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 321. See also *id.* at 15, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 322 (quoting statement of Asst. Attorney General Mooman that imposition of joint and several liability is the best incentive for controlling hazardous substance releases); see also 126 CONG. REC. 26,339-40 (statement of Rep. Staggers) ("The liability provisions will . . . serve as an incentive to potentially liable persons to ferret out and address hazardous waste problems with which they may be associated."), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 232.

The decision to establish a standard of strict liability was viewed by Congress as consistent with the "law of product liability" that applies to "manufacturers of unavoidably dangerous products." S. REP. NO. 848, *supra* note 7, at 14, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 321. See also *id.* at 33 (relying on the rule of strict liability established in *Rylands v. Fletcher*, 1 L.R.-Ex. 265 (Ex. Ch. 1865)), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 340.

40. Congress's decision to impose strict liability for hazardous waste disposal activities was premised on its view that these activities are "ultrahazardous." See 126 CONG. REC. 30,940 (statement of Sen. Tsongas) ("For purposes of this act, Congress declares that manufacture, use, transportation, treatment, storage, disposal, and release of hazardous substances are ultrahazardous activities. This is not a new concept. Strict liability for ultrahazardous activities has been accepted and applied throughout the United States."), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 708; 126 CONG. REC. 31,978 (state-

substance disposal involved inherent risks, much of the harm to public health and the environment could be eliminated through the use of greater care.⁴¹ CERCLA's liability provision, which seeks to establish the responsibility of persons to pay the cost to remedy the harmful effects of their inadequate disposal activities, was critical to Congress' choice to implement the new, strict standard of care.⁴² In contrast, the tax levied on chemical and petrochemical concerns to finance the Superfund would not necessarily create an incentive to observe a stricter standard of care because the tax was uniformly imposed on each enterprise in those industries without regard to specific disposal practices.⁴³

To promote this new standard of care, Congress imposed liability throughout the chain of distribution so that all waste generators who make disposal arrangements are liable for the costs of cleaning up releases, regardless of whether those parties actually disposed of the substances.⁴⁴ By extending liability in this man-

ment of Rep. Jeffords) ("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."), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 813.

41. See S. REP. NO. 848, *supra* note 7, at 33 ("Most risks [posed by hazardous substances] are not inevitable. On the contrary, many can be minimized or eliminated altogether through the exercise of greater care."), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 340.

42. Evidence of this view is manifest by the testimony of EPA Assistant Administrator Jorling: "I think the penalty and liability provisions are a much superior way to establish a high standard of care than the use of an economic disincentive in the fee." *Administrative Testimony*, *supra* note 25, at 19, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 73. "The deterrent mechanism for any spill, whether it be 1 gallon or hundreds of thousands of gallons, is that when the Government acts to respond, those costs are charged back, plus penalties. That is the basic incentive system." *Id.* at 15, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 69.

During debate on SARA, Senator Stafford reiterated this understanding of the significance of the liability scheme for ensuring that parties observe the new standard of care. Senator Stafford, who was then Chairman of the Committee on Environment and Public Works, stated:

The primary purpose of Superfund is to minimize releases of toxic chemicals. This is achieved by establishing a standard of liability only marginally short of absolute based on the conviction, now confirmed by experience, that this will induce the highest standard of care. Erosion of liability, whether through indemnification [of contractors] or otherwise, increases the probability that care will be lessened proportionally.

132 CONG. REC. S14,902 (1986).

43. For a discussion of CERCLA's fee system and its rationale, see *infra* text accompanying notes 132-38.

44. See 42 U.S.C. § 9607(a)(3) (imposing liability on those who contract for the dis-

ner, Congress has ensured that various actors will have an incentive to observe a high standard of care.⁴⁵ Congress also acted to ensure the new standard's integrity by precluding responsible parties from relying on third-party defenses;⁴⁶ a party, such as a generator, who is involved in disposal activities, cannot avoid liability for cleanup costs by claiming that another person was contractually responsible for adequately performing the disposal.⁴⁷

Congress viewed the imposition of this new standard of care for hazardous substance disposal activities as warranted for several reasons. First, Congress believed that such liability would promote the internalization of costs within business organizations so that the market price of goods would reflect the actual, total cost of their production.⁴⁸ In Congress' view, this policy to encourage internal-

posal or treatment of hazardous substances).

45. See S. REP. NO. 848, *supra* note 7, at 15 ("In correcting the historic neglect of hazardous substances disposal, it is essential that th[e] incentive for greater care focus on the initial generators of hazardous wastes since they are in the best position to control the risks."), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 322; see also *Administration Testimony*, *supra* note 25, at 65 (statement of EPA Assistant Administrator Jorling) ("By making producers, as well as the party which spills, liable for damages from a spill, an additional party — the producers — would have a strong incentive to improve standards of care throughout the chain of commerce."), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 119.

46. See 42 U.S.C. § 9607(b)(3) (permitting potentially responsible parties to use a third party defense *only* in the limited instances where they can show (a) that the damage was caused by an act or omission of a third party not an employee or agent, (b) that they exercised due care in light of the characteristics of the hazardous substance, and (c) that they took precautions against the foreseeable acts or omissions of such third parties).

47. See *infra* notes 127-29 and accompanying text.

48. S. REP. NO. 848, *supra* note 7, at 13 ("Strict liability . . . assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business."), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 320; see generally 126 CONG. REC. 30,940 (statement of Sen. Bradley) ("the real cost of production [of hazardous substances] includes safe disposal, and all of us should recognize that"), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 706; *id.* at 26,798 (statement of Rep. Eckhardt) ("It is high time that we internalized all the costs of chemicals — both production and disposal — so that they can play their appropriate role in the American marketplace."), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 386; *id.* at 26,351 (statement of Rep. Volkner) ("Placing the cost of cleanup on waste generating industries will prevent the externalization of costs for products developed by such industries and thus will make it clear to society what the true costs of such products are. Only if such a path is followed will the generation of hazardous wastes be controlled in the future."), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 265.

During the debate on SARA in 1986, one Senator criticized the Department of the Interior's rules on the recovery of natural resources damages because the rules failed to provide for the internalization of the full costs of natural resources damages. 132 CONG. REC. S14,930 (statement of Sen. Baucus) (The Interior Department regulations "reduce the incentive on the part of industries to exercise care in order to avoid liability for natural

ization of costs would be equitable to all market participants. Internalization is equitable because companies that have borne the costs of disposing of hazardous substances adequately will have no cleanup costs, while companies that attempted to avoid costs by disposing of hazardous substances inadequately will be liable for the expense incurred in cleaning up the improperly handled waste.⁴⁹ Congress also reasoned that cost internalization would be beneficial to the economy in general.⁵⁰ Second, Congress decided to impose a higher standard of care based on its understanding that the costs of adequate disposal are substantially less than the costs of eliminating the harms caused by inadequate disposal via cleanup.⁵¹ Finally, Congress believed its new liability scheme was nec-

resource damages. By thus failing to force these industries to internalize the true cost of their activities to society, the proposals issued to date are impediments to the restoration and replacement of resources, and incentives to careless, not careful, conduct.”)

49. See, e.g., 126 CONG. REC. 26,343 (statement of Rep. Gore) (“this legislation really does help those who are trying to be responsible by removing the unfair advantage that irresponsible companies have taken by dumping their waste in an unacceptable fashion”), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 243.

50. The Senate report on CERCLA explained that the economy would “operate better” because

[s]trict liability is, in effect, a method of allocating resources through choice in the market place.

The most desirable system of loss distribution is one in which the prices of goods accurately reflect their full costs to society. This therefore requires, first, that the cost of injuries be borne by the activities which caused them, whether or not fault is involved, because, either way, the injury is a real cost of these activities. Second, it requires that among the several parties engaged in an enterprise the loss be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.

S. REP. NO. 848, *supra* note 7, at 34, reprinted in 1 CERCLA HISTORY, *supra* note 6, at 341.

51. See S. REP. NO. 848, *supra* note 7, at 7 (indicating that the cost of proper control in the James River kepone disaster would have been \$200,000, while the cleanup costs might reach \$8 billion), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 314.

In the Senate hearings on the administration-proposed bill, Senator Culver stated:

We would be pennywise and pound foolish to continue to ignore the problem [of toxic and hazardous waste dumps and spills]

. . . .

In the case of Love Canal, for example, the cost of proper disposal of all of the toxic chemicals dumped would have been about \$4 million. Already, the State of New York has spent more than \$23 million trying to stop the spread of those wastes through the city of Niagra Falls and to relocate exposed citizens, and the suits for damages now total more than \$2 billion.

Similarly, the James River kepone disaster could have been averted with sensible controls at limited cost — but now, commercial fishing is prohib-

essary because state laws imposing liability for inadequate disposal of hazardous substances lacked uniformity and contained insufficient standards of care.⁵²

Although Congress' intent in and rationale for creating a new standard of care to govern disposal activities are plain, Congress did not elaborate on the significance of the fact that the liability scheme would effectively impose this heightened standard of care retroactively in many instances. To be sure, CERCLA has important prospective effects. For instance, it assigns liability in the case of unintentional spills, encouraging potential responsible parties to take steps aimed at reducing the likelihood of accidental releases.⁵³ Moreover, the prospective effects of CERCLA on disposal activities compensate for some of the shortcomings of the Resource Conservation and Recovery Act ("RCRA").⁵⁴ At the time it was enacted, Congress viewed RCRA as establishing the requirements for prospective "cradle-to-grave" management of hazardous waste

ited altogether in that river for the foreseeable future.

Administration Testimony, *supra* note 25, (statement of Sen. Culver), *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 56.

One commentator has relied on the "exponentially larger" costs associated with a release and subsequent cleanup of hazardous substances as compared to the costs of "containment and proper disposal of toxic products in the first place[]" to support his argument that federal agencies should act to prevent improper disposal in the first instance. Peter Huber, *Environmental Hazards and Liability Law*, in *LIABILITY: PERSPECTIVES AND POLICY* 151 (Robert E. Litan & Clifford Winston eds., 1988).

52. See 126 CONG. REC. 31,965 (statement of Rep. Florio) ("To insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area."), *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 778.

53. Section 104(a)(1), 42 U.S.C. § 9604(a)(1), authorizes response actions when there has been a release or threat of release of hazardous substances. A release is defined to include "any spilling, leaking, . . . [or] escaping . . . into the environment," with certain exceptions. 42 U.S.C. § 9601(22). See MARY D. WOROBEK & GIRARD ORDWAY, *TOXIC SUBSTANCES CONTROLS GUIDE* 186 (1989) (CERCLA applies to "[b]oth new spills and leaking or abandoned dumpsites").

The problem of releases caused by accidental spills and leaks is a significant one. See *supra* note 25. As long as an accidental spill results from the responsible party's conduct alone, the rule of strict liability mandated by the statute will be efficient. See *infra* notes 71-76 and accompanying text. See also JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 204 (rev. ed. 1990).

54. 42 U.S.C. §§ 6901-6992k. RCRA represents the federal government's attempt to manage wastes generally. See *id.* §§ 6901-02 (listing Congress' findings with respect to waste and its effects on health and the environment and the objectives it intended the statute to accomplish).

disposal.⁵⁵ However, by the time Congress considered CERCLA, the legislature viewed the scope of RCRA regulation as far short of comprehensive⁵⁶ and the EPA as too slow in implementing the regulations RCRA mandated.⁵⁷ Therefore, CERCLA was enacted to have important prospective effects on hazardous substance disposal activities.⁵⁸

CERCLA's retroactive effects, however, are at least as significant as its forward looking objectives.⁵⁹ Congress intended to apply the new liability standard to inadequate disposals which occurred in the past but which result in a present release of hazardous substances. It broadened the theory of cost internalization to support CERCLA's retrospective effects; by imposing liability upon parties who were responsible for and profited from past improper disposals that require present cleanup measures, CERCLA ensures that those parties ultimately bear the full cost of their activities.⁶⁰

55. *United Technologies Corp. v. U.S. Environmental Protection Agency*, 821 F.2d 714, 716 (D.C. Cir. 1987). Subchapter III of RCRA, 42 U.S.C. §§ 6921-6939b, directs the EPA Administrator to promulgate regulations governing the disposal of hazardous wastes.

56. Indeed, a principal reason Congress enacted CERCLA was because it had concluded that RCRA was not sufficient to control the problems of hazardous substance disposal. *See supra* note 10. Congress further amended RCRA in 1984 — four years after CERCLA's enactment — based on its view that gaps remained in RCRA's regulatory scheme. *See H.R. REP. NO. 98-198*, 1st Sess., pt. 1, at 19 (1983) ("It is estimated that an amount of hazardous waste equal to that which is currently regulated under RCRA (40 million metric tons per year) is escaping control through various loopholes."), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5578.

57. *See* CHRISTOPHER HARRIS, et al., *HAZARDOUS WASTE: CONFRONTING THE CHALLENGE* 86-87 (1987). EPA's failure to act timely in promulgating the regulations mandated under RCRA has created a need to rely on CERCLA's response authorities. *See* RICHARD C. FORTUNA & DAVID J. LENNETT, *HAZARDOUS WASTE REGULATION: THE NEW ERA* 271 (1987).

58. It is nevertheless true that the EPA prefers to rely on RCRA authorities, rather than CERCLA, when releases occur at RCRA sites. 1 STEVER, *supra* note 14, § 6.06[2][a], at 6-69 (Following the 1984 RCRA amendments, the EPA "has tended to favor RCRA corrective action over CERCLA as the basis for remedial action at sites under the RCRA program."); *see also* FORTUNA & LENNETT, *supra* note 57, at 266-67.

59. *See United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072 (D. Colo. 1985) ("[CERCLA] is by its very nature backward looking. Many of the human acts that have caused the pollution already had taken place before its enactment[] . . .").

60. *See* S. REP. NO. 848, *supra* note 7, at 33 (CERCLA's strict liability scheme is intended "to assure that the costs of injuries resulting from defective or hazardous substances are borne by the persons who create such risks rather than by the injured parties who are powerless to protect themselves"), *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 340; 126 CONG. REC. 26,338 (statement of Rep. Florio) ("It is wholly appropriate and equitable for the industries which have benefited most directly from cheap, inadequate disposal practices, and which have generated the wastes which imposed the risks on society to contribute a substantial portion of the response costs."), *reprinted in* 2 CERCLA

Indeed, this nexus rationale emphasizing past profit as a justification for current liability has been relied upon by courts upholding CERCLA against claims that its retroactive effects violate due process.⁶¹

Congress did not relate imposition of liability for past improper disposal directly to development of a new, safer standard of care. Justifying retrospective liability as a means of encouraging modified behavior would have been inconsistent with the Supreme Court's 1972 decision in *Usery v. Turner Elkhorn Mining Co.*⁶² In *Turner Elkhorn*, the Court upheld a federal statute requiring coal companies to pay benefits for black lung disease to miners who had ceased employment in the industry prior to the Act's effective date.⁶³ The Court held that retrospective effects of legislation must satisfy due process requirements and concluded that it would "hesitate to approve the retrospective imposition of liability on any theory of deterrence or blameworthiness."⁶⁴ Nonetheless, the majority found that the retroactive liability imposed by Congress was permissible because the legislation rationally spread the costs of black lung disease.⁶⁵

In a concurring opinion, Justice Powell strongly criticized the

HISTORY, *supra* note 6, at 229; *see also* S. REP. NO. 848, *supra* note 7, at 98 (quoting Sept. 25, 1979, Letter of Douglas Costle, EPA Administrator) ("[S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving the substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created."), *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 405.

61. *See, e.g.*, *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 734 (8th Cir. 1986) ("Congress acted in a rational manner in imposing liability for the costs of cleaning up [inactive and abandoned hazardous waste disposal] sites upon those parties who created and profited from the sites . . ."), *cert. denied*, 484 U.S. 848 (1987); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1443-45 (W.D. Mich. 1989) (spreading the costs of cleanup on those responsible for and who profited from past hazardous waste disposal is a rational legislative purpose, satisfying the due process requirement).

62. 428 U.S. 1 (1976).

63. *Id.* at 12 (upholding the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified as amended at 30 U.S.C. §§ 901-945(c) (1988)).

64. *Id.* at 17-18 (citations omitted).

65. The Court upheld the Black Lung Benefits Act because retrospective imposition of liability was "justified as a rational measure to spread the costs of the employees' disability to those who have profited from the fruits of their labor — the operators and the coal consumers." *Id.* at 18. This rationale for retroactive liability is analogous to Congress' rationale for imposing CERCLA liability on past disposal activities. *See supra* notes 60-61 and accompanying text.

conclusion of the *Turner Elkhorn* majority that retroactive liability provided a rational basis for spreading the costs of past mining activities. Justice Powell challenged the Court's assumptions that mining companies would have earned excess profits in the past by virtue of their previous non-liability for pneumoconiosis and that all companies would have the present ability to pass the costs of liability on to consumers.⁶⁶

At first blush, Justice Powell's critique is consistent with concerns scholars have raised about the retroactive application of tort liability.⁶⁷ Considered more broadly, however, the imposition of retroactive liability in the context of hazardous substance disposal may indeed promote safer conduct which is also more efficient. Such liability would tend to encourage businesses to act with greater foresight and restraint with respect to risks posed by activities, which, although free from liability under the existing legal framework, may be a source of liability in the future.⁶⁸

66. *Turner Elkhorn*, 428 U.S. at 42-43 (1976) (Powell, J., concurring in part). In Justice Powell's view, the economics of imposing retrospective liability are more complex than the majority's opinion recognized, that burden could result in real injustice in a particular case, and retrospective liability could provide a substantial competitive advantage to new mining firms. See *id.* at 43-45.

67. See, e.g., Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 825 (1983). Professor Schwartz criticizes the reasoning in *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539 (N.J. 1982), which held that liability may be imposed for a failure to warn regardless of whether the hazard was scientifically unknowable at the time the product was sold. Professor Schwartz argues that basing such a rule of liability on principles of risk-spreading, on resource allocation through cost internalization and prior excess profitability, and on the goal of accident prevention is "senseless." 58 N.Y.U. L. REV. at 825.

For a general theoretical discussion of retroactivity, see Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUDIES 373 (1977).

68. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 599-600 (1986). Kaplow states:

Although behavior prior to the rule change [in tort law] cannot be altered after the fact, transition policy can nonetheless influence such behavior *ex ante* [F]irms making initial construction and product design decisions will have made earnings projections that take into account expected liabilities. If it was known that tort liability would ensue when a product or production process caused substantial harm, decisions might have been substantially different than if it was likely that the firm would be immune. Transition policy that exempts or otherwise gives relief to past investments confers such immunity. Thus, when the risk of tort liability depends in important ways on the evolution of tort law, as might often be the case with toxic substances and product liability, the expectation that future evolution in the law will be made applicable to harms arising . . . prior to the announcement of new rules will have a desirable effect on behavior.

Congress thus intended to impose a new standard of care for hazardous substance disposal activities, without addressing in detail the fact that this standard would be applied retroactively in many cases. There is *no* indication that Congress intended the scope of liability for responsible parties to differ depending on whether the liability-causing conduct pre-dated CERCLA's enactment. The only reasonable conclusion which can be drawn from the legislative history is that the uniform liability standard should be applied in a manner that prospectively promotes cost internalization as well as the new standard of care.

In applying the CERCLA liability scheme, courts have followed Congress' direction that those who profit from inadequate disposal should pay the costs resulting from releases of hazardous substances into the environment.⁶⁹ Courts have not, however, accounted sufficiently for Congress' decisions to impose a new standard of care on all those engaged in or responsible for hazardous substance disposal activities and to ensure that those persons internalize the costs of adequate disposal. By failing to rely on these two stated congressional objectives, courts have created a body of common law which does not provide a coherent foundation for

Id.

In rejecting the use of general tax revenues to fund the cleanup of hazardous waste sites, the Senate Report makes an analogous argument. "The concept of a fund financed largely by appropriations was not adopted. A largely appropriated fund establishes a precedent adverse to the public interest — it tells polluters that the longer it takes for problems to appear, the less responsible they are for paying the consequences of their actions, regardless of the severity of the impacts." S. REP. NO. 848, *supra* note 7, at 72, *reprinted in* 1. CERCLA HISTORY, *supra* note 6, at 379.

See also Schwartz, *supra* note 67, at 816-20. Professor Schwartz states that the notion of justifiable reliance is not a strong argument in favor of only prospective application of changes in the common law of torts. Courts typically apply new tort rules retroactively, thereby forcing businesses to account for future changes in tort law when they make their decisions about current operations. *See id.* at 816-19. Professor Schwartz notes that this reasoning does not apply to the effects of "[i]ntervening legislation," because "legislation almost always operates in a basically prospective manner." *Id.* at 818 n.148 (citation omitted).

69. *See infra* notes 139-48. *See also* Ohio v. Department of the Interior, 880 F.2d 432, 445 n.10 (D.C. Cir. 1989). In that case, the court invalidated Interior Department regulations limiting damages recoverable under CERCLA for injury to natural resources to the lesser of restoration costs or the lost use value of the resource. The court relied in part on the language of § 107 and CERCLA's legislative history to support its decision that the measure of damages specified in the regulations was inadequate. *Id.* at 444-46. The court concluded that rules limiting damages to less than the cost of restoring or replacing the injured resources would be contrary to Congress' intent that responsible parties bear the full costs of their inadequate disposal activities. *Id.* at 445 & n.10.

assessment of liability in future CERCLA cases.⁷⁰

C. The Expansive Nature of CERCLA Liability

1. A Strict Liability Standard

To accomplish its goals of facilitating prompt cleanups and encouraging responsible parties to adhere to a new standard of care, Congress imposed strict liability for improper disposal activities. It incorporated by reference in section 101(32) the standard of liability in another federal pollution control scheme.⁷¹ Section 101(32) states: "liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of title 33 [the Federal Water Pollution Control Act]."⁷² The central purpose of this section of the Federal Water Pollution Control Act is to prevent discharges of oil and hazardous substances into waters of the United States and to provide for cleanup when such discharges occur.⁷³ That statute achieves its goal by subjecting owners and operators whose facilities or vessels violate the law to a standard of strict liability.⁷⁴ Thus, section 101(32)⁷⁵ embodies Congress' plain intent to establish a strict standard of care under CERCLA. Courts construing CERCLA have confirmed this analysis; based on the Act's terms and its legislative history,

70. Part III discusses the implications of this new standard of care for liability decisions. *See infra* text accompanying notes 149-365.

71. 42 U.S.C. § 9601(32) (adopting the standard of liability imposed by § 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321).

Interestingly, Congress did not expressly provide that responsible parties would be jointly and severally liable for response costs. Congress intended to rely on the development of federal common law to resolve that issue. *See infra* notes 139-48 and accompanying text. Courts have, in fact, held that a rule of joint and several liability applies when harm is indivisible. *See infra* text accompanying notes 141-42. Congress noted approvingly this judicially-created liability rule during consideration of SARA. *See infra* note 141.

72. 42 U.S.C. § 9601(32). Section 9601 provides the definitions applicable in subchapter I of CERCLA, 42 U.S.C. §§ 9601-15. Subchapter I includes CERCLA section 107, 42 U.S.C. § 9607, the Act's liability provision.

73. 33 U.S.C. § 1321(b).

74. 33 U.S.C. § 1321(b)(3). *See* *Stuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979) (noting Congress' intention to impose strict liability for violations of the Water Act); *see also* *United States v. Monsanto Co.*, 858 F.2d 160, 167 n.11 (4th Cir. 1988) (citing a body of precedent favoring strict liability), *cert. denied*, 491 U.S. 1106 (1989); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806-07 (S.D. Ohio 1983) (supporting imposition of strict liability).

75. 42 U.S.C. § 9601(32).

courts have concluded that Congress established a federal standard of strict liability for CERCLA response costs.⁷⁶

2. The Broad Definition of Responsible Parties

CERCLA's new standard of care applies to the "responsible parties" identified in Section 107.⁷⁷ Section 107(a), along with the section 101 definitions,⁷⁸ and the limitations on defenses in Section 107(b)⁷⁹ demonstrate the breadth of direct liability established by the Act.

a. Persons Subject to CERCLA Liability: Section 107(a)

CERCLA expressly provides that the mere ownership of a vessel or facility at which the release of a hazardous substance occurs is sufficient to create liability;⁸⁰ it is irrelevant whether the owner actually was involved in operating the vessel or facility.⁸¹ Thus, Congress intended "owner and operator" liability under Section 107(a) to attach regardless of whether a person fitting that statutory description can be viewed as directly liable because of actual involvement in hazardous substance disposal activities.⁸²

Current owner liability, in particular, furthers Congress' intent that the liability scheme encourage site cleanups. Failure to hold all *current* owners liable without regard to their relationship to the property at the time of disposal would remove the incentive for

76. See, e.g., *Monsanto Co.*, 858 F.2d at 167; *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988); *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 & n.13 (2d Cir. 1985); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983).

77. 42 U.S.C. § 9607(a) (also defining the scope of liability for response costs).

78. 42 U.S.C. § 9601.

79. 42 U.S.C. § 9607(b).

80. The Act imposes liability on both the facility's owner at the time of the release, 42 U.S.C. § 9607(a)(1), and the facility's owner at the time the hazardous substances are disposed, 42 U.S.C. § 9607(a)(2).

81. 42 U.S.C. § 9601(20)(A). See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) (relying on legislative history, other courts' opinions and the definition of owner or operator to construe that term in the disjunctive), *cert. denied*, 111 S. Ct. 752 (1991); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) ("[C]ourts addressing the issue have rejected the argument . . . that liability may be imposed upon only those persons who both own and operate polluted property.").

82. See *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988) ("The plain language of Section 107(a)(2) extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste."), *cert. denied*, 491 U.S. 1106 (1989).

prospective purchasers and lenders to complete careful environmental audits prior to executing a purchase or loan.⁸³ Moreover, liability imposed on current owners of sites contaminated by hazardous substances encourages those owners to assess the environmental quality of their property and to perform the cleanup.⁸⁴

Congress strengthened the incentive for prospective purchasers to perform environmental audits before sale when it enacted the innocent purchaser exception as part of SARA.⁸⁵ In Section 101(35) of CERCLA,⁸⁶ Congress specifically exempts from liability an owner who demonstrates that, after a reasonable investigation, it neither knew nor had reason to know at the time the owner acquired title or possession, that hazardous substances had been disposed of on the property.⁸⁷

Congress was clearly aware that the statute it enacted would impose liability on the basis of mere ownership of a vessel or facility. This awareness is evident in Congress' creation of a narrow exception to owner liability. Set forth in Section 101(20)(A), that exception provides that an "owner" liable under the statute 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."⁸⁸ By

83. See Terry Dinan & F. Reed Johnson, *Effects of Hazardous Waste Risks on Property Transfers: Legal Liability vs. Direct Regulation*, 30 NAT. RESOURCES J. 521, 530 (1990) ("Under Superfund, buyers and lenders are motivated to conduct environmental assessments to protect themselves from liability.").

84. See *id.* Dinan and Johnson suggest that under Superfund, "sellers may wish to conduct their own audits prior to putting the property up for sale. This allows them to assess the extent of the environmental damage and to conduct a cleanup in advance of sale, if desired." *Id.* The expense of cleanups conducted by owners themselves would likely be less than liability imposed for violations later discovered. See *supra* note 37. But see Phillip D. Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You As Much As What You Don't Know?*, 13 *Env'tl. L. Rptr.* (Env'tl. L. Inst.) 10,303 (Oct. 1983) (suggesting that rules requiring broad disclosure of audits discourage owners from engaging in evaluations of possible liability for hazardous substance releases).

85. See *supra* note 3.

86. 42 U.S.C. § 9601(35).

87. *Id.* To qualify for this exemption, the individual must meet the requirements of § 107(b)(3)(a)-(b), 42 U.S.C. § 9607(b)(3)(a)-(b) which provides a defense against liability for certain third-parties. The "innocent purchaser" exemption "further signals Congress' intent to impose liability on landowners who cannot satisfy its requirements." *United States v. Monsanto Co.*, 858 F.2d 160, 168 n.14 (4th Cir. 1988), *cert. denied*, 491 U.S. 1106 (1989). The scope of this exception is understood to be quite narrow. See ANDERSON et al., *supra* note 29, at 640 ("CERCLA recognizes the possibility of an innocent landowner defense, but most Superfund lawyers doubt that such a person exists.").

88. 42 U.S.C. § 9601(20)(A).

providing this specific exception for secured creditors, Congress has effectively established a third category of "owner or operator" liability. In other words, CERCLA imposes liability (1) on owners, (2) on operators and (3) on persons who hold indicia of facility or vessel ownership primarily to protect a security interest and who also "participate[] in the management of" the facility or vessel.⁸⁹

Although the legislative history of the secured creditor exemption is "sparse,"⁹⁰ the legislative materials do offer several insights into its meaning and scope.⁹¹ The exemption as enacted in Section 101 is virtually identical to a provision in one of the House bills which served as a source for CERCLA's drafters.⁹² The House committee report for that bill explains that the definition of "owner" exempts "certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, *hold title* either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regula-

89. 42 U.S.C. § 9601(20)(A)(iii).

90. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 n.11 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

91. *But see* National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 56 Fed. Reg. 26,798, 26,799 (June 24, 1991) (proposed rule), in which the EPA states that the "scant" legislative history concerning the exemption "does not . . . provide any guidance or other indication of the types of activities that would be considered impermissible participation or involvement in the facility's management, or of the sorts of activities that were considered to be consistent with the exemption."

92. *See* H.R. 85, 96th Cong., 1st Sess. § 101(x) (1979), *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 480. The House of Representatives drafted H.R. 85 to respond to "oil and chemical pollution of navigable waters." 126 CONG. REC. 26,195 (statement of Rep. Wright), *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 899. During consideration of H.R. 85, the House amended the secured creditor exemption at the behest of Rep. Harsha. Rep. Harsha explained that he intended to "clarify[]" the extent of owner liability by "truly exempt[ing] those who hold title but do not participate in the operation or management activities." 126 CONG. REC. 26,212, *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 945. The definition of "owner," as amended with Rep. Harsha's "clarification" appears in § 101(x) of H.R. 85. H.R. 85, 96th Cong., 2d Sess. § 101(x) (1980), *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 1021-22. The Harsha amendment also sought to clarify the liability of persons "affiliated with" lessees or operators and holding indicia of ownership. *See* H.R. 85 § 101(x) (as amended). CERCLA, as finally enacted, does not include the language of the Harsha amendment. *See* 42 U.S.C. § 9601(20)(A).

Notwithstanding Congress' eventual rejection of the Harsha amendment, the Eleventh Circuit applied the secured creditor exemption by relying without qualification on Rep. Harsha's discussion of the liability of affiliated persons under H.R. 85. *See* *Fleet Factors*, 901 F.2d at 1558 n.11. The *Fleet Factors* court thus erred in its analysis of the legislative history.

tions."⁹³ The provision's focus on title holders is consistent with the House's intent to exempt certain lenders from owner liability.⁹⁴ Thus, the first insight to be drawn from the legislative history is that only lenders holding title to, or some other ownership interest in property for the purpose of protecting a security interest in that property must concern themselves with the scope of the secured creditor exemption.⁹⁵

The language of the statute and legislative history are less helpful in discerning when a secured creditor will lose the protection of the exemption and become liable for the costs of cleanup by "participating in the management" of a facility.⁹⁶ However, two guideposts exist. First, the statute's reference to participation in management indicates that owner liability for a secured creditor holding "indicia of ownership" is to be premised on something

93. H.R. REP. NO. 172, 96th Cong., 1st Sess., pt. 1, at 36 (1979) (emphasis added), reprinted in 2 CERCLA HISTORY, *supra* note 6, at 546.

94. The House Report also reflects that body's concern that lenders holding title to obtain favorable tax consequences should also be insulated from liability imposed on owners. *See id.* ("[A] financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an 'owner' as long as it did not participate in the management or operation of the vessel or facility.") (emphasis added).

95. The statute's reference to title holders has the practical effect of limiting the number of lenders potentially liable as owners. In only a minority of states — the so-called title states — will a mortgage itself convey title to the lender/mortgagee. *See United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986) ("Under the law of Maryland (and twelve other states), the mortgagee-financial institution actually holds title to the property while the mortgage is in force."); *see also* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW, §§ 1.5, 4.1 (2d ed. 1985) (discussing the three "theories" of mortgage law and the history of "title" theory); 3 RICHARD R. POWELL et al., THE LAW OF REAL PROPERTY ¶ 439 (1991) (discussing the diversity of mortgage forms) [hereafter LAW OF REAL PROPERTY]; Percy L. Angelo & Lynn L. Bergeson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. REV. 101, 107 n.13a (1985) ("In some states, including Illinois, land trusts are a common method of owning real property, with title to the property being held in the name of the trustee, often a financial institution, and the beneficial owner being the beneficiary of the trust.").

"In at least twenty-eight states, the lien theory of mortgages has wholly supplanted the title theory." 3 LAW OF REAL PROPERTY, *supra*, ¶ 439, at 37-12 (footnotes omitted). In these lien theory states, the mortgagee does not hold title to the property until there has been a foreclosure. *See* G. NELSON & D. WHITMAN, *supra*, § 4.2, at 146 (discussing the "lien" theory of mortgage law). A third group of states has adopted an intermediate theory which provides for the transfer of title to the mortgagee at the time of default. *See id.* § 4.3 (discussing the "intermediate" theory of mortgage law). In all of these non-title theory states, a secured lender would not hold any "indicia of ownership" until, respectively, the lender foreclosed and secured title or the debtor defaulted on the loan.

96. 42 U.S.C. § 9601(20)(A).

other than involvement in operating a facility. Typically, a person who operates a facility would necessarily be involved in activities directly related to disposal of hazardous substances there. Therefore, imposing owner liability on a secured party operating a facility would be redundant since CERCLA provides that such conduct establishes operator liability regardless of whether the operator has any ownership interest.⁹⁷ Second, the legislative history supports the conclusion that owner liability for secured parties holding "indicia of ownership" does not arise merely because those persons earn profits due to their status as secured creditors. Although Congress sought to impose liability for cleanups on persons that have profited from inadequate disposal practices,⁹⁸ profiting from a security interest alone does not accord a sufficient liability basis.⁹⁹

In determining whether or not a person holding "indicia of ownership" to protect a security interest should be liable for response cost as an owner of the property, emphasis should be placed on Congress' choice of the term "management" as a criterion for liability.¹⁰⁰ As noted above,¹⁰¹ the statute distinguishes between "managing" and "operating" a facility.¹⁰² Because CERCLA embodies Congress' decision to impose a new standard of care for activities related to hazardous substance disposal, these

97. 42 U.S.C. §§ 9607(a)(1)-(2).

98. See *supra* notes 60-61 and accompanying text.

99. See *supra* note 94.

100. 42 U.S.C. § 9601(20)(A). See also *supra* note 92 (discussing legislative history of the provision).

101. See *supra* text accompanying note 97.

102. But see Roslyn Tom, Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 935-36 (1989). Tom asserts that "because a lender whose activities constitute 'participating in the management' of the facility under the statute would incur liability as an operator, the security interest exemption only makes sense if management participation encompasses at a minimum activities that would lead to operator liability under the general liability scheme." This argument is, however, inconsistent with the facts that (1) the secured creditor exemption is tied to ownership and (2) a lender would be liable as an operator in any event if it were to operate a facility instead of only holding indicia of ownership of the facility. See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

Although similar, the phrase 'participating in the management' and the term 'operator' are not congruent. Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.

Id. (footnotes omitted).

terms should be construed to reflect Congress' objectives in enacting the statute. The nexus between operating a facility and improving care in disposal activities is clear: Creating liability for those who operate a facility when hazardous substances are released into the environment should deter individuals and firms from participating in conduct likely to cause a release.¹⁰³ Imposing liability on a

103. Imposing liability on business enterprises as a method of limiting harm-causing activity is "widespread" and "relatively uncontroversial." Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 13 (1980). Enterprise liability in the context of hazardous waste disposal (1) is advantageous "[f]rom a moral perspective" because it requires the enterprise, rather than a third-party, to bear burdens the enterprise caused; (2) ensures a source of financing for cleanup efforts since "the enterprise ordinarily provides a superior fund and instrument of risk spreading"; and (3) promotes general deterrence "consonant with market-valued benefits and burdens." *Id.* (footnotes omitted).

Liability for individuals employed by business enterprises effectively supplements enterprise liability as a means of enforcing the new standard of care for hazardous substance disposal activities. In general, "a dual liability regime that joins absolute personal liability with enterprise liability offers two sanctioning tools, each providing a different marginal deterrent. Together, they may provide far more effective deterrence than comparable levels of either could alone." Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 880 (1984). Simultaneously, this dual liability regime reduces the costs of enforcing the heightened standard of care. For example, enforcement activities directed against a firm are at the same time aimed toward the individuals employed there. Furthermore, dual liability encourages individuals to aid in prosecuting the enterprise by allowing a compromise of the individual's liability at the expense of the firm. *Id.* at 886.

Individual liability has traditionally been imposed when the individual actor's conduct is obviously blameworthy; individual liability is most appropriate in those circumstances. See Stone, *supra*, at 28 n.113. But individual wrongdoing may be difficult to identify in large business enterprises. See *id.* at 31 ("A bribe, for example, can be traced to a particular hand and mind; not so a new car with flawed brakes. In a large organization, the division of bureaucratic functions makes it difficult to ascribe individual responsibility for the brake design even when we are using 'responsibility' in its moral sense." (footnote omitted)). Therefore, when large corporations are potentially responsible for CERCLA cleanup costs, attempts to fix individual liability are usually unwarranted, absent blameworthy conduct by a particular individual. Similarly, individuals involved generally in corporate management, as contrasted with those individuals who can be linked with plainly inadequate hazardous substance disposal activities, should rarely, if ever, be held individually liable for response costs.

When closely-held and under-capitalized corporations are subject to CERCLA liability, individual liability may be more appropriate. See Kraakman, *supra*, at 868-69 ("[T]he personal liability of firm agents — and in particular, of managers and directors — can serve as a partial check on asset insufficiency, that is, on the danger that undercapitalized corporations will abuse their limited assets to evade the compensatory or deterrent policies of liability rules." (footnote omitted)). Such liability both reinforces the strict standard of care and ensures that those who have profited from inadequate disposal pay the costs of its cleanup. See *id.* at 873 ("When pervasive inattention to risk occurs in conjunction with corporate inability to pay full tort damages, it rises to the threshold of deliberate policy. Here, restricting liability to the firm and its lower-level agents does more than subsidize

secured party holding "indicia of ownership" and "participating in the management of a . . . facility"¹⁰⁴ should also promote enhanced care in the disposal of hazardous substances. As long as the nature of the third party's involvement enables that party to play the role of a "gatekeeper,"¹⁰⁵ that party's potential liability should improve the level of care in the disposal of hazardous substances.¹⁰⁶

b. The Statutory Definition of Owner or Operator

Like the statute's list of responsible persons, its definition of "owner or operator" also reflects the broad scope of CERCLA liability. Section 101(20)(A)(iii)¹⁰⁷ and the related legislative history indicates Congress' intent to include within its definition of a vessel or facility "owner or operator" any person who "control[s]"

an occasional but inevitable tort loss; it provides an incentive for firm decisionmakers to underprice risk and underinvest in safety.").

104. 42 U.S.C. § 9601(20)(A).

105. The theoretical basis for gatekeeper liability is discussed in Kraakman, *supra* note 103, at 890-91. One requirement a third party must fulfill to play the role of gatekeeper is status as "an outsider who can influence controlling managers to forego offenses." *Id.* at 890. For example, where a borrower is having difficulty making loan payments, the lender will typically exercise influence in restructuring the loan and possibly subjecting the debtor to new conditions. See generally MARGARET H. DOUGLAS-HAMILTON, *Some Problems Associated with Creditor Control of Debtor Companies*, in 1 AMERICAN LAW INSTITUTE & AMERICAN BAR ASSOCIATION, RESOURCE MATERIALS: BANKING AND COMMERCIAL LENDING LAW 329 (1980) [hereinafter BANKING RESOURCE MATERIALS]; EDWARD F. MANNINO, *Prevention Techniques for Avoiding Lender Liability*, in 10 BANKING RESOURCE MATERIALS, *supra*, 559 (1989); HARVEY R. MILLER et al., *Perils and Pitfalls of Lender Liability as the Borrower's Bankruptcy Looms Larger*, in 10 BANKING RESOURCE MATERIALS, *supra*, 229 (1989).

106. "[T]rue gatekeeper liability" is another effective supplement to liability of enterprises and of individuals employed by them because it "enlist[s] the support of outside participants in the firm when controlling managers commit offenses, that is, when the firm's internal monitors have failed." Kraakman, *supra* note 103, at 890. In the particular context of lenders participating in the management of a facility during a loan workout or when otherwise administering a loan, the lender is not a classic gatekeeper; the lender is not an "incorruptible outsider [employed] to gain legitimacy or expertise or to meet a legal requirement." *Id.* at 891. For obvious reasons, a lender will have an interest in promoting the financial success of operations at a debtor's facility, or at least in the debtor's near-term cash-flow. Because a lender in this situation is not an "incorruptible outsider," potential liability ensures that creditors do not compel or encourage loan payments to be made at the expense of adequate disposal of hazardous substances. However, as discussed *infra*, imposing liability on a third party, such as a lender, raises difficult questions: "The success of gatekeeper liability hinges on the development of legal duties that encourage the detection and interdiction of offenses without overburdening the private relationships that serve as their vehicles." *Id.* at 893.

107. 42 U.S.C. § 9601(20)(A)(iii).

the vessel or facility. Section 101(20)(A)(iii) provides that "[t]he term 'owner or operator' means . . . 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 before-hand."¹⁰⁸ As they appear in this provision, the term "title" suggests ownership and the term "control" suggests status as an operator. The current version of the "owner or operator" definition¹⁰⁹ was included in SARA¹¹⁰ as one part of a two-part provision¹¹¹ exempting states and localities from CERCLA liability in cases where they would otherwise become an "owner or operator" within the meaning of the Act as a result of abandonment or bankruptcy.¹¹² The statute now excludes from owner or operator liability a

108. *Id.* (emphasis added).

109. Before SARA's enactment in 1986, the Act provided that "'owner or operator' means . . . in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment." CERCLA, § 101(20)(A)(iii), 94 Stat. at 2769. This definition appears to have been drawn from the Senate's Superfund bill. As reported by the Senate Committee on Environment and Public Works, the bill provided that

[i]n the case of any abandoned facility or site, the term "owner or operator" shall include the person who owned or operated *or otherwise controlled activities* at such facility or site immediately prior to such abandonment or at the time of any discharge, release, or disposal of a hazardous substance.

S. REP. NO. 1480, 96th Cong., 2d Sess., § 2(b)(15)(A) (1980), *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 470. CERCLA's legislative history does not specifically explain this clause of the "owner or operator" definition.

The original provision differs in two important respects from the current one. First, the original version did not directly associate "control" with operator status — a direct association which the current statute makes. Second, the original provision was not enacted to exempt state and local governments from "owner or operator" liability which could arise because of their "control."

110. SARA, § 101(b)(2), 100 Stat. at 1615 (codified at 42 U.S.C. § 9601(20)(A)(iii)). This provision was first passed by the Senate in its version of the bill ultimately enacted as SARA. *See* H.R. REP. NO. 962, 99th Cong., 2d Sess., 185-86 (1986); H.R. 2005, 99th Cong., 1st Sess., § 133 (1985). The Senate approved the language when it was offered as a floor amendment to the bill. *See* 131 CONG. REC. S11,619 (1985).

111. For the other part of the state and locality exemption, see SARA, § 101(b)(1), 100 Stat. at 1615 (codified at 42 U.S.C. § 9601(20)(D)).

112. 42 U.S.C. § 9601(20)(D) (emphasis added) provides that:

The term "owner or operator" does not include a unit of State or local government which acquired *ownership or control* involuntarily through bankruptcy, tax delinquency, abandonment or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government

state or locality that has "acquired ownership or *control* involuntarily,"¹¹³ and imposes liability in these cases on the person considered the "owner or operator" of the facility "immediately before[]" the abandonment or bankruptcy.¹¹⁴

Consistent with the statute's direct association of "control" with operator status,¹¹⁵ the legislative history shows that the 1986 Congress¹¹⁶ believed it was necessary to exempt states or localities in these particular situations¹¹⁷ because those governmental entities "technically [would have been] 'owners or operators' under the . . . definition of the law" then existing.¹¹⁸ Congress therefore considered the term "owner or operator" used in Section 107 broad enough to encompass all persons with "ownership or control"¹¹⁹ or with "title or control"¹²⁰ who are not otherwise exempt.¹²¹ One federal appellate court has improperly relied upon the reference to "control" in Section 101(20)(A)(iii) to infer that the absence of that term in other parts of the "owner or operator" definition means "control" is an appropriate test only when states and localities acquire property by an involuntary conveyance.¹²² Con-

which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 [42 U.S.C.S. § 9607].

For a discussion of the meaning of this provision and its potential to operate as a waiver of state immunity in private cost recovery actions, see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (holding that the language of CERCLA indicates Congress' intent to hold states liable for damages).

113. 42 U.S.C. § 9601(20)(D) (emphasis added).

114. 42 U.S.C. § 9601(20)(A)(iii).

115. See *supra* note 108.

116. Although the Supreme Court has warned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," *United States v. Price*, 361 U.S. 304, 313 (1960), post-enactment legislative history is allowed more significant weight when, as with CERCLA's use of "control," "the precise intent of the enacting Congress is obscure." *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). See WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 757-59 (1988).

117. 42 U.S.C. § 9601(20)(D) (emphasis added).

118. 131 CONG. REC. S11,619 (statement of Sen. Stafford) (introducing amendment, subsequently passed, that exempts states or localities from liability which was involuntary obtained).

119. 42 U.S.C. § 9601(20)(D).

120. 42 U.S.C. § 9601(20)(A)(iii).

121. See *supra* text accompanying notes 85-87 (innocent purchaser exception) and text accompanying notes 88-106 (secured creditor exception).

122. See *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert.*

trary to that conclusion, the legislative history contains no indication that Congress intended that the term "owner or operator" should have a different, more expansive meaning when there has been a bankruptcy or abandonment and a state or locality becomes the "owner or operator" of property, than when the term is used in any other CERCLA context. In sum, the definition of "owner or operator" supports the conclusion that Congress intended "operator" status to be construed broadly to cover situations where persons exercise control over facilities.

3. CERCLA's Limited Defenses

Limitations placed on defenses which might otherwise be asserted in a cost recovery action further demonstrate Congress' intent to create an expansive liability scheme under CERCLA.¹²³ Section 107 expressly imposes liability "[n]otwithstanding any other provision or rule of law and subject *only* to the defenses set forth in [Section 107(b)]."¹²⁴ Specifically, a potentially responsible party has a defense to liability when the party "establish[es] 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

denied, 111 S. Ct. 1017 (1991). Note that the author of this article participated in drafting a brief as amicus curiae filed by the United States with the Fifth Circuit in this case. The *Joslyn Mfg.* court considered whether CERCLA altered the common law rule for piercing the corporate veil, an issue beyond the scope of this article. However, the court's opinion is relevant here for its discussion of the definition of "owner or operator."

Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations. In fact, Congress adopted a "control" test in the next subsection of the statute. Under CERCLA, the term "owner or operator" is defined for facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment, as "any person who owned, operated or otherwise controlled activities at such facility immediately" before conveyance. 42 U.S.C. Section 9601(20)(A)(iii) (emphasis added). No such "control" test appears in subsection (ii), the subsection at issue in this case, and we will imply none

Joslyn Mfg., 893 F.2d at 83.

The court offers no other analysis in support of its view that Congress intended that a "control" test be applied to determine the "owner or operator" liability of a shareholder only in a situation where a bankruptcy or abandonment results in conveyance of the property to the state. In view of the statute's language and legislative history discussed in the text, the conclusion of the *Joslyn Mfg.* court is plainly wrong.

123. One text characterizes the "effective defenses" available to potentially responsible parties as "[v]ery, very few." ANDERSON, et al., *supra* note 29, at 640.

124. 42 U.S.C. § 9607(a).

act or omission of a third party [in certain enumerated circumstances]; or (4) any combination of the foregoing paragraphs.”¹²⁵ CERCLA liability can be avoided only by relying on one of these identified exceptions.¹²⁶

In the third-party context, an otherwise responsible party can escape liability by demonstrating that the release or threat of a release of hazardous substances and the damages resulting therefrom “were caused solely by . . . (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.”¹²⁷ For example, this limited defense precludes a facility owner from avoiding liability by proving that a third party caused the release or threat of a release of hazardous substances even if the third party implicated had contractually assumed the risk of such liability.¹²⁸ Congress viewed this limitation on the third-party defense as a necessary reinforcement of the new, strict standard of care for hazardous substance disposal activities.¹²⁹

125. 42 U.S.C. § 9607(b); *see generally*, ANDERSON et al., *supra* note 29 at 641-42 (citing cases and providing discussion illustrating that liability will be avoided only if one of the exceptions in § 9607(b) applies).

126. *See* United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1118 (D. Minn. 1982) (“Congress did not intend that courts engage in [a] complex inquiry Section 107(a) was meant to stand by itself; . . . the plain language of the statute says so. Liability for the specified response cost under section 107(a) is absolute, subject only to the defenses listed in section 107(b)”).

127. 42 U.S.C. § 9607(b). *See* United States v. Monsanto Co., 858 F.2d 160, 168-69 (4th Cir. 1988) (holding that a party “could not establish the absence of a direct or indirect contractual relationship necessary to maintain the affirmative defense”), *cert. denied*, 490 U.S. 1106 (1989).

128. The owner would be liable under those circumstances without regard to the third party’s intent in entering into the contract and without regard to state tort and contract law that would apply to determine the owner’s liability in another civil action; *see Monsanto Co.*, 858 F.2d at 169. *See also* ANDERSON et al., *supra* note 29, at 642-43 (discussing third party liability).

129. Concern with reinforcing the new standard of care is apparent in both the Senate’s and House’s consideration of a third-party defense to liability. In commenting on the provision excluding a contract-based defense to liability, the Senate Report states that the language:

provides incentives to all involved with hazardous substances to assure that such substances are handled with the utmost of care. Consistent with the concept of strict liability, persons can not [sic] escape liability by “contracting away” their responsibility or by alleging that the incident was caused by the act or omission of a third party.

S. REP. 848, *supra* note 7, at 31, *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at

An important consequence of the limited, enumerated defenses to CERCLA liability has been a rejection of generalized causation defenses raised by defendants in cost recovery actions.¹³⁰ The ef-

338.

The House bill as originally reported from committee included a much broader defense which foreclosed liability when a person proved that the release of hazardous waste was caused solely by "an act or omission of a third party if the defendant establishes that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such hazardous waste." H.R. 7020, 96th Cong., 2d Sess., § 3071(a)(2) (1980), *reprinted in 2 CERCLA HISTORY, supra* note 6, at 184. In an additional statement included in the House Report on this bill, Representative Gore commented on the scope of this version of the third party defense against liability:

[T]he third party defense provision of the committee bill offers a gaping loophole through which companies can escape liability when the government sues to force a cleanup. Under that provision, a company that contract[s] out the job of waste disposal may be able to contract away legal liability for damages caused by improper disposal of its waste. Thus the company has a greatly reduced incentive to ensure that its waste is safely disposed of.

H.R. REP. NO. 1016, pt. 1, *supra* note 8, at 64, *reprinted in 2 CERCLA HISTORY, supra* note 6, at 95.

During debate on the House bill, Representative Gore introduced an amendment to "restrict the application of the third party defense to situations where the third party is not an employee or agent of the defendant, or where the third party's act or omission does not occur in connection with a contractual relationship." 126 CONG. REC. 26,783, *reprinted in 2 CERCLA HISTORY, supra* note 6, at 350. Representative Gore argued that his proposed limits on the third-party defense were warranted because of the unusually dangerous character of hazardous waste disposal.

Having decided to permit the abnormally dangerous activity, however, society imposes certain obligations on those individuals engaged in such activities. Fundamentally, an abnormally dangerous activity must "pay for itself." The activity may be carried on, but if an innocent party is injured, he must be compensated regardless of whether the defendant was "at fault."

Id. at 26,782, *reprinted in 2 CERCLA HISTORY, supra* note 6, at 348. According to Representative Gore, an actor participating in and profiting by hazardous substance disposal activities should not by intentional structuring of its business relationships "be permitted to shift responsibility to [a] contractor." *Id.* at 26,783, *reprinted in 2 CERCLA HISTORY, supra* note 6, at 349.

Whether or not the responsible party exercised due care in its relationship with the third-party was viewed as irrelevant: "it does not matter that the defendant exercised due care in his selection or instructions to the contractor. The inherently dangerous nature of the activity to be performed provides the grounds for liability." *Id.* at 26,783 (statement of Rep. Gore), *reprinted in 2 CERCLA HISTORY, supra* note 6, at 349. The Gore amendment was thereafter adopted by the House. *Id.* at 26,788, *reprinted in 2 CERCLA HISTORY, supra* note 6, at 365.

130. See *Monsanto Co.*, 858 F.2d at 169-70 & n.17 (citing cases allowing only statutorily enumerated defenses); *State of New York v. Shore Realty*, 759 F.2d 1032, 1044-45 (2d Cir. 1985) (interpreting CERCLA to impose liability without regard to causation); *Violet v. Picillo*, 648 F. Supp. 1283, 1293 (D.R.I. 1986) (discussing how the strict limitation on a causation defense "encourages defendants to mark and dispose of their haz-

fect of the broadly defined scope of liability and the narrowly drawn exceptions is to ensure that the costs of cleanup are borne by the parties responsible for the inadequate disposal and to encourage parties currently engaged in disposal activities to provide for adequate disposal.¹³¹

D. The Superfund Financing Scheme: Congress' Desire for an Equitable and Efficient System for Assessing Cleanup Costs

In enacting CERCLA, Congress had to decide how it would raise the money to finance government cleanups of sites posing the greatest risk to human health and the environment.¹³² Congress' objective "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created"¹³³ is evident not only in the CERCLA liability scheme, but in the Superfund-financing provisions as well.

Discussing the fees needed to finance the Superfund, the Sen-

ardous waste with the greatest care"), *quoted in* ANDERSON et al., *supra* note 29, at 641.

However, in a concurring opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), Justice White suggests that state and local governments may have a general causation defense against CERCLA liability. "[U]nder § 9601(20)(D), State and local governments are liable only if they have 'caused or contributed' to a release of toxic materials." *Id.* at 53 n.5. The Fifth Circuit, although not construing the scope of CERCLA defenses, has suggested that a party is not liable for response costs when a particular release of hazardous substances cannot be said to have "cause[d] the incurrence of response costs." *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 670 (5th Cir. 1989) (quoting 42 U.S.C. § 9607(a)(4)). The *Borden* court held that CERCLA implies "a standard of justification acceptable for determining whether a release or threatened release of a hazardous substance has caused the incurrence of response costs." *Id.* The court then stated that "the relevant factual inquiry should focus on whether the particular hazard justified any response actions." *Id.* *Accord* *Louisiana-Pacific Corp. v. Asarco, Inc.*, 735 F. Supp. 358, 362 (W.D. Wash. 1990) (CERCLA "liability does not attach because the defendant caused 'a release,' but because it caused 'response costs.' While a defendant may often cause both, it is the causing of response costs that subjects a party to liability under CERCLA." (citations omitted)). This new quasi-causality requirement is unlikely to affect cost recovery in government cleanups, which focus on sites posing the greatest risks to health and the environment. *See supra* notes 11 & 33. However, this requirement may affect privately-funded cleanups, depending on how the new standard is applied.

131. CERCLA does not preclude responsible parties under Section 107 from shifting risk *inter se* as regards indemnification for CERCLA response costs. 42 U.S.C. § 9607(e). *See also, e.g.*, *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988) ("agreements to hold harmless are enforceable between the parties but not against the government" (citing 42 U.S.C. § 9607(e))).

132. *See supra* notes 27-34 and accompanying text.

133. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

ate committee stated that "equity, a nexus to the problem" was the first of several criteria "used to develop a fair fee system."¹³⁴ Congress formulated the fee system principally to affect the chemical and petrochemical industries because Congress identified those industries as being responsible for producing "the relatively few basic building blocks used to make all hazardous products and wastes."¹³⁵ Consistent with its view that the CERCLA liability scheme should promote the internalization of hazardous waste disposal costs,¹³⁶ the Senate committee reasoned that imposing the Superfund fee at the outset of the chain of production and distribution "spreads costs more broadly throughout the chain of commerce of hazardous products and wastes" and ensures that the fee is reflected in the price of the raw materials as well as the end products.¹³⁷ By assessing fees against the chemical and petro-

134. S. REP. NO. 848, *supra* note 7, at 21, *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 328. The other two criteria were avoidance of "administrative complexity in the collection system" and consideration of the "economic impact on the basic systems of production that exist in this country in oils and chemicals." Beyond the three criteria recommended by the Administration, the Committee also considered "the speed with which fees could begin to be collected and the legal defensibility of any fee system." *Id.* The fee system thus reflected an effort to accommodate the goals of equity and administrative simplicity.

Similarly, the same Senate committee had stated that the bill's liability provision, which was subsequently amended upon final passage of CERCLA, reflects a policy of "fairness and equity" by ensuring that cleanup costs "are borne by the persons who create such risks rather than by the injured parties who are powerless to protect themselves." S. REP. NO. 848, *supra* note 7, at 33, *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 340. Even in cases where the risks posed by the hazardous substance disposal could not have been eliminated, the Senate Report states that the costs of cleanup should be imposed on the disposing party because "[t]he question then is whether the loss should fall on the victim or on the person who created the risk. The issue is really one of fundamental fairness." *Id.*

135. S. REP. NO. 848, *supra* note 7, at 19, *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 326.

136. *See supra* notes 39-52 and accompanying text. The fact that Congress's theory of cost internalization is flawed with respect to pre-enactment disposal activities is discussed *supra* notes 55-57 and accompanying text.

137. S. REP. NO. 848, *supra* note 7, at 20, *reprinted in* 1 CERCLA HISTORY, *supra* note 6, at 327.

Notwithstanding Congress' view that the fee system was equitable, some legislators criticized the system as being unfair because it did not ensure that companies which had profited from inadequate disposal were actually paying the costs of cleanup. *See, e.g.*, 126 CONG. REC. 26,767-68 (statement of Rep. Gramm) (arguing that the fee system works as a "tax" which companies pass on to consumers, resulting in no loss of profits to the offending companies), *reprinted in* 2 CERCLA HISTORY, *supra* note 6, at 323, 325. Concerns about fairness and implementation of the fee system led Congress to provide that the fee would be evaluated after four years so that a decision could be made about "stat-

chemical industries, the Senate committee refused to rely solely on general appropriations. The committee concluded that “[t]axpayers too often are asked to remedy problems they do not help create” and that “a Fund derived exclusively from appropriations would subsidize those generators and users of hazardous substances who, while benefiting economically, have exposed society to the risks of commerce in hazardous substances.”¹³⁸

In short, Congress intended for CERCLA’s financing scheme to reinforce its liability scheme by ensuring that the economic sectors responsible for creating environmental risks bear the costs of

tory changes that could better reflect who and how much should be paid into the Fund according to the pay out experience of the Fund.” S. REP. NO. 848, *supra* note 7, at 21, *reprinted in 1 CERCLA HISTORY*, *supra* note 6, at 328. *See also* H.R. REP. 1016, pt. 1, *supra* note 8, at 32 (discussing a provision to require development of a report on the fee to ensure that it “will more accurately and equitably internalize the costs of the risks posed to society by hazardous wastes”), *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 63. The assessment of the fee system mandated by Congress in CERCLA is codified at 42 U.S.C. §§ 9651(a)(1)(F)-(I).

SARA later modified the method of Superfund financing, raising some funds through a general tax on businesses. *See* 132 CONG. REC. H9571 (statement of Rep. Stangeland) (“a review of the wastes found at Superfund sites discloses that these sites are often repositories of waste from a broad spectrum of American industry Accordingly, the conference agreement adopts a funding mechanism that seeks to broaden somewhat the cost of the program among a wider segment of our economy.”); *Id.* at S14,923 (daily ed. Oct. 3, 1986) (statement of Sen. Chafee) (discussing “[i]nclusion of a broad-based corporate tax” to finance the Superfund); *Id.* at S14,909 (daily ed. Oct. 3, 1986) (statement of Sen. Bentsen) (SARA’s new funding mechanism “may not be perfect, but it serves the purpose of spreading the Superfund burden broadly through the economy”).

Even after SARA, a substantial portion of Superfund monies continues to be derived from fees levied on the petrochemical industry. *See id.* at S14,909 (statement of Sen. Bentsen) (SARA’s new tax provision “still singles out the chemical and oil industry for some special treatment”). Nonetheless, the final compromise funding scheme adopted in SARA was criticized by some as a movement away from the principle that the polluter pays. *See id.* at H9610 (statement of Rep. Schneider) (SARA’s reliance in part on general corporate income tax to fund Superfund is “a regrettable step away from the ‘polluter pays’ principle, as it will be imposed on many companies that have no connection with the Superfund Program”); *id.* at H9621 (statement of Rep. Wolpe) (SARA’s “broad-based corporate profits tax . . . represents a most unfortunate departure from the polluter-pays principle that has historically underpinned our approach to Superfund financing.”).

138. S. REP. NO. 848, *supra* note 7, at 19, *reprinted in 1 CERCLA HISTORY*, *supra* note 6, at 326. *See also* *United States v. Wade*, 577 F. Supp. 1326, 1339 (E.D. Pa. 1983) (CERCLA’s method for directly funding the Superfund by taxing the chemical industry reflects “the general congressional intent of placing liability for toxic waste clean-up as nearly as possible on those responsible for creating the hazard.”); H.R. REP. NO. 1016, pt. 2, *supra* note 6 at 5 (House committee “recognizes that the United States Government must bear some of the costs incurred for this purpose. However, it also believes that these costs generally should be borne by the party responsible for the waste, and alternatively by the industries which create the items most frequently located in inactive waste sites.”), *reprinted in 2 CERCLA HISTORY*, *supra* note 6, at 122.

hazardous substance disposal cleanups and by mandating the internalization of a fraction of such costs within certain industries. Congress recognized this approach as the most equitable for all parties affected by and responsible for the release of hazardous substances.

II. THE ROLE OF COURTS IN IMPLEMENTING THE CERCLA LIABILITY SCHEME

While it intended CERCLA to promote prompt cleanups and to impose a new standard of care for the disposal of hazardous substances, Congress also anticipated that the courts would play a critical role in implementing this new standard of liability. Congress suggested that "issues of liability not resolved by this act [CERCLA], if any, [would] be governed by traditional and evolving principles of common law."¹³⁹ Thus, in *United States v. Chem-Dyne Corp.*, the court concluded after reviewing CERCLA's legislative history in detail that Congress had intentionally left interstices in the statute's scheme of liability to be "determined under common law principles . . . [by] a court performing a case by case evaluation."¹⁴⁰ Based on Congress' direction to apply common law principles, the *Chem-Dyne* court held that CERCLA imposed joint and several liability.¹⁴¹ This rule has been adopted

139. 132 CONG. REC. 30,932 (statement of Sen. Randolph), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 686. Representative Florio made a virtually identical comment in summarizing the final bill considered by the House of Representatives. See 132 Cong. Rec. 31,965 (1985) ("Issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law To insure the development of a uniform rule of law, . . . the bill will encourage the further development of a Federal common law in this area."), reprinted in 1 CERCLA HISTORY, *supra* note 6, at 778. See also *United States v. Monsanto Co.*, 858 F.2d 160, 171 & n.23 (4th Cir. 1988) (reasoning that the deletion of the imposition of joint and several liability indicates congressional intent that common law principles should govern), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 806-808 (S.D. Ohio 1983) (discussing generally the legislature's intent that issues of liability not covered within CERCLA should be governed by common law principles).

140. *Chem-Dyne Corp.*, 572 F. Supp. at 808. See also *Monsanto Co.*, 858 F.2d at 171 & n.23 (discussing the role of courts in "supply[ing] interstitially" the law as to joint and several liability and citing approvingly the analysis of the legislative history in *Chem-Dyne*).

141. *Chem-Dyne Corp.*, 572 F. Supp. at 810. Although the court's adoption of joint and several liability no doubt reflected well-recognized common-law doctrine, joint and several liability, in combination with CERCLA's strict liability standard, does not necessarily lead to the efficient economic system that Congress had hoped to promote. See *supra* text accompanying notes 39-52. See also WILLIAM M. LANDES & RICHARD A. POSNER, THE

by numerous courts.¹⁴²

Similarly, in *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*,¹⁴³ the court considered its role in the construction of the statute, particularly the liability provisions.

CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes . . . With this in mind, we join the Second Circuit in proclaiming that “[w]e will not interpret section 9607(a) in any way that apparently frustrates the statute’s goals, in the absence of a specific congressional intent otherwise.”¹⁴⁴

Finally, in deciding *Smith Land & Improvement Corp. v. Celotex Corp.*, the Third Circuit fashioned federal common law to establish a rule of successor liability for CERCLA cases.¹⁴⁵ The *Celotex* court first recognized that “Congress expected the courts to develop a federal common law to supplement the statute.”¹⁴⁶

ECONOMIC STRUCTURE OF TORT LAW 215 (1987) (illustrating that joint and several responsibility for a strict liability offense only causes polluters to forego efforts to clean up hazardous waste sites).

Nevertheless, Congress has indicated that application of the common-law doctrine of joint and several liability is proper. During the debate on SARA, the House of Representatives specifically approved the *Chem-Dyne* court’s analysis. Representative Dingell stated:

The reasoning of the court in the seminal case of [*Chem-Dyne*], which established a uniform Federal rule allowing for joint and several liability in appropriate cases, correctly expresses congressional intent. Nothing in this legislation is intended to change the application of the uniform Federal rule of joint and several liability enunciated in the *Chem-Dyne* case and followed by a number of other Federal courts.

132 CONG. REC. H9563. See also *id.* at H9624 (statement of Rep. Eckart) (“The legislation maintains the strict, joint, and several liability standards of current law, as enumerated in the leading case, *United States versus Chemdyne [sic] Corporation*, as the principal mechanism to obtain complete site cleanup by private parties.”); *Monsanto Co.*, 858 F.2d at 171 & n.23 (discussing SARA legislative history).

142. See, e.g., cases cited *supra* note 24.

143. 805 F.2d 1074 (1st Cir. 1986).

144. *Id.* at 1081 (citations omitted). See also *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (refusing to adopt a “crabbed” reading of CERCLA’s liability provisions).

145. 851 F.2d 86, 90-92 (3d Cir.) (holding that successor liability may be imposed on corporations which have either merged with or consolidated with the responsible corporation as defined by CERCLA), *cert. denied*, 488 U.S. 1029 (1988).

146. *Id.* at 91 (citations omitted).

Considering the common law rule of successor liability in view of Congress' intent to establish an equitable liability scheme, the Third Circuit panel concluded that the "concerns" underlying that particular common law rule "are equally applicable to the assessment of responsibility for clean-up costs under CERCLA."¹⁴⁷

Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost [of cleanup]. Benefits from use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective stockholders and accrued only indirectly, if at all, to the general public. We believe it in line with the thrust of the legislation to permit—if not require—successor liability under traditional concepts.¹⁴⁸

In sum, Congress intended that courts would play a substantial role in clarifying and supplementing the rules of liability stated in the Act. Congress expected that courts would focus on the purposes of the statute, i.e., prompt cleanups, a strict standard of care for disposal activities, narrowly limited defenses, and an equitable cleanup cost allocation, to guide their construction of interstitial rules.

III. APPLYING THE CERCLA DIRECT LIABILITY SCHEME IN PARTICULAR CASES

Having identified Congress' views about the scope of direct liability under CERCLA, this article now focuses on the judiciary's application of the liability scheme.

A. Direct Liability Of Individuals For Hazardous Substance Disposal Activities: Setting The Analytic Framework For Applying CERCLA

Two early CERCLA cases decided by federal appeals courts addressed the issue of individuals' direct liability. In *New York v. Shore Realty Corp.*,¹⁴⁹ the Second Circuit held an individual,

147. *Id.*

148. *Id.* at 92 (citation omitted).

149. 759 F.2d 1032 (2d Cir. 1985).

LeoGrande, liable as an operator.¹⁵⁰ Although the opinion's recitation of the facts relating to LeoGrande's liability is not extensive,¹⁵¹ the court concluded that he was "in charge of the operation of the facility in question, and as such [was] an 'operator' within the meaning of CERCLA."¹⁵² LeoGrande was the controlling shareholder of the corporation which owned the facility where the release occurred. The court's characterization of LeoGrande as an operator was apparently based on its finding that "it [was] beyond dispute that LeoGrande specifically direct[ed], sanction[ed], and actively participate[d] in Shore's maintenance of [the site]."¹⁵³ Given the court's determination that LeoGrande personally exercised authority over the facility, imposing liability on him was entirely consistent with Congress' intent that a strict standard of liability apply in connection with the handling and disposal of hazardous substances.¹⁵⁴

Nevertheless, the *Shore Realty* court went on to present an alternate theory to support LeoGrande's liability as an "owner or operator."¹⁵⁵ In doing so, the court relied on the terms of the secured creditor exemption¹⁵⁶ to infer "that an owning stockholder who manages the corporation, such as LeoGrande, is liable under CERCLA as an 'owner or operator.'"¹⁵⁷ The logic of this dictum is troublesome for several reasons. First, the mere reference to the secured creditor exemption in assessing the liability of a stockholder could be misleading to those who may rely on the case as precedential authority. Any suggestion that the exemption applies to a stockholder (even a controlling stockholder) of a corporation, without inquiry as to whether the stockholder is a secured creditor, is an inaccurate interpretation of the exemption.¹⁵⁸ Sec-

150. *Id.* at 1052.

151. *See id.* at 1038-39.

152. *Id.* at 1052.

153. *Id.*

154. *See supra* notes 39-70 and accompanying text. *See also supra* note 103.

155. 42 U.S.C. §§ 9607(a)(1)-(2).

156. 42 U.S.C. § 9501(20). The exemption and its legislative history are discussed *supra* notes 90-95 and accompanying text.

157. *Shore Realty*, 759 F.2d at 1052 (quoting 42 U.S.C. § 9601(20)).

158. Nothing in the legislative history suggests that the exemption applies to a person who holds stock in a corporation that owns a facility. A stockholder — even one who holds a controlling amount of stock — is not a secured creditor who holds indicia of property ownership in order to protect a security interest. 12B CHARLES R.P. KEATING & GAIL O'GRADNEY, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, §5755 (1984); 16 KEATING & O'GRADNEY, *supra*, §§ 7919-21 (1989).

ond, the court's discussion fails to identify the secured creditor as a special category for purposes of CERCLA liability.¹⁵⁹ Finally, the discussion directly associates "managing" a facility with "operating" a facility. Equating "managing" with "operating" could lead some courts to impose liability on operator liability at a threshold of activity lower than the statute requires or to impose secured creditor liability only at a threshold of activity higher than CERCLA would mandate.¹⁶⁰

In the second of the early court of appeals decisions, *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*,¹⁶¹ an Eighth Circuit court resolved the question of direct liability for individuals by relying specifically on CERCLA's remedial policies. The court reasoned that:

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.¹⁶²

The *NEPACCO* court found an individual directly liable under Section 107(a)(3)¹⁶³ for arranging for the disposal of hazardous

Not only should stockholders be distinguished from secured creditors for purposes of CERCLA liability, stockholders should be distinguished from the corporate entity as owners of a vessel or facility at which a release is threatened or occurs. In *Riverside Mkt. Dev. Corp. v. International Bldg Prod., Inc.*, 931 F.2d 327 (5th Cir. 1991), the court declined to hold a corporation's majority shareholder liable as an owner of a facility actually owned by the corporation.

Prescott's position as majority shareholder of IBP did not make him an owner of the asbestos manufacturing plant. The plant was purchased by the IBP corporate entity and not by Prescott. "The property of the corporation is its property, and not that of the stockholders, as owners."

Id. at 330 (quoting 1 KEATING & O'GRADNEY, *supra*, § 31, at 555 (1990)).

159. The rationale for analyzing secured creditors as a special category for determining liability is discussed *supra* note 89 and accompanying text.

160. As discussed previously, the statute and the legislative history distinguish between operating and managing a facility. See *supra* notes 96-106 and accompanying text. If these separate concepts become confused, as they have been by some courts, analytical difficulties in determining liability increase. For an example of such confusion, see the discussion of the district court opinion in *United States v. Northeastern Pharmaceutical & Chem. Co.*, *infra* notes 184-88.

161. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

162. *Id.* at 743.

163. 42 U.S.C. § 9607(a)(3).

substances. The court noted that "Lee, as plant supervisor, actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances at the [disposal] site."¹⁶⁴ In the court's view, Lee's "actual 'control' over" the hazardous substances was sufficient to establish his direct liability, notwithstanding the absence of proof that Lee had "personal ownership or actual physical possession of hazardous substances."¹⁶⁵ The court held that "Lee [could] be held individually liable because he [had] personally participated in conduct that violated CERCLA."¹⁶⁶ The NEPACCO case represents precisely the situation in which personal liability supplements enterprise liability to strengthen the standard of care used in hazardous substance disposal activities.¹⁶⁷

In addition to these two appellate court decisions, district courts have imposed individual liability in several other cases in which there had been direct involvement by the individual in hazardous substance disposal activities. In *United States v. Ward*,¹⁶⁸ the individual defendant, Ward, was held liable for cleanup costs arising from improper disposal of polychlorinated biphenyl ("PCBs") in fourteen counties in eastern North Carolina. The PCBs were produced at Ward Transformer Co. ("WTC").

Both WTC and Ward personally arranged for disposal of PCBs by contract with a transporter Ward, as president, chief operating officer, director and majority shareholder of WTC, acted on behalf of and for the benefit of the corporation when he entered into this agreement. He also personally participated in securing the contract [for disposal] The agreement, in addition to benefiting WTC, benefited Ward personally in that he received partial repayment on [a] personal debt¹⁶⁹

Thus, the court imposed liability on both Ward and WTC under section 107(a)(3).

Under similar circumstances, the district court in *United States v. Conservation Chem. Co.*, held an individual who had been di-

164. NEPACCO, 810 F.2d at 743.

165. *Id.*

166. *Id.* at 744.

167. See *supra* note 103 and accompanying text.

168. 618 F. Supp. 884 (E.D.N.C. 1985).

169. *Id.* at 894.

rectly and intimately involved in developing and supervising disposal activities at a facility,¹⁷⁰ liable under section 107. The individual's involvement with the facility included daily contact with the plant manager about equipment, personnel and customer service, as well as monthly visits to the site.¹⁷¹ Specifically, the court stated that Hjersted's activities at Conservation Chemical in his capacity as the company's "founder, chief executive officer and majority stockholder, [warranted the] imposition of personal liability under CERCLA section 107. The high degree of personal involvement in the operation and the decision-making process was particularly acute during the early years of the corporation."¹⁷²

In all of these decisions, individual liability under CERCLA clearly furthered Congress' intent to impose liability on "persons," including individuals, who engage in inadequate disposal activities. The analyses in these cases do not, however, reflect careful attention to the language and intent of CERCLA. The courts employed each individual's status as a stockholder of a corporation liable for cleanup costs,¹⁷³ his capacity or authority to control operations at the facility,¹⁷⁴ and his involvement, without indicia of ownership, in managing the facility,¹⁷⁵ as indicators of CERCLA liability. However, none of these factors provides a proper basis for individual liability. Rather, these courts have identified immaterial and improper bases, thereby confounding the future imposition of individual liability under section 107.¹⁷⁶

170. 628 F. Supp. 391, 420 (W.D. Mo. 1985). The individual, Norman Hjersted, "conceived of several waste treatment processes that led to the disposal of wastes into lagoons on the site, and implemented other waste treatment processes suggested by others." *Id.* The court found Hjersted liable as an "owner and operator" under 42 U.S.C. §§ 9607(a)(1)-(2).

171. *Id.*

172. *Id.*

173. See *New York v. Shore Realty Corp.*, 759 F.2d, 1032, 1052 (2d Cir. 1985); *Conservation Chem. Co.*, 628 F. Supp. at 420; *United States v. Ward*, 618 F. Supp. 884, 894 (E.D.N.C. 1985).

174. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) ("It is the authority [of an individual] to control the handling and disposal of hazardous substances that is critical under the statutory scheme."), *cert. denied*, 484 U.S. 848 (1987).

175. See *Shore Realty*, 759 F.2d at 1052.

176. 42 U.S.C. § 9607. For a similarly confused analysis of the bases for individual liability under CERCLA, see *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532 (W.D. Mich. 1989). There, the court identified "a number of recurring factors" useful in formulating "a standard for individual corporate liability." *Id.* at 1543. Along with evidence of actual activities "undertaken and neglected," *id.* at 1544, the court would consider "evi-

A possible explanation of the courts' failure to present fully coherent rationales for individual liability lies in the courts' failure to rely on the heightened standard of care for waste disposal activities intended by Congress. If there had been proper recognition of this central purpose of CERCLA, the courts and the parties would have focused more intently on the actual activities of the individuals alleged to be liable for response costs, and they would have distinguished more carefully between managing a facility through involvement in broad financial decisionmaking and operating a facility through involvement in disposal activities.

Notwithstanding the limitations of the analysis in these decisions, the result in each case may be reconciled with the CERCLA liability scheme. As long as these cases are understood to assign direct liability for CERCLA response costs to an individual or corporation based on the "person[']s" direct participation in the hazardous substance disposal activities identified in the statute, the decisions are fully consistent with the statutory language and intent.¹⁷⁷ A narrow reading of the decisions indicates that liability under section 107 was, in fact, properly imposed on individuals who exercised authority over company operations and participated in arranging for the disposal of hazardous substances, or who operated a facility at which hazardous substances were disposed, or who accepted hazardous substances for transportation.¹⁷⁸

B. The Direct Liability of Parent Corporations under CERCLA

The analytic difficulties apparent in the cases fixing direct CERCLA liability on individuals are compounded in the decisions considering whether or not parent corporations should be directly liable for CERCLA response costs arising from their subsidiaries'

dence 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 . . . [and] distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned." *Id.* at 1543-44.

177. See *Riverside Market Dev. Corp. v. International Bldg. Prods.*, 931 F.2d 327, 330 (5th Cir. 1991) (In deciding whether an individual who is a majority shareholder and officer of a company that operated a facility is personally liable for CERCLA response costs, "we must look to the extent of the defendant's personal participation in the alleged wrongful conduct.").

178. Although these decisions do not specifically address the liability of those who accept hazardous substances for transportation, their reasoning — focused by reference to the intent of § 107, 42 U.S.C. § 9607 — would apply to that situation as well. See 42 U.S.C. § 9607(a)(4).

improper disposal activities. Confusion results when analyses stray from a parent corporation's activities and turn to the consideration of the parent corporation's potential to control the subsidiary or the permissibility of piercing the corporate veil under state or federal law. If courts and litigants were to focus more carefully on issues of direct liability and CERCLA's approach to the liability question, they may avoid the difficulties apparent in the early decisions in this area and articulate a coherent rule of liability.

1. The Initial Support for a Rule of Broad Parent Corporation Liability Based on Ability To Control

The judiciary's failure to identify particular activities justifying imposition of direct liability under CERCLA has made articulating a defensible approach to parent corporation liability difficult. The line of cases supporting a broad rule of parent corporation liability began with the district court decision in *NEPACCO*.¹⁷⁹ Although the *NEPACCO* court considered the CERCLA liability of an individual, its reasoning was expansive enough to be applied to impose liability on parent corporations.

The *NEPACCO* court could have made a determination of individual liability on narrow grounds. However, rather than limiting its opinion to a factual determination of whether the individual (Lee) had actually participated in arranging for the disposal of hazardous substances and a policy decision as to whether imposing individual liability in the case before it would promote the standard of care Congress sought to impose, the court broadened its liability analysis.¹⁸⁰

The district court held Lee personally liable under section 107(a)(3) for arranging the disposal of hazardous substances.¹⁸¹ In addition, the court considered whether he was liable as an "owner and operator" under section 107(a)(1).¹⁸² Assessing liability under

179. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

180. *See NEPACCO*, 579 F. Supp. at 847-49.

181. *Id.* at 848. The Eighth Circuit affirmed this basis of liability. *NEPACCO*, 810 F.2d at 743.

182. *NEPACCO*, 579 F. Supp. at 848-49. The district court's identification of the facility for purposes of the CERCLA analysis was, however, flawed. "[T]he place where the hazardous substances were disposed of and where the government ha[d] concentrated its cleanup efforts [was] the Denney farm site, [the location to which an independent contractor had hauled the waste,] not the *NEPACCO* plant." *Id.* at 743. Therefore, the court

this alternate provision, the district court focused on "Lee's unique position as both vice president in charge of the Vernon plant and as a major stockholder, actively participating in NEPACCO's management."¹⁸³ This "unique position" led the court to conclude that two bases for imposing "owner and operator" liability existed.

First, quoting the language in section 101(20)(A) creating the secured creditor exemption, the court identified two criteria for owner or operator status: "The statute literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste."¹⁸⁴ Because Lee, as a stockholder in NEPACCO, had an ownership interest in the facility and, as plant supervisor, actively participated in facility management, the court concluded that Lee had satisfied the CERCLA criteria for owner or operator liability to attach.¹⁸⁵ The court's reference to the secured creditor exemption is misleading because, as discussed earlier,¹⁸⁶ that provision was not intended to apply to all persons — including stockholders — who have an ownership interest in a vessel or facility, but rather it applies only to those persons who "hold[] indicia of ownership primarily to protect [their] security interest in the vessel or facility."¹⁸⁷ Furthermore, by construing the statute as it did, the district court mistakenly added an element to owner or operator liability — participation in management. Participation in management is relevant to the determination of owner or operator liability only when a secured creditor holding indicia of ownership is alleged to fit that definition. In those cases, creditors cannot claim the protection of the statutory exemption if it is proven they have actually participated in the management of vessels or facilities in which they hold security interests.¹⁸⁸

Second, the court relied on the Fifth Circuit's decision in *Unit-*

of appeals concluded that the relevant "facility" for assessing "owner and operator" liability was the Denney farm. Because Lee did not own or operate that facility, Lee could not be liable under § 107(a)(1)-(2), 42 U.S.C. § 9607(a)(1)-(2). *Id.* The Eighth Circuit thus reversed this part of the trial court's decision because the "facility" at which a release of hazardous substances occurred was not a facility owned by NEPACCO or the individual defendants. *NEPACCO*, 810 F.2d at 742-43.

183. *NEPACCO*, 579 F. Supp. at 848.

184. *Id.*

185. *Id.*

186. *See supra* notes 90-95 and accompanying text.

187. 42 U.S.C. § 9601(20)(A).

188. *See supra* text accompanying notes 96-106.

*ed States v. Mobil Oil Corp.*¹⁸⁹ to impose "owner and operator" liability on Lee.¹⁹⁰ Contrary to the *NEPACCO* court's characterization of this Fifth Circuit decision as construing the scope of "owner or operator" status,¹⁹¹ the *Mobil Oil* court's opinion actually construed the term "person-in-charge" as it is used in the Federal Water Pollution Control Act (the Clean Water Act).¹⁹² That provision of the Clean Water Act imposes an immediate reporting requirement on the "person-in-charge" when there is a release of oil or hazardous substances into United States waters.¹⁹³ The Fifth Circuit panel concluded that the Mobil Oil Corporation, which owned an oil plant that had discharged oil into navigable waters,¹⁹⁴ was a "person-in-charge" under the Clean Water Act.¹⁹⁵ It reasoned that:

The owner-operator of a vessel or a [f]acility has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the [F]WPCA, such as the Mobil facility here, must be regarded as a "person in charge" of the facility for purposes of § 1161. A more restrictive interpretation would frustrate congressional purpose by exempting from operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by it.¹⁹⁶

Relying on this language as a test for "owner and operator"

189. 464 F.2d 1124 (5th Cir. 1972).

190. *NEPACCO*, 579 F. Supp. at 848-49.

191. *NEPACCO*, 579 F. Supp. at 848.

192. 33 U.S.C. § 1161(b)(4) (reenacted and currently codified at 33 U.S.C. § 1321(b)(5)).

193. 33 U.S.C. § 1321(b)(5).

194. *Mobil Oil*, 464 F.2d at 1126.

195. *Id.* at 1127. CERCLA does not use the term "person-in-charge" in defining responsible parties under section 107, 42 U.S.C. § 9607. It does, however, include a reporting requirement for spills of "reportable" quantities of hazardous substances. 42 U.S.C. § 9603(a). That provision, like 33 U.S.C. § 1321(b)(5), imposes the reporting requirement on the "person in charge" of the facility from which the hazardous substance is released. 42 U.S.C. § 9603(a). See generally *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989) (clarifying the meaning of "person-in-charge" for the imposition of criminal penalties under 42 U.S.C. § 9603).

196. *Mobil Oil*, 464 F.2d at 1127.

liability under CERCLA, the district court in *NEPACCO* analyzed whether Lee should be liable as an "owner and operator" based on his position as vice president and a major stockholder in the company which had produced the hazardous waste.¹⁹⁷ The court concluded that:

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. The Court finds that the evidence presented is sufficient to impose [CERCLA] liability on Lee as an "owner and operator"¹⁹⁸

The court then stated that this liability must be imposed notwithstanding the fact that Lee was a stockholder; the court decided that shielding Lee from liability with the corporate veil "would frustrate congressional purpose."¹⁹⁹

This second basis for imposing "owner and operator" liability on Lee is flawed for two reasons. First, the court's analysis focuses on the potentially responsible party's capacity, power or ability to control disposal activities, rather than the party's actual control as evidenced by actual conduct.²⁰⁰ Imposition of CERCLA liability on these grounds would mean that an individual may be held liable

197. *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 849 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

198. *NEPACCO*, 579 F. Supp. at 849.

199. *Id.* (quoting *Apex Oil Co. v. United States*, 530 F.2d 1291, 1293 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976)).

200. It might be argued that the definition of "owner or operator" in 42 U.S.C. § 9601(20) provides some support for broadly imposing liability on a person based on the person's ability or power to control a facility. As discussed above, § 101(20), 42 U.S.C. § 9601(20), directly associates operator status with control of a facility. *See supra* notes 108-22 and accompanying text. However, direct association of these terms provides somewhat stronger support for the view that only the active exercise of control amounts to involvement in operating a facility. Moreover, imposing liability only when control has been exercised is more consistent with Congress' intent to improve the standard of care exercised by persons engaged in disposal activities. *See supra* notes 48-52 and accompanying text.

on the basis of a position as an important corporate officer, without regard to that officer's actual involvement in disposal activities. Imposing substantial liability on individuals based only on their potential ability to control disposal activities casts a liability net that is much wider than necessary to enforce the intent of Section 107.²⁰¹ The deterrent effect of the liability scheme on one who neither actively engages in nor directs inadequate disposal activities is minimal. Furthermore, such a person lacks culpability for releases of hazardous substances.²⁰²

Beyond the facts of the case before it, the *NEPACCO* court's analysis could be read as implying an unduly broad rule for holding parent corporations liable for a subsidiary's inadequate disposal activities. By relying on the court's position that potential power and capacity to control is a sufficient basis to impose CERCLA liability, a parent corporation would be liable for cleanup costs whenever its subsidiary is responsible for disposal activities. This result follows from the definition of subsidiary, i.e., an entity "controlled by another corporation [the parent] by reason of the latter's ownership of at least a majority of the shares of the capital stock."²⁰³ As in the case of an important corporate officer, liability would be imposed on the parent corporation on the basis of its

201. In contrast, the scope of the term "person in charge" as used in Section 103 of CERCLA, 42 U.S.C. § 9603 suggests a broader group of culpable persons. As the court concluded in *United States v. Carr*, 880 F.2d 1550, (2d Cir. 1989) (citations omitted), the reporting requirement of § 103 is intended to apply not only to owners or operators, but it also "extend[s] to any person who is 'responsible for the operation' of a facility from which there is a release." *Id.* at 1554 (quoting *Apex Oil Co. v. United States*, 530 F.2d 1291, 1294 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976)). In fact, *Carr* imposes the reporting responsibility on anyone who "exercised any control over the dumping," thereby placing the duty to report even on those in relatively low-level management positions. *Id.* at 1551. This result is achieved by excluding "sole control" as a prerequisite for responsibility. The wider net cast by the reporting requirement ensures that reports of releases are forthcoming from any persons able to "make timely discovery of a release, direct the activities that result in the pollution, and have the capacity to prevent and abate the environmental damage." *Id.* (citing *Mobil Oil*, 464 F.2d at 1127).

202. See generally *Stone*, *supra* note 103, at 31, 43 (suggesting that in a large corporate bureaucracy, discerning blame is difficult and penalizing an agent is unfair absent very specific standards regulating the agent's conduct).

This is not to say that in limited circumstances a person's nonfeasance cannot be the basis for liability under CERCLA. If, for example, a person is directly responsible for a particular disposal activity and failure to perform that duty results in a release of hazardous substances, the failure to act would be conduct warranting the imposition of liability. Imposing liability in such a circumstance would also reinforce the heightened standard of care for disposal activities.

203. 18 AM. JUR. 2D *Corporations* § 35 (1985) (footnote omitted).

potential to act rather than on any actual tortious conduct. However, this is an insufficient basis upon which to impose substantial CERCLA liability in view of Congress' intent.

The second flaw in the court's discussion of "owner and operator" liability is its suggestion that, ordinarily, the corporate veil would have protected Lee from liability; the important policies of CERCLA justified the court's ignoring the shield of the corporate veil and imposing liability.²⁰⁴ This discussion by the court confuses the issue of Lee's direct liability as an individual with the issue of Lee's derivative liability as a shareholder. The latter would be implicated if piercing the corporate veil were proper.²⁰⁵ The court's errant reference to piercing the corporate veil appears to have led one appellate court to narrow the scope of parent corporations' direct liability under the guise of refusing to construe CERCLA to allow any change in the test for piercing the corporate veil.²⁰⁶

The Fifth Circuit's decision in *Mobil Oil*²⁰⁷ has, in fact, had a substantial impact on several early decisions construing the scope of "owner and operator" liability under CERCLA, notwithstanding the breadth of its reasoning and the fact that it was construing a different statutory provision. In addition to the decision in *NEPACCO*, district courts in *Idaho v. Bunker Hill Co.*,²⁰⁸ *Colorado v. Idarado Mining Co.*,²⁰⁹ and *Vermont v. Staco, Inc.*,²¹⁰ relied directly or indirectly on the *Mobil Oil* court's explanation of the term "person-in-charge" to define the scope of "owner and

204. *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 599 F. Supp. 823, 849 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). 579 F. Supp. at 849.

205. The liability of a shareholder for obligations of the corporation is, under all but extraordinary circumstances, limited to the extent of the shareholder's investment in the corporation. See Kraakman, *supra* note 103, at 862 ("Limited liability assures that shareholders retain an unlimited claim to the profits of successful firms but never risk more than the value of their shares in unsuccessful ones.") (footnote omitted). Only when applicable law provides that the corporate veil may be pierced does a shareholder incur liability beyond the extent of the value of the shares held. See generally Stone, *supra* note 103, at 65-76.

206. See *infra* notes 231-32 and accompanying text.

207. *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972).

208. 635 F. Supp. 665 (D. Idaho 1986).

209. 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,578 (D. Colo. 1987), *rev'd*, 916 F.2d 1486 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584 (1991).

210. 684 F. Supp. 822 (D. Vt. 1988).

operator" liability under CERCLA.²¹¹ Indeed, the *Bunker Hill* and *Idarado Mining* courts relied on the *Mobil Oil* court's focus on a person's "capacity" and "power to direct the activities" of others to hold that parent corporations were owners or operators of facilities actually owned and operated by their subsidiaries.²¹²

Like *NEPACCO*, these three additional district court decisions illustrate substantial confusion among courts attempting to articulate the grounds for CERCLA liability. In the earliest of the three decisions, the *Bunker Hill* court held that Gulf Resources & Chemical Corp. ("Gulf") was liable as an "owner or operator" of a facility admittedly owned and operated by Gulf's subsidiary, the Bunker Hill Company.²¹³ Although the record contained ample facts demonstrating Gulf's substantial involvement in operating the Bunker Hill facility,²¹⁴ the court based its decision to impose liability in part on Gulf's "capacity to control . . . disposal and releases," as well as its "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."²¹⁵ The court also emphasized that Gulf had profited greatly by the activities of its subsidiary.²¹⁶ Finally, the court held that Gulf would not be shielded from liability by the corporate veil because to do so would thwart the purposes of CERCLA.²¹⁷

The analysis in *Idarado Mining* is quite similar to that in *Bunker Hill*. The *Idarado Mining* court held Newmont Mining Corporation ("Newmont") liable as an "owner or operator" of a facility owned and operated by Idarado Mining, Newmont's subsidiary.²¹⁸ As in *Bunker Hill*, the record revealed numerous

211. 42 U.S.C. §§ 9607(a)(1)-(2).

212. *Bunker Hill*, 635 F. Supp. at 672; *Idarado Mining*, 18 Env'tl. L. Rep. at 20,578-79.

213. *Bunker Hill*, 635 F. Supp. at 671-72.

214. For example, the record showed that "in matters dealing with pollution problems, Bunker Hill was not allowed to spend more than Five Hundred Dollars (\$500) without approval of Gulf; . . . all capital expenditures were to be approved by Gulf; and Gulf could overrule a transaction or decision regarding management made by Bunker Hill." *Id.* at 670. In addition, substantial involvement by Gulf might have been inferred from the fact that "Gulf obtained weekly reports of day-to-day aspects of Bunker Hill operations." *Id.* at 672.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Colorado v. Idarado Mining Co.*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,578, 20,578-79 (D. Colo. 1987), *rev'd*, 916 F.2d 1486 (10th Cir. 1990), *cert. denied*, 111 S.

facts showing substantial actual involvement by the parent corporation in the disposal activities of the subsidiary.²¹⁹ Rather than conclude only that these activities made Newmont directly liable as an operator of the facility, the court held that Newmont "fairly may be characterized as both an 'owner' and 'operator' of Idarado and the Idarado Mine for purposes of imposing liability under CERCLA § 107(a)."²²⁰ It must be inferred then that owner liability followed from Newmont's status as a parent corporation, rather than from any particular conduct or property interest which would establish such liability directly.

In the third decision, *Vermont v. Staco, Inc.*, a federal district court in Vermont held three individuals and three corporations liable for CERCLA response costs as owners and operators of the facility from which hazardous substances were released.²²¹ The court presented only a limited summary of the material facts supporting its liability decision.

Although the liability of three of the defendants appears clearly on the facts,²²² the court's articulation of its rationale for imposing liability on three others is confused and unfocused. Two of the defendants in the latter group were individuals described as owners of stock in Chase Instruments Corporation ("Chase Instruments") who, "as executive officers of Chase [Instruments], participated in the control and management of Staco."²²³ This explanation of liability suffers from the same flaw as the *Shore Realty* decision²²⁴ — it equates participation in management with participation in controlling or operating a facility, when it should have distin-

Ct. 1584 (1991).

219. Although the district court's decision in *Idarado Mining* is not particularly detailed, the court does state that from 1944 until 1987, Newmont employees had been involved in efforts to deal with environmental problems at the site. *Id.* at 20,578. In addition to these specific activities related to the release of hazardous substances at the site, Newmont "was intimately involved in operating Idarado[]" by hiring and transferring Idarado Mining's employees, dictating particular business policies and negotiating and entering into contracts on Idarado Mining's behalf. *Id.* at 20,579.

220. *Id.* at 20579.

221. 684 F. Supp. 822, 831-32, 835 (D. Vt. 1988).

222. *Staco, Inc.*, a thermometer manufacturer which had used mercury at the contaminated site, was properly liable as an operator. *Id.* at 831. Keeper Corporation owned the property on which the *Staco* facility was located and, thus, was plainly an owner of the site. *See id.* Robert Sirkus "managed and directed the operations of the *Staco* plant" and was therefore properly held to be directly liable as an operator of the facility. *See id.*

223. *Id.*

224. *See supra* notes 149-60 and accompanying text.

guished these activities as separate bases for liability. The rationale for imposing liability is also flawed because it fails to specify how these individuals acted to control or operate the facility. To properly impose direct operator liability on an individual, there must be evidence that the individual had some direct involvement in disposal activities.

The court's failure to explain its rationale for imposing liability on these two individuals precludes proper analysis of the liability of the final defendant, Chase Instruments. The opinion describes Chase Instruments only as the owner of all stock in those corporations directly liable as owners and operators of the facility.²²⁵ The court may have been imposing liability on the ground that, as a parent corporation, Chase Instruments had the capacity to control the facility owned and operated by its subsidiaries. Indeed, since the only apparent support for the imposition of liability on this parent corporation is a citation to the *Bunker Hill* decision,²²⁶ it is likely that the court was adopting the *Bunker Hill* court's improper, expansive view of parent corporation liability. If, instead, the court had been more attentive to the grounds on which Congress intended direct liability to be imposed on individuals and corporations, the result in this case may have been properly explained and consistent with the purposes of CERCLA. Specifically, if the two "executive officers of Chase"²²⁷ had been found to have been directly involved in operating the Staco facility in their capacities as officers of the parent corporation, then that corporation should have been held directly liable as an operator.

In sum, by failing to ground liability on the actual, identified activities of individuals and the corporations they served, these district court decisions do not present defensible theories of CERCLA liability. While the parties determined to be liable in these cases may, in fact, have been directly liable for participating in disposal activities, the courts' decisions failed to identify and rely upon this culpable behavior to impose liability. As a result, these decisions may be read as imposing very broad and unwarranted liability based solely on a person's — particularly a parent corporation's — capacity to control disposal activities.

These decisions also demonstrate that, when courts were initial-

225. See *Staco, Inc.*, 684 F. Supp. at 831, 835.

226. *Id.* at 832.

227. *Id.* at 831.

ly confronted with litigation of parent corporations' CERCLA liability, the courts displayed a willingness to impose direct liability on the corporations based on these entities' ability to control the disposal activities of their subsidiaries. Although the courts recognized this rule as being in tension with the common law limits on shareholder liability, they imposed CERCLA liability based principally upon an ability to control in order to promote what they viewed as the purposes of the Act.

2. Support for an Improperly Narrow Rule of Direct Liability for Parent Corporations Intended to Maintain the Protection of the Corporate Veil

In general, district court decisions which support broad rules of parent corporation liability have ignored the tension between the imposition of liability on parent corporations (or on other controlling shareholders) based on the parent's ability to control the subsidiary corporation and the corporate veil's limitation of shareholder liability to the extent of actual investment.²²⁸ The Eighth Circuit, however, addressed this problem in dicta in its *NEPACCO* decision. Discussing the direct liability of Lee, the plant supervisor and a NEPACCO shareholder, the court stated that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'"²²⁹ Later, the court explained that the actions of a parent corporation's officers may make that corporation itself directly liable under principles of respondeat superior without any need to pierce the corporate veil.²³⁰ The distinction between the direct and derivative liability of shareholders is plain; direct liability is based on the parties' actual conduct while derivative liability depends on formal relationships. Because the early district court decisions failed to base liability on the actual disposal activities of the potentially responsible parties, they failed to make the necessary distinction between direct and derivative liability of

228. "Generally, absent fraud or bad faith, a corporation will not be held liable for the acts of its subsidiaries." 1 KEATING & O'GRADNEY, *supra* note 158, § 43.

229. *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 810 F.2d 726, 744 (8th Cir. 1986), *aff'g in part and rev'g in part* 579 F. Supp. 823 (W.D. Mo. 1984), *cert. denied*, 484 U.S. 848 (1987). *See also* *Riverside Market Dev. Corp. v. International Bldg. Prod.*, 931 F.2d 327, 330 (5th Cir. 1991) ("CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act." (citations omitted)).

230. *NEPACCO*, 810 F.2d at 744.

shareholders, including parent corporations.

While the Eighth Circuit recognized the distinction between direct and derivative liability, the first court of appeals actually presented with an opportunity to decide the scope of parent corporation liability under CERCLA stated an improperly narrow rule of liability.²³¹ The Fifth Circuit erroneously believed that a liability rule any broader than the one it stated in *Joslyn Mfg.* would weaken the common law standards for piercing the corporate veil. The *Joslyn Mfg.* court considered whether a parent corporation could be held liable for response costs incurred in a private cleanup action.²³² The Joslyn Manufacturing Company ("Joslyn") had incurred response costs in cleaning up a site used for many years to manufacture creosote and treat wood with it.²³³ The creosoting operation had been started by Lincoln Creosoting Company, Inc. ("Lincoln Creosoting"), a company funded in large part by its majority shareholder, T.L. James & Co. ("T.L. James").²³⁴ Joslyn sought recovery from T.L. James, basing its claim in part on the theory that T.L. James had directly involved itself in the operations of Lincoln Creosoting. Those operations included dumping and spilling large amounts of creosote at the site.²³⁵ Joslyn alleged that as a result of T.L. James's involvement in the disposal activity, T.L. James was directly liable under CERCLA.²³⁶

231. See *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

232. *Id.*

233. *Id.* at 81-82.

234. *Id.* at 81. T.L. James owned 60% of the common stock and all 200 shares of the non-voting preferred stock.

235. *Id.*

236. *Id.* at 82. The Fifth Circuit did not summarize Joslyn's argument in its opinion. However, the district court issued an opinion which also rejected in a similarly broad holding the theory that T.L. James could be held directly liable. According to the district court:

CERCLA does not specifically address the question of whether a court may hold a parent corporation or corporate officers liable for clean-up costs without first piercing the corporate veil. Several courts addressing the issue have held that corporate officers may be individually liable for hazardous waste clean-up under CERCLA. *The undersigned respectfully declines to adopt the analysis utilized by these courts because they have chosen to ignore the corporate form without an express congressional directive.*

Joslyn Mfg. Corp. v. T.L. James & Co., 696 F. Supp. 222, 224 (W.D. La. 1988) (footnote omitted) (emphasis added), *aff'd*, 893 F.2d 80 (5th Cir. 1991), cert. denied, 111 S. Ct. 1017 (1991). The *Joslyn Mfg.* district court disagreed with *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), and *United States v. Northeastern Pharm. & Chem.*

Although it rejected the argument that parent corporations could be held directly liable under CERCLA without piercing the corporate veil, the Fifth Circuit failed to present any clear analysis or rationale for its conclusion. The court presented the theory of direct liability in its least defensible form and ignored the strong rationale for direct liability discernible in the appeals courts' decisions in *NEPACCO* and *Shore Realty*.²³⁷

The Fifth Circuit viewed Joslyn's claim against T.L. James as an attempt to impute the subsidiary's culpable conduct to its parent. As the court understood the issue, a ruling in favor of Joslyn would have, in effect, imposed CERCLA liability based on the mere fact of the parent-subsidiary relationship rather than on the fact of parent corporation involvement in disposal activities.²³⁸ Considered from this faulty perspective, it is understandable why the Fifth Circuit viewed the possibility of direct liability as a threat to the limited liability of shareholders.

Prior decisions by Fifth Circuit panels should, however, have made apparent the error of the *Joslyn Mfg.* court's approach. The Fifth Circuit had already recognized that corporations and their officers and directors may be held directly liable for their own tortious conduct, without threatening the well-settled limits on shareholder liability.²³⁹ In *L.C.L. Theatres, Inc. v. Columbia Pictures Industries, Inc.*, a Fifth Circuit panel applying Texas law considered whether the corporate veil had to be pierced before a person who was a corporate officer and principal shareholder could be held directly liable in tort.²⁴⁰ That court held that the individual

Co. (NEPACCO), 579 F. Supp. (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), among others. See *Joslyn Mfg.* 696 F. Supp. at 224 n.4. The precise extent of the court's disagreement with those earlier CERCLA decisions is, however, somewhat unclear. See *id.* at 232 n.20 (stating that it would likely have reached the same result as the cited cases if corporate officers in the instant case had been directly involved in the illegal activity).

237. These courts' rationale for imposing direct liability on stockholders is discussed *supra* at notes 150-61 & 162-70 and accompanying text.

238. *Joslyn Mfg.*, 893 F.2d at 82.

239. The Fifth Circuit is not alone in distinguishing shareholder direct liability from derivative liability. That distinction is well supported. See, e.g., *In re Interstate Agency, Inc.*, 760 F.2d 121, 125 (6th Cir. 1985) (applying Michigan law, the court stated that "a corporate officer is personally liable for the tortious injury committed by him regardless of a piercing of the corporate veil"); 18A AM. JUR. 2D, *Corporations* § 851 (1985) ("It is generally held that stockholders are not liable for the tortious acts of the corporation unless they participate in or aid the commission of such acts.") (footnote omitted).

240. 619 F.2d 455 (5th Cir. 1980).

could be directly liable based on "his authorization, participation and approval" of the tortious conduct.²⁴¹ The court explained that:

[i]n these circumstances, [i]t is not necessary that the corporate "veil" be pierced or even discussed. An officer or any other agent of a corporation may be personally as responsible as the corporation itself for the tortious acts when participating in the wrongdoing.²⁴²

The Fifth Circuit reached a similar conclusion in *United States v. Jon-T Chemicals, Inc.*,²⁴³ a decision relied upon by the *Joslyn Mfg.* court.²⁴⁴ In *Jon-T Chemicals*, the court distinguished the issue of parent corporation direct liability from the issue of piercing the corporate veil. In its discussion of the criteria to be assessed in determining the liability of a parent corporation, the court identified the following factor for separate consideration: "the 'connection of [the] parent's employee, officer or director to [the] subsidiary's tort or contract giving rise to [the] suit.'"²⁴⁵ The Court explained that this factor "relates more to the involvement of the parent itself in the acts giving rise to the suit than to its vicarious liability for the subsidiary's acts in general."²⁴⁶ What the *Jon-T Chemicals* court

241. *Id.* at 457.

242. *Id.* (citations and internal quotations omitted).

243. 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

244. See *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *aff'g* 696 F. Supp. 222 (W.D. La. 1988), *cert. denied*, 111 S. Ct. 1017 (1991).

245. *Jon-T Chemicals*, 768 F.2d at 691-92 (citation omitted).

246. *Id.* at 692. This important distinction between direct and vicarious liability of shareholders and, in particular, of parent corporations as shareholders of their subsidiaries, is also recognized by the authors in William O. Douglas & Carrol M. Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929) [hereinafter Douglas & Shanks], an article the Fifth Circuit had relied upon in presenting its rule for piercing the corporate veil. See *Jon-T Chemicals*, 768 F.2d at 692; see also *Miles v. American Tel. & Tel. Co.*, 703 F.2d 193, 196 (5th Cir. 1983) (relying on Douglas & Shanks, in holding that a subsidiary was not an alter ego of the parent corporation and thus there was no need to pierce the corporate veil). Douglas and Shanks discuss approvingly "a group of cases where liability is imposed upon the parent for torts of the subsidiary, even though the four standards of organization and operation [which indicate that two business units are properly treated as separate] . . . are in most instances met." Douglas & Shanks, *supra*, at 205. In some of these cases, the parent corporation was held liable because "the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management." *Id.* at 209.

As the Fifth Circuit itself stated in its *Jon-T Chemicals* decision, holding a parent corporation directly liable for its own actions taken through its officers and directors is not vicarious liability that results from piercing the corporate veil. *Jon-T Chemicals*, 768

recognized, and what the *Joslyn Mfg.* court ignored, is that liability for torts or for CERCLA cleanup costs should be imposed when a person, including a parent corporation, has engaged in conduct that the law has defined as culpable. The corporate veil should not be used as a shield to absolve parent corporations for their own liability when they have engaged in inadequate hazardous substance disposal activities along with their subsidiaries. The Fifth Circuit's *Joslyn Mfg.* decision suggests that the corporate veil could be used as such a shield, a result which improperly constrains the effectiveness of the new standard of care that Congress sought to impose on hazardous substance disposal activities when it enacted CERCLA.²⁴⁷

At the opposite extreme from the *Joslyn Mfg.* decision is the possibility that allegations of direct liability by parent corporations could be used to circumvent the common-law limits on shareholder liability.²⁴⁸ Thus, it is no doubt true that courts and litigants will have to focus more carefully on the activities of the directors and officers of parent corporations and the relevance of those activities to the inadequate disposal and release of the hazardous substances.²⁴⁹ In particular, courts may be required in certain cases to address the problem of role differentiation for individuals who serve as officers or directors of both the parent and the subsidiary corporations.²⁵⁰ When this issue arises, courts will have to rely on litigants to develop a complete record which adequately explains the

F.2d at 692. This conclusion is consistent with *Douglas and Shanks*. See *Douglas & Shanks, supra*, at 209 ("[T]he use of the latent power incident to stock ownership to accomplish a specific result made the parent a participator in or the doer of the act The connection between the injury and the interference was so intimate as to make the resulting liability direct and not vicarious." (discussing *Gulf C. & S.F. Ry. v. Cities Serv. Co.*, 281 F. 214 (D. Del. 1922)).

247. See *supra* notes 39-47 and accompanying text.

248. This is indeed the likely result of the district court decisions discussed *supra* notes 208-27 and accompanying text.

249. See generally *Joslyn Mfg.*, 696 F. Supp. 228-30 & n.19. The activities of two individuals would have been critical to the question of whether or not T.L. James & Co. should have been held directly liable for cleanup costs. F. B. James, for example, was an executive officer and director of James Company during the same period that he served as director of Lincoln Creosoting; G. W. James, Sr., served as President and director of James Company at the same time he managed Lincoln as its President and director.

250. Because corporations act through their agents, an individual who is an officer or director of two corporations may make either or both of the corporations directly liable if the individual acts tortiously. See *Jon-T Chemicals*, 768 F.2d at 692 (discussing the legal "fiction," which recognizes that a corporate employee may wear a number of different "hats").

interests and actions of the parent corporation and provides a proper basis for the assessment of direct liability. While this determination may in many cases be a complicated one, courts should not allow the fact that individuals hold positions as agents, officers or directors of both parent and subsidiary corporations to frustrate Congress' intent that persons be held liable when they have actually engaged in inadequate hazardous substance disposal activities.

In sum, because the *Joslyn Mfg.* court unnecessarily feared that allowing parent corporations to be held directly liable for cleanup costs would erode the important limits on shareholder liability, it ruled that a parent corporation cannot be liable for cleanup costs unless the corporate veil can be pierced. The most likely explanation of the court's unwarranted concerns is the precedent offered by the early CERCLA decisions appearing to impose CERCLA liability on parent corporations merely because their subsidiaries had engaged in inadequate hazardous substance disposal activities.

3. A Proper Rule of Direct Liability for Parent Corporations Based on Actual Involvement in Hazardous Substance Disposal Activities

The inadequacy of the Fifth Circuit's approach to parent corporation liability should be contrasted with the more recent decision of the First Circuit in *United States v. Kayser-Roth Corp.*²⁵¹ Again, the question presented was whether a parent corporation may be held directly liable for CERCLA cleanup costs, regardless of whether the corporate veil had been pierced.

In *Kayser-Roth*, the EPA sought to recover costs expended in cleaning up a release of trichloroethylene ("TCE"), a hazardous organic compound used in cleaning fabrics, at a site in North Smithfield, Rhode Island.²⁵² Stamina Mills, Inc. ("Stamina Mills") had manufactured textiles at that site from 1952 to 1975 and had used TCE in its operations from 1969 to 1975.²⁵³ Stamina Mills "was a wholly owned subsidiary of Kayser[-Roth] prior to Stamina's dissolution in 1977."²⁵⁴

251. 910 F.2d 24 (1st Cir. 1990), *aff'g* 724 F. Supp. 15 (D.R.I. 1989), *cert. denied*, 111 S. Ct. 957 (1991).

252. *Kayser-Roth*, 724 F. Supp. at 17 (D.R.I. 1989).

253. *Id.* A substantial release of TCE into the environment apparently occurred in November 1969 when a tanker spilled a large amount of the compound because its driver failed to attach a hose coupling properly. *Id.*

254. *Kayser-Roth*, 910 F.2d at 25 (footnote omitted).

However, Kayser-Roth was more than just Stamina's parent corporation. Kayser-Roth "made the ultimate decision to acquire the dry cleaning process using TCE."²⁵⁵ Moreover,

Kayser-Roth exercised pervasive control over Stamina Mills through, among other things: 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 funneled 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 finally, 6) its placement of Kayser-Roth personnel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out.²⁵⁶

Based on these activities, the First Circuit held that Kayser-Roth was directly liable as an operator for CERCLA response costs.²⁵⁷ The court's approach to the question of parent corporation liability differed starkly from the approach taken by the *Joslyn Mfg.* court.²⁵⁸ The *Kayser-Roth* court understood and preserved the distinction between liability as a direct participant and liability as a result of piercing the corporate veil. After concluding that Kayser-Roth was directly liable as an operator, the court observed that it was not necessary to decide whether the corporate veil

255. *Kayser-Roth*, 724 F. Supp. at 18. See also *Kayser-Roth*, 910 F.2d at 27 ("Kayser's control included environmental matters including the approval of the installation of the cleaning system that used the TCE." (footnote omitted)).

256. *Kayser-Roth*, 724 F. Supp. at 22, quoted in *Kayser-Roth*, 910 F.2d at 27.

257. *Kayser-Roth*, 910 F.2d at 28. Liability attached under 42 U.S.C. § 9607(a)(2).

258. The *Kayser-Roth* court did not state that its decision conflicted directly with the *Joslyn Mfg.* decision. Instead, the court read the *Joslyn Mfg.* decision narrowly:

Although there is some broad language in *Joslyn* that might support Kayser's position, the opinion is concerned primarily with owner rather than operator liability. The *Joslyn* court framed its issue as whether to "impose direct liability on parent corporations for the violations of their wholly owned subsidiaries." On the theory of the case presently under consideration, Kayser is being held liable for its activities as an operator, not the activities of a subsidiary.

Kayser-Roth, 910 F.2d at 27 (citation omitted).

should be pierced.²⁵⁹ Additional inquiry would have been redundant.

The *Kayser-Roth* court also discussed whether its theory of direct liability would indirectly threaten the limited liability of a parent corporation.

Without deciding the exact standard necessary for a parent to be an operator, we note that it is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary. *To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary.*²⁶⁰

Thus, while parent corporation status does not automatically result in CERCLA liability, it also does not preclude direct liability.

Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership [C]orporate status, while relevant to determine ownership, cannot shield a person from operator liability.²⁶¹

Under the reasoning presented in *Kayser-Roth*, therefore, a

259. *Id.* at 28 n.11.

260. *Id.* at 27 (emphasis added). *Cf.* *City of New York v. Exxon Corp.*, 112 B.R. 540 (S.D.N.Y. 1990) (holding Exxon directly liable under CERCLA for the actions of its wholly owned subsidiary). According to the *Exxon* court,

while the parent corporation's capacity to discover in a timely fashion the release or threat of release of hazardous substances, the parent corporation's power to direct mechanisms causing the release and the parent corporation's capacity to prevent and abate the damage, are certainly relevant and material factors to consider in evaluating a parent corporation's potential liability, the parent corporation must exercise its power or capacity to control its subsidiary in order to be held liable under Section 107(a).

Id. at 548 n.9 (citations omitted). The *Exxon* decision is discussed in greater detail *infra* note 264.

261. *Kayser-Roth*, 910 F.2d at 26. The only flaw in the *Kayser-Roth* court's assessment of parent corporation liability is that the court did not rely on Congress's objective to impose a heightened standard of care for disposal activities as support for its decision. *See supra* notes 39-52 and accompanying text. This standard loses its effectiveness if it is not applied to all parties directly involved in inadequate disposal activities.

parent corporation should be held directly liable under Section 107 of CERCLA²⁶² when the corporation has itself participated directly in a subsidiary's hazardous substance operations by (a) operating a hazardous substance facility or vessel, (b) arranging for the disposal or treatment of hazardous substances, or (c) accepting hazardous substances for transportation. A parent corporation is directly liable when its officers, directors or employees, in the ordinary course of activities prescribed by these roles, participate in the hazardous substance disposal activities identified in the statute.

As the result in *Kaysner-Roth* demonstrates, a court which focuses first on the question of direct liability can avoid the difficulties inherent in considering whether or not to pierce the corporate veil. Because piercing the corporate veil undermines the limited liability of shareholders, courts are often reluctant to hold that that shield should be removed.²⁶³ Courts should not, however, be reluctant to hold a corporation liable for the activities of its officers, directors or employees. Direct involvement by the corporation means that the corporation itself has engaged in culpable conduct warranting the imposition of liability. In the context of CERCLA liability, an emphasis on direct liability should focus litigants' and courts' attention on the disposal activities of the potentially responsible parties — the conduct specifically targeted by Congress in its enactment of CERCLA.²⁶⁴ This shift in focus is also important in

262. 42 U.S.C. § 9607.

263. See ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS* § 6.1, at 81 (3d ed. 1991) (stating that, as a general rule, "there must be compelling reasons before a court will ignore [the] basic assumption [that corporations maintain a separate legal existence]"); HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS* 344-52 (3d ed. 1983) (explaining that courts will demonstrate a "disregard of corporateness" or will "pierc[e] the corporate veil" only if it finds reason to make an exception to the general principle that corporation shareholders enjoy limited liability).

264. See *supra* notes 39-52 and accompanying text.

In contrast to the analysis in *Kaysner-Roth*, the decision in *Exxon Corp.*, 112 B.R. 540 (S.D.N.Y. 1990), indicates that focusing on the direct liability of a parent corporation does not necessarily result in an inquiry into the parent corporation's own disposal activities. The *Exxon* court acknowledged the distinction between direct liability under CERCLA and the liability of a parent corporation "using traditional corporate veil-piercing standards." *Id.* at 546.

In considering direct liability, however, the court relied upon *Bunker Hill* and *Idarado Mining*, two decisions which had failed to distinguish properly between a parent corporation's direct and derivative liability. *Id.* at 548. See *supra* notes 212-19 and accompanying text. The *Exxon* court granted the City's motion for summary judgment and held the parent corporation, Refinemet, directly liable as a generator or transporter of hazardous substances. *Exxon*, 112 B.R. at 552; see 42 U.S.C. §§ 9607(a)(3)-(4) (the scope of CERCLA's liability includes those who transport or arrange for the transport of hazard-

ensuring that the effort to impose liability is not driven by the search for deep pockets to fund cleanup costs, but relates to CERCLA's remedial purposes.

C. CERCLA Liability for Lenders Holding Indicia of Ownership: The Scope of the Secured Creditor Exemption

The liability of lenders for hazardous waste cleanup costs has probably become the most controversial aspect of CERCLA liability. This issue has received substantial comment in legal literature²⁶⁵ and has become the subject of proposed legislation aimed at further limiting lender liability.²⁶⁶

As discussed above,²⁶⁷ Congress provided a specific exemp-

ous substances).

The court relied on a number of uncontradicted facts in reaching its determination, even though many of those facts had no apparent relevance to Refinemet's actual involvement in disposal activities. First the court "emphasize[d]" that, at the time of acquisition, Refinemet understood that the subsidiary's business "exclusively involved reprocessing waste oils and disposing of industrial and chemical wastes" and "fully expected to profit from [the new subsidiary's] waste handling operations." *Exxon*, 112 B.R. at 549. However, such knowledge and intent to profit do not demonstrate any direct involvement in disposal activities and would be present any time a parent corporation purchases a subsidiary engaged in waste disposal operations. The court next presented a laundry list of facts that it believed "establish[ed] that [the parent's] control over [the subsidiary's] affairs was pervasive." *Id.* at 549-50. The list included the following: the subsidiary was wholly owned by Refinemet; Refinemet had the power to appoint and replace the subsidiary's officers and directors; Refinemet and its subsidiary had several officers and directors in common; and Refinemet guaranteed loans and contributed funds to ensure its subsidiary's operations. *Id.* In short, notwithstanding its apparent understanding that a parent corporation's direct liability is distinct from its derivative liability, the *Exxon* court found direct liability based on a number of factors which do not show direct involvement by the parent corporation in disposal activities, but rather are inherent in parent-corporation status.

265. See, e.g., Ann M. Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 HARV. J. ON LEGIS. 317 (1988) (discussing the scope of liability for secured lenders); Robin P. Malloy, *Equity Participations and Lender Liability Under CERCLA*, 15 COLUM. J. ENVTL. L. 63 (1990) (examining whether CERCLA liability should be imposed on lenders in equity participation schemes); Richard H. Mays, *Secured Creditors and Superfund: Avoiding the Liability Net*, 18 CHEM WASTE LITIG. REP. 411 (1989); Patricia L. Quentel, Note, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 WIS. L. REV. 139 (suggesting precautions to limit the liability of secured lenders under CERCLA); Tom Roslyn, Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925 (1989); Scott Wilsdon, Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261 (1987) (proposing that lenders be permitted to police their security interests without risking liability).

266. See *infra* note 301.

267. See *supra* notes 88-106 and accompanying text.

tion from liability for a lender "who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."²⁶⁸ Several courts have addressed the scope of this exemption, thus defining the scope of lender liability for cleanup costs. The following discussion considers the extent to which these cases conform to the language and intent of CERCLA and then reviews a recent EPA regulation which attempts to narrow the definition of lender liability.

1. Asking the Wrong Questions: The Initial District Court Decisions

The first prominent decision to discuss the scope of the exemption does not seem to have involved a secured creditor at all. In *New York v. Shore Realty Corp.*, a Second Circuit panel relied on the terms of the exemption to define the scope of an individual shareholder's liability without specifying whether the liability was based on the shareholder's status as an owner or as an operator.²⁶⁹ This lack of analytical specificity blurred the distinction between the liability of an operator and the liability of a secured creditor holding indicia of ownership.²⁷⁰

These seeds of confusion yielded the *United States v. Mirabile* decision.²⁷¹ In that case, the court had to decide whether a secured creditor that had foreclosed on property securing a loan could be held liable for CERCLA cleanup costs.²⁷² The court

268. 42 U.S.C. § 9601(20)(A).

269. 759 F.2d 1032, 1052 (2d Cir. 1985) ("The use of this [secured creditor] exception implies that an owning stockholder who manages the corporation, such as [the defendant] is liable under CERCLA as an 'owner or operator.' That conclusion is consistent with that of other courts that have addressed the issue." (citing *United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 579 F. Supp. 823, 847-48 (W.D. Mo. 1984) *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Carolawn Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,699, 20,700 (D.S.C. 1984)).

270. See *supra* notes 155-60 and accompanying text.

271. 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985).

272. *Id.* at 20,996. The court concluded that summary judgment should be entered in favor of the lender, American Bank and Trust Company ("ABT") because it had not participated in the management of the debtor. The court declined to resolve the threshold issue of whether ABT's purchase of the site at a foreclosure sale "technically vested ABT with ownership as defined by the statute." *Id.*

The court also considered the potential liability of two other lenders, the Small Business Administration ("SBA") and Mellon Bank. With respect to the SBA, the court found no CERCLA liability because the SBA had not participated in the management of the

found that the secured creditor exemption “plainly suggests that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for cleanup costs.”²⁷³ In particular, the court was persuaded by the logic of the *Shore Realty* decision and the cases cited therein.²⁷⁴ In the cited cases, liability was warranted because the individuals involved had “participat[ed] not only in financial aspects of management but also in the nuts-and-bolts, day-to-day production aspects of the business.”²⁷⁵

In the district court’s view, the situation in *Mirabile* differed in a “critical” respect since “the participation of the creditors . . . in the management of the corporation appears to have been limited to participation in financial decisions.”²⁷⁶ Employing reasoning directly contrary to Congress’ intent to make secured creditors liable for participation in “management” rather than participation in the facility’s operation,²⁷⁷ the court proceeded to equate secured creditor liability with operator liability as though Congress had not established the former as a separate category of responsible parties. Construing the language of the exemption, the court explained that “[t]he reference [in Section 101(20)(A)] to management of the ‘facility,’ as opposed to management of the affairs of the actual owner or operator of the facility, suggests once again that the participation which is critical is participation in operational, production, or waste disposal activities.”²⁷⁸ In the court’s view, CERCLA established a critical “distinction between parties involved in the actual operation of the facility and those who are involved in what may properly be characterized as the financial aspects of the business conducted at the facility” — a distinction determinative of liability.²⁷⁹ The court therefore held that “before a secured

borrower. *Id.* at 20,997. While the court also noted that the SBA never had equitable or legal title to the site, it chose not to base its decision on that fact. *Id.* The court refused to grant summary judgment on the question of Mellon Bank’s liability, finding issues of material fact in dispute. *Id.*

273. *Id.* at 20,995.

274. *See id.*

275. *Id.*

276. *Id.*

277. *See supra* notes 96-106 and accompanying text.

278. *Mirabile*, 15 *Envtl. L. Rep.* at 20,995. *But see* 42 U.S.C. § 9601(20)(A)(iii) (stating that financial control assumed as a result of bankruptcy confers status as “owner” or “operator” upon the party involved).

279. *Mirabile*, 15 *Envtl. L. Rep.* at 20,995-96.

creditor . . . may be held liable, it must, at a minimum, participate in the day-to-day operational aspects of the site."²⁸⁰

Thus, notwithstanding the language and intent of the Act, the confusion surrounding the distinction between operator liability and secured creditor liability born in the *Shore Realty* dicta was adopted as CERCLA law by the *Mirabile* court. The *Mirabile* decision set the standard for determining the liability of secured creditors for CERCLA cleanups.²⁸¹

2. Asking the Right Questions: A Standard for Applying the Secured Creditor Exemption that Promotes the Purposes of CERCLA

A court of appeals finally had the opportunity to consider secured creditor liability in *United States v. Fleet Factors Corp.*²⁸² Fleet Factors had made a series of loans to Swainsboro Print Works ("SPW"), a cloth printing business.²⁸³ To secure the extension of credit, Fleet Factors "held an 'indicia of ownership' in the facility through its deed of trust to SPW."²⁸⁴ SPW subse-

280. *Id.* at 20,996.

281. *See, e.g.*, *Guidice v. BFG Electroplating and Mfg. Co.*, 732 F. Supp. 556, 561-63 (W.D. Pa. 1989) (applying *Mirabile* to find a bank liable for the hazard created); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989) (holding a mortgagee liable for CERCLA cleanup costs because it was an active participant in management and operations); *United States v. Fleet Factors Corp.*, 724 F. Supp. 955, 960 (S.D. Ga. 1988) (adopting the standard set out in *Mirabile* and refusing to impose liability), *rev'd in part*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991). *But see* *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (D. Md. 1986) (expressing "respectful[] disagree[ment]" with *Mirabile* and suggesting that "a former mortgagee of a site that purchased the site at a foreclosure sale . . ." was exempt from liability by reason of the secured creditor exemption).

282. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

283. *Id.* at 1552.

284. *Id.* at 1556 (quoting 42 U.S.C. § 9601(20)(A)).

The court noted that the parties did not dispute whether Fleet Factors held indicia of ownership. *Id.* Had Fleet Factors challenged that position, the company may have been able to avoid liability on the theory that it held no indicia of ownership. When, as in *Fleet Factors*, a deed of trust is "given as security for the performance of an obligation," it is generally treated as a mortgage. *See* 55 AM. JUR. 2D, *Mortgages* § 15 (1971) (explaining deeds of trust and mortgages) (footnote omitted); LAW OF REAL PROPERTY, *supra* note 95, § 1.6. Georgia, the state in which SPW was located, is a lien theory state. In states following this theory of mortgages, a mortgagee does not hold title to the property securing the loan prior to foreclosure. *See generally* LAW OF REAL PROPERTY, *supra* note 95, § 4.2 & n.1. Thus, Fleet Factors might have argued that its deed of trust did not constitute holding indicia of ownership. Compare, however, California's treatment of trust deeds. Even though California is a lien theory state, courts there hold that a deed of trust passes title to the trustee-lender. *See id.* § 1.6 (quoting *Bank of Italy Nat'l Trust & Sav-*

quently failed, and the EPA conducted a cleanup of hazardous substances at the site.²⁸⁵

In the ensuing cost-recovery action, the United States asserted that Fleet Factors was liable as an "owner and operator" for these cleanup costs.²⁸⁶ The appellate court addressed Fleet Factors's position that it should be exempt from liability as an "owner" because of its secured creditor status.²⁸⁷ Fleet Factors relied on the *Mirabile* holding to argue that a lender is not liable under CERCLA in the absence of "participat[ion] in the day-to-day or operational aspects of [a] site."²⁸⁸

The Eleventh Circuit rejected the *Mirabile* analysis and adopted a "narrow construction of the secured creditor exemption."²⁸⁹ The court first concluded that the exemption must be given effect so that lenders are protected against "CERCLA liability for engaging in their normal course of business."²⁹⁰ The standard should give the lenders sufficient "latitude" to monitor debtors and to "become involved in occasional and discrete financial decisions relating to the protection of its security interest without incurring liability."²⁹¹

Notwithstanding this allowance for normal oversight, the court made clear that liability would follow from a lender's participation in the management of the facility, even if it did not participate in operating the facility.²⁹² In the court's view, the approach taken by the *Mirabile* court imposes liability only when a secured creditor is an operator and otherwise liable under the Act, thus reading

ings Ass'n. v. Bentley, 20 P.2d 940 (Cal.), cert. denied, 290 U.S. 659 (1933)).

285. *Fleet Factors*, 901 F.2d at 1553.

286. *Id.* at 1554 (alleging that Fleet Factors was liable under either 42 U.S.C. § 9607(a)(1) or 42 U.S.C. § 9607(a)(2)).

287. *Id.* at 1556.

288. *Id.* (quoting *United States v. Mirabile*, 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. 1985)).

289. *Id.* at 1558 n.11. In describing its construction as "narrow," the court was apparently comparing the standard it adopted to the "broader" standard of liability urged by the United States. See *id.* at 1558. The court stated that the government's standard would impose liability on "any secured creditor that participates in any manner in the management of a facility." *Id.* at 1556.

290. *Id.* at 1556.

291. *Id.* at 1558. This position is consistent with Congress' view that the normal activities related to a secured creditor's administration of a loan do not result in liability. See *supra* notes 93-95 and accompanying text.

292. See *id.* at 1557 ("[T]he statutory language chosen by Congress explicitly holds secured creditors liable if they participate in the management of a facility.").

out of the statute the particular terms of the secured creditor exemption.²⁹³

Based on these considerations, the *Fleet Factors* court held that a lender holding indicia of ownership to protect a security interest will be liable as an owner when it:

participat[es] in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes [A] secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous substance disposal decisions if it so chose²⁹⁴

This standard is entirely consistent with the notion of gatekeeper liability discussed earlier in this article.²⁹⁵ Indeed, without referring specifically to the legislative history of CERCLA, which demonstrates Congress' intent to impose a new standard of care for the disposal of hazardous substances, the court itself recognized that the potential liability of lenders would aid in the monitoring of disposal practices and encourage compliance with the statute.²⁹⁶

Applying this standard to *Fleet Factors*, it became clear that the company could be held liable for the response costs. Because "Fleet [Factors] actively asserted its control over the disposal of hazardous wastes at the site," an inquiry into the lender's capacity to control through its involvement in the facility's financial management was unnecessary.²⁹⁷ In fact, the court stated that, if proven, the record's substantiation of *Fleet Factor's* involvement with the facility was sufficient to establish the company's liability as an operator.²⁹⁸

In sum, when the Eleventh Circuit finally asked the right ques-

293. *See id.* (The *Mirabile* court's construction of the statute "ignores the plain meaning of the exemption and essentially renders it meaningless.")

294. *Id.* at 1557-58 (footnote omitted).

295. *See supra* notes 100-06 and accompanying text.

296. *See Fleet Factors*, 901 F.2d at 1558. The court also stated that its standard for secured creditor liability would promote full investigation into potential hazardous waste problems prior to a loan and adjustment of the applicable interest rate to reflect the risk to the lender when hazardous waste problems are identified. *Id.*

297. *Id.* at 1559 n.13.

298. *Id.* at 1556 n.6. In this regard, the court observed that, "[a]lthough we can conceive of some instances where the facts showing participation in the management are different from those indicating operation, this is not such a case." *Id.*

tions about why secured creditors should be held liable under the Act, it cleared up the confusion surrounding the scope of the secured creditor exemption. The legislative intent identified in this article adds support to the *Fleet Factors* court's reasoning. The *Fleet Factors* decision is also important because it has begun to untangle the concepts of operator and secured creditor liability, concepts that have been confused since the earliest litigation of individual direct liability.²⁹⁹

3. The Administrative Response: An EPA Regulation Defining the Scope of the Secured Creditor Exemption

The Eleventh Circuit's *Fleet Factors* opinion prompted concern among members of the lending industry that the mere status of being a secured lender to a facility from which there is a release or threatened release of hazardous substances would result in CERCLA liability.³⁰⁰ As a result, industry representatives have pressured Congress to amend CERCLA to exempt lenders from liability almost entirely.³⁰¹ "In an effort to hold off legislation

299. In a case post-dating the *Fleet Factors* decision, the Ninth Circuit applied the secured creditor exemption and held that a public agency which held indicia of ownership primarily to protect a security interest was not liable for response costs. *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990). The *Bergsoe Metal* court concluded that formulating a Ninth Circuit standard for determining the liability of secured creditors was unwarranted. *Id.* at 672. It stated that "whatever the precise parameters of 'participation [in the management],' there must be *some* actual management of the facility before a secured creditor will fall outside the exception. Here there was none . . ." *Id.* The court noted, in particular, that it is erroneous to "equat[e] the power to manage with actual management . . . Merely having the power to get involved in management, but failing to exercise it, is not enough." *Id.* at 673 n.3. *Cf. supra* notes 179-227 and accompanying text (criticizing cases imposing direct liability on parent corporations solely because of their ability to control the facility).

300. *See, e.g.*, Stephen Labaton, *Bank Liability for Toxic Sites*, N.Y. Times, Apr. 18, 1991, at D2; Jube Shiver Jr., *Lenders to Seek Exemption in Land Cleanup*, L.A. Times, Apr. 10, 1991, at D2. Whether or not banks have well-grounded fears about their potential liability for CERCLA response costs is disputed. *Compare* Labaton, *supra* (summarizing the conclusion of a study by Essential Information, Inc. and the U.S. Public Information Research Group that none of the nation's twenty largest banking companies reported any liabilities related to Superfund in financial reports filed with the Securities and Exchange Commission) with Amy Kaslow, *Environmental Cleanup Costs Add to S&L Bail-out Woes*, Christian Sci. Monitor, July 20, 1990, at 1 (reporting an environmental attorney's estimate that "70 percent of the transactions [engaged in by lenders] were environmentally risky").

301. Efforts to enact legislation have focused principally on two bills. The first, sponsored by Representative LaFalce and co-sponsored by more than 200 members of the House, would amend the secured creditor exemption to allow lenders to engage in a broad range of activities, including foreclosure, without risking loss of the exemption.

pending in the House and Senate that would tinker with CERCLA's liability language," the EPA drafted a regulation clarifying the scope of the secured creditor exemption.³⁰² Indeed, the EPA believes that this proposed regulation may narrow secured creditors' liability under CERCLA.³⁰³ The proposed regulation was published on June 24, 1991, "to interpret the provisions of section[] 101(20) . . . as [it] affect[s] private lending institutions . . . that hold a security interest in . . . a facility contaminated by or containing hazardous substances, or that acquire ownership of contaminated property in the course of . . . protecting a secured interest."³⁰⁴

The regulation, which, if adopted, will be codified within CERCLA's National Contingency Plan,³⁰⁵ first defines the term "[i]ndicia of ownership as used in section 101(20)(A)."³⁰⁶ The definition of this term is critical because it delineates the universe of lenders who may be subject to CERCLA liability as owners. According to the regulation, "indicia of ownership":

means *evidence of interests* in real or personal property

2

Lenders would be liable where their actions "cause[d] or exacerbated a release or threatened release of a hazardous substance." H.R. 1450, 102d Cong., 1st Sess., § 1(a) (1991) (proposed amendment of 42 U.S.C. §9601(20), quoted language from § 9601(20)(E)(vi)).

The second bill, sponsored by Senator Garn, would modify the liability of banks by adding a new section 36 to the Federal Deposit Insurance Act (codified as amended at 12 U.S.C. §§ 1811-1833e (1988)). S. 651, 102d Cong., 1st Sess., § 152 (1991). The bill would generally limit a lender's potential liability under CERCLA "to the actual benefit conferred on [the lending] institution by a removal, remedial, or other response action undertaken by another party." *Id.* This limitation on liability would not apply, however, when the lender causes or contributes to the release of, or "actively directs or conducts operations that result in the release of a hazardous substance . . ." *Id.*

302. EPA Draft Lays Out Lender Liability For Site Cleanup, 59 U.S.L.W. 2225 (Oct. 16, 1990).

303. See National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 56 Fed. Reg. 28,798, 28,808 (to be codified, if adopted, at 40 C.F.R. § 300, 1100 (proposed June 24, 1991)) (stating that "this proposal could potentially result in costs savings to holders of security interests which may have previously been held liable under CERCLA sections 107(a)(1) or 107(a)(2)").

304. *Id.* at 28,798.

305. See *id.* at 28,808. The National Contingency Plan is discussed *supra* at note 11. The preamble to the proposed rule states that "[p]rior to its promulgation as a final rule, this rule represents EPA's interpretation of section[] 101(20)(A) . . . and EPA will utilize it as guidance for implementing th[is] section[]." *Id.* at 28,799.

306. *Id.* at 28,808. The relevant text of 42 U.S.C. § 9601(20)(A) provides: [T]he term 'owner or operator' . . . 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."

held as security for a loan or other obligation, including full title to real or personal property acquired incident to foreclosure and its equivalents. Examples of such indicia may include, but are not limited to, a mortgage, deed of trust, or legal title obtained pursuant to foreclosure or its equivalents, or an assignment, lien, pledge, or other right to or other form of encumbrance against property that is recognized under applicable law as establishing a *bona fide* security interest. If a defendant claims an exemption, the plaintiff has the burden of establishing that the defendant is the owner or operator as provided in this regulation.³⁰⁷

This definition, which is unaccompanied by any helpful or relevant explanation in the preamble, initially adds needless ambiguity to the intended scope of the secured creditor exemption. Under the terms of the statute, a party's need to rely on the secured creditor exemption should arise only after the party is shown, pursuant to state property law, to be an "owner" of the property based on the legal effect of the interest that the creditor holds.³⁰⁸ The legislative history of the provision suggests that Congress intended to exempt from owner liability lenders that hold title to property under state law to protect their security interest.³⁰⁹ It did not intend to treat automatically all secured lenders as owners, thereby forcing them to rely solely on the exemption to avoid liability.³¹⁰

Despite the relative clarity of the legislative record³¹¹ and the EPA's intent merely to reassure lenders,³¹² the EPA's recently-promulgated definition of "indicia of ownership" could potentially be construed quite broadly because it refers to "evidence of interests in . . . property held as security" rather than to "evidence of ownership interests."³¹³ While the definition is accompanied in the following sentence with examples of the indicia of ownership, the examples neither clarify the ambiguity in nor limit the breadth of the definition itself.³¹⁴ The preamble to the regulation also

307. 56 Fed. Reg. at 28,808 (emphasis added).

308. See 42 U.S.C. § 9601(20)(A).

309. See *supra* notes 90-95 and accompanying text.

310. See *supra* notes 93-95 and accompanying text.

311. See *supra* note 90-91 and accompanying text.

312. See *supra* notes 302-03 and accompanying text.

313. 56 Fed. Reg. at 28,808.

314. Recall, for example, that only in the small number of title theory states will the

fails to state whether the EPA takes the position that all security interests in property are ownership interests, and thus necessitates the lenders' reliance on the secured creditor exemption to avoid CERCLA liability as owners.³¹⁵

The EPA's definition of "indicia of ownership" is also noteworthy because it expressly places the burden of proof on the party seeking to recover response costs. Under the regulation, that party must show that the person possessing "indicia of ownership" either did not hold the ownership interest to protect a security interest or had participated in the facility's management so as to fall beyond the protection offered by the secured creditor exemption.³¹⁶ The EPA does not explain its allocation of the burden of proof.³¹⁷ This rule may be defensible if, as discussed above, the secured creditor exemption is understood as creating a category of liability distinct from, and in addition to, liability imposed on owners and operators.³¹⁸ To succeed in an action under the lender category of liability, the person seeking to recover response costs should have, as elements of its case, the burden of showing that the defendant meets each condition set forth in the statute.³¹⁹ However, the EPA's regulation may go too far in shifting the burden of proof onto the party claiming response costs. The secured creditor exemption appears in the statute as an exception to the definition of owner or operator.³²⁰ Under normal rules of statutory construc-

mortgagee have an ownership interest in property prior to the date of default or foreclosure. See *supra* note 95.

315. See 56 Fed. Reg. at 28,798-806. The EPA recognized that "[t]he process of foreclosure and sale may require or result in the security holder taking record title to the property under the laws of some states." *Id.* at 28,805. The EPA's discussion indicates that, notwithstanding this effect, foreclosure may still not result in loss of the secured creditor exemption. *Id.* The EPA does not address whether, prior to foreclosure in a lien state, the secured creditor must be concerned with liability as an owner even though it technically holds no "indicia of ownership." *Id.* But see *id.* at 28,798 (stating that the proposed regulation "interpret[s] the provisions of section[] 101(20) . . . as [it] affect[s] private lending institutions . . . that hold a security interest in . . . a facility contaminated by or containing hazardous substances, or that acquire ownership of contaminated property in the course of . . . protecting a secured interest").

316. *Id.* at 28,808.

317. The preamble merely restates the language of the regulation. *Id.* at 28,801 ("The burden is on the plaintiff to prove that the defendant is an owner or operator . . .").

318. See *supra* notes 96-106 and accompanying text.

319. See MCCORMICK ON EVIDENCE § 337, at 951 (Edward Cleary, gen. ed. 1984) (stating the general rule that "the constituent elements of a . . . statutory command . . . must be proved by the party who relies on the . . . statute").

320. 42 U.S.C. § 9601(20)(A).

tion, the party seeking the protection of the exception — here, the secured creditor holding indicia of ownership — bears the burden of proving the conditions the exception requires.³²¹ Thus, in its attempt to broaden the secured creditor exemption to make it available to lenders wishing to avoid liability for a broad range of activities,³²² the EPA placed the lenders' burden under the statute with response-cost claimants. Furthermore, the EPA's allocation of the burden of proof appears particularly unfair given the nature of the evidence necessary to show a lender's intent in holding indicia of ownership or the details about a lender's activities which would demonstrate participation in management.³²³

Having defined the "indicia of ownership" which may cause a lender to incur liability under CERCLA, the regulation next discusses the meaning of the phrase "[p]rimarily to protect a security interest."³²⁴ To come within the secured creditor exemption, CERCLA requires that the indicia of ownership must be held "primarily to protect [a] security interest."³²⁵ The EPA suggests that this issue generally will be "determined by the facts of each case and whether a security interest is created under applicable law."³²⁶

321. While the constituent elements of a statute must be proved by the party who relies on it, "matters of exception . . . must be proved by his adversary." MCCORMICK ON EVIDENCE, *supra* note 319, § 337 at 951 (footnote omitted). The treatise then notes that "[o]ften the result of this approach is an arbitrary allocation of the burdens, as the statutory language may be due to a mere casual choice of form by the draftsman." *Id.*

322. See *infra* notes 350-54 and accompanying text.

323. See McCormick on Evidence, *supra* note 319, § 337 at 951. Courts are unlikely to be sympathetic to claimants' arguments that evidence is difficult to compile.

A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue This consideration should not be overemphasized. Very often one must plead and prove matters as to which his adversary has superior access to the proof.

Id.

324. 56 Fed. Reg. at 28,808.

325. 42 U.S.C. § 9601(20)(A).

326. 56 Fed. Reg. at 28,808. The EPA does, however, specifically state that an ownership interest is *not* held "primarily to protect a security interest" when the "ownership interest in property [is] held for investment purposes," or the "ownership indicia [are] held for purposes other than as protection for a security interest." *Id.*

Consistent with the legislative history discussed earlier, the EPA clarifies in the preamble that the fact lenders "typically have revenue interests in the loan transactions that create security interests" does not deprive them of their character as security interests. *Id.* at 28,802. See also *supra* notes 90-106 and accompanying text for a discussion of

Notwithstanding this case-by-case approach, the EPA has sought to ensure generally that the mere facts of foreclosure and purchase of title by the lender in a foreclosure sale are consistent with the lender's objective of protecting its security interest and do not cause the lender to lose the protection of the secured creditor exemption.³²⁷ The regulation provides that title obtained through a foreclosure is held to protect a security interest as long as (1) the lender did not reject an offer of "fair consideration" for the property at the time of foreclosure,³²⁸ (2) the lender takes specified steps within one year to sell the property,³²⁹ and (3) after holding title to the property for six months following foreclosure, the lender does not reject a firm, *bona fide* offer of fair consideration for the property.³³⁰

This basic treatment of foreclosures does not appear to be inconsistent with Congress' intent in enacting the secured creditor exemption.³³¹ The regulation provides that a lender which obtains

CERCLA's legislative history with respect to the exemption for secured creditors.

327. 56 Fed. Reg. at 28,808. The EPA finds support for this position in prior case law. *See id.* at 28,803. However, in *Guidice v. BFG Electroplating and Mfg. Co.*, 732 F. Supp. 556, 562 (W.D. Pa. 1989), cited by the EPA as contrary authority, the court suggests that "[t]here is a divergence in case law as to whether the security interest exemption is applicable when a secured creditor purchases its security interest at a foreclosure sale." The *Guidice* court concluded that "[w]hen a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been." *Id.* at 563. *See also* *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 580 (D. Md. 1986) (holding that a bank which had held title to property for four years following purchase at a foreclosure sale was liable as an owner); *Burkhart*, *supra* note 265, at 343 ("When the lender has foreclosed [on a mortgage and purchased the title], the security interest is extinguished and so is the protection of the exception.").

The *Guidice* court relied on the terms of 42 U.S.C. § 9601(20)(D). *Guidice*, 732 F. Supp. at 563. That provision had been added to the statute by SARA to exempt from liability states and localities involuntarily acquiring hazardous waste sites. *See supra* notes 109-14 and accompanying text for a discussion of that exemption. The court reasoned as follows: "That Congress did not simultaneously amend the statute to exclude from liability lenders who acquire property through foreclosure might indicate that Congress intended to hold them liable as owners." *Guidice*, 732 F. Supp. at 563 (citation omitted).

328. 56 Fed. Reg. at 28,808. The regulation defines "fair consideration" at the time of the foreclosure sale as the fair market value of the facility or as an amount equal to or greater than the debtor's outstanding obligation. *Id.*

329. *Id.* at 28,809. The lender/owner must list the property with a third party as being for sale and must provide periodic notice of the offer for sale. *See id.*

330. *Id.* at 28,809. The regulation defines "fair consideration" in this context as the sum of the principal owed to the lender plus unpaid interest and penalties plus reasonable costs incident to the foreclosure and sale. *Id.*

331. *See supra* notes 90-106 and accompanying text. However, the conduct in which the regulation permits a secured lender to engage once title to the property is obtained fol-

title to property (an indicium of ownership) through foreclosure is not an owner when the title is held to protect the lender's security interest and the lender does not participate in management. However, the regulation's treatment of foreclosure does not help to clarify EPA's definition of secured creditors subject to CERCLA liability because of their participation in management of a facility. As in its discussion of "indicia of ownership,"³³² the regulation fails to state whether lenders in lien theory states³³³ may rely on the secured creditor exemption to avoid liability as "owners" prior to their foreclosing on and obtaining title to the property. Before foreclosure, such lenders arguably do not hold the requisite "indicia of ownership."³³⁴

The final and most important part of the regulation defines "[p]articipation in [m]anagement" of a facility.³³⁵ In defining this term, the regulation distinguishes the secured lender's actual exercise of its authority over the debtor from the secured lender's capacity to exercise such authority; it provides that the lender's authority must be exercised through "actual participation" in management.³³⁶ Thus, in the EPA's view, a lender does not lose the protection of the secured creditor exemption because of its "mere capacity, or ability to influence, or the unexercised right to control facility operations."³³⁷

While this distinction between the actual exercise of authority and the "capacity . . . to influence . . . operations" is quite similar to the distinction this article draws for assessing the liability of parent corporations,³³⁸ the distinction in the context of the secured creditor exemption is problematic. With respect to lenders, the distinction focuses the liability inquiry on the secured creditor's operation of the facility rather than its participation in the facility's management. Instead, the liability analysis for secured creditors holding indicia of ownership should focus on the lender's actual

lowing foreclosure is less defensible. See *infra* notes 359-65 and accompanying text.

332. See *supra* notes 306-15 and accompanying text.

333. See *supra* note 95. A majority of states adhere to the lien theory of mortgages.

334. See *supra* note 95.

335. 56 Fed. Reg. at 28,809.

336. *Id.*

337. *Id.* The preamble emphasizes the EPA's position that "[p]articipation in the management of a facility means actual participation in the management or operational affairs by the holder of the security interest, and does not include the mere capacity, ability, or unexercised right to influence facility operations." *Id.* at 28,802-03.

338. See *supra* notes 262-64 and accompanying text.

conduct in administering the loan.³³⁹ Furthermore, the loan-related conduct need not rise to the level of actual control over the facility; rather, conduct of a character sufficient to give the lender the ability to control disposal activities supports liability.³⁴⁰ Indeed, the *Fleet Factors* decision reached this conclusion.³⁴¹ However, the EPA now wishes to overrule that result.

The regulation proceeds to describe specific conduct in which a lender may engage during various stages of loan administration without compromising its secured creditor exemption.³⁴² With respect to the pre-loan period, the regulation provides:

No act or omission prior to the creation of a security interest constitutes evidence of participation in management within the meaning of section 101(20)(A). The holder of a security interest who undertakes or requires an environmental inspection of the vessel or facility in which indicia of ownership are held is not by such action considered to be participating in the vessel or facility's management, nor is such ongoing involvement with the borrower that responds to the inspection by ensuring that the vessel or facility remains or is maintained in compliance with all applicable requirements considered to be evidence of management participation. Neither the statute nor this regulation require[s] a holder of a security interest to conduct an inspection to qualify for the [exemption], and the liability of a holder of a security interest cannot be based on or affected by a failure to conduct an inspection.³⁴³

This proposed treatment of environmental audits warrants two comments.³⁴⁴ First, it appears reasonable that conduct by a secured creditor occurring prior to its decision to make a loan should not be used as evidence that the creditor participated in the facility's management during the time the creditor actually holds indicia of ownership in the facility. Thus, the EPA correctly provides that a lender's failure to conduct an environmental audit does

339. See text accompanying notes 294-99.

340. See *supra* notes 103-06 and accompanying text (discussing gatekeeper liability and how such liability reinforces the CERCLA liability scheme).

341. See *supra* text accompanying note 294.

342. 56 Fed. Reg. at 28,809.

343. *Id.*

344. See *supra* text accompanying notes 83-87 for a discussion of environmental audits.

not affect its ability to rely on the exemption.³⁴⁵ Second, however, the statute does not support the EPA's position that a creditor's actions in response to an environmental audit during the loan's administration do not constitute participation in the management. In effect, the EPA has diverted the inquiry into lender liability away from the character of the lender's actions in administering the loan or otherwise participating in the facility's management and toward a determination of whether or not any action suggesting participation in management was taken in response to the results of a pre-loan environmental audit.

If the EPA intended to use its lender liability regulations to encourage environmental audits, its objective would have been consistent with public policy as determined by Congress.³⁴⁶ However, the EPA could have accomplished this objective without distracting courts from assessing the nature and scope of lenders' participation in management. For example, the EPA could have encouraged environmental audits by construing the innocent landowner provision³⁴⁷ to protect lenders who conduct appropriate environmental audits prior to the loan, and who would otherwise be liable as owners because they hold indicia of ownership to protect a security interest and participate in the management of the facilities which serve as collateral.³⁴⁸ In contrast to the blanket approach taken by the EPA, this alternative approach would be more consistent with the language of the statute which directs courts to focus on lenders' participation in the management of facilities, without being influenced by lenders' claims that their involvement was in response to problems identified in environmental audits.³⁴⁹

345. Congress imposes no requirement that lenders conduct environmental audits as a condition for claiming the secured creditor exemption. See 42 U.S.C. § 9601(20)(A).

346. Congress' intent to encourage pre-transaction environmental audits by potential owners is inferred from two specific provisions of the law. First, Congress made current owners liable for cleanups even where a release or threatened release results from activities of previous owners. 42 U.S.C. § 9607(a)(1). See generally *supra* notes 80-84 and accompanying text. Second, SARA created an exemption from liability for "innocent" landowners, i.e., those landowners who make a reasonable inquiry into the condition of property prior to purchase. See 42 U.S.C. §§ 9601(35)(A)-(B). See generally *supra* notes 85-87 and accompanying text.

347. 42 U.S.C. §§ 9601(35)(A)-(B).

348. If the innocent landowner defense were available to a secured creditor who holds indicia of ownership to protect a security interest and who participates in management of the facility, that creditor could avoid liability upon proof it had made an appropriate environmental audit indicating there were no hazardous substances at the site. See *supra* text accompanying notes 85-87.

349. Separating the inquiry into participation in management from the determination of

The second stage of loan administration occurs when the debtor is in possession of the facility. The regulation provides that during this period, the exemption is lost if the creditor either "exercis[es] decisionmaking control over the borrower's environmental compliance"³⁵⁰ or "exercis[es] control at a management level encompassing the borrower's environmental compliance responsibilities, comparable to that of a manager of the borrower's enterprise."³⁵¹ Any loan "work out" activities³⁵² in which creditors and debtors engage will occur in this stage of loan administration. The regulation seeks to allow lenders broad latitude to pursue these activities without risking loss of the secured creditor exemption.³⁵³ During this stage of loan administration, the EPA's only real limitation on a lender's conduct appears to be that the lender must refrain from

whether or not an environmental audit motivated that participation is also consistent with the statute's organization; the innocent landowner defense and sufficiency of the audit should become issues only after a person is determined to be an owner. *Cf.* 42 U.S.C. § 9601(20)(A) (first defining "owner or operator" broadly, but then exempting a narrow class of persons, i.e., secured creditors who do not participate in management, from liability). Under the proposed regulations, a lender may modulate its level of involvement with a facility depending on the outcome of its pre-loan environmental audit. As a result, the standard for assessing participation in management will vary with the findings of environmental audits. The EPA approach therefore adds uncertainty to liability determinations, increases the likelihood of litigation, and reduces the effectiveness of the standard of care that Congress sought to impose when it enacted CERCLA.

350. 56 Fed. Reg. at 28,798, 28,809. The proposed regulation further requires that the lender's exercise of control has the effect "that the security holder . . . undertake[s] responsibility for the borrower's waste disposal or hazardous substance handling practices which results in a release or threatened release." *Id.*

351. *Id.* The proposed regulation states further that this exercise of control is to have the effect "that the security holder has assumed or manifested responsibility for the management of the enterprise by establishing, implementing, or maintaining the policies and procedures encompassing the day to day environmental compliance decisionmaking of the enterprise." *Id.*

352. The regulation provides that loan "work out" activities "include, but are not limited to, restructuring or renegotiation of the terms of the loan or other obligation, payment of additional interest, extension of the payment period, specific or general financial advice, suggestions, counseling, guidance, or other actions . . . to protect the security interest." *Id.* at 28,809.

353. *See id.* According to the regulation:

"[w]ork out" activities will not void the exemption provided that the actions are taken in the course of protecting the security interest When the holder of a security interest undertakes work-out activities, provides financial or other advice, or similar support to a distressed borrower, the security holder will remain within the exemption when the holder participates in management, as specified in 40 C.F.R. sec. 300.1100(c)(1).

Id.

operating the facility if it is to remain within the exemption.

[M]erely labeling a certain activity as part of a "workout," for example, is not by itself conclusive; what matters is what the security holder actually does In this context, the statute does not permit a security holder to act as the operator of a facility (an independent basis of liability) under the mantle of holding a security interest.³⁵⁴

Given the apparent political volatility of lenders' liability for CERCLA cleanups,³⁵⁵ the EPA appears to step away from the statute's intent and to read out of its "owner or operator" definition the "participating in the management" language which makes certain lenders responsible parties.³⁵⁶ While the EPA asserts in the regulation's preamble that operating a facility will result in a secured creditor's liability as an operator without regard to the secured creditor exemption,³⁵⁷ the EPA's construction of "participating in the management" makes it difficult to imagine that any conduct by a secured creditor short of actually operating the facility will result in liability as an owner.³⁵⁸

During the third and final stage of loan administration—the post-foreclosure period—the EPA allows the broadest range of conduct a creditor may undertake while retaining the protection of the statutory exemption. The post-foreclosure stage encompasses the period during which a creditor holds property obtained through foreclosure.

A security holder, who did not participate in management prior to foreclosure, may, without incurring liability under CERCLA Section 101(20)(A), foreclosure [sic], sell, liquidate, wind up operations, or *retain and continue functioning the enterprise* in order to protect the value of the secured asset prior to sale as a means to realize the debtor's

354. 56 Fed. Reg. at 28,803.

355. See *supra* notes 300-03 and accompanying text.

356. 42 U.S.C. § 9601(20)(A).

357. 56 Fed. Reg. 28,800.

358. The EPA's general definition of "participation in management" is discussed *supra* at notes 335-37 and accompanying text. The definition requires that the lender exercise either decisionmaking control over the borrower's environmental compliance or exercise general control over the borrower so that the lender is comparable to a general manager. During a loan workout, however, even this level of control may not be enough to cause a creditor to lose the exemption, unless the conduct also constituted operation of the facility.

unpaid obligation pending sale, liquidation, or other disposition of the property, without incurring liability under CERCLA section 107(a)(1)³⁵⁹

Although the EPA obscures the substance of its regulation by avoiding use of the word "operating" in defining the creditor's permitted conduct after foreclosure,³⁶⁰ the regulation has the unmistakable effect of expanding the secured creditor exemption so that it eliminates both current owner and operator liability.³⁶¹ Thus, for creditors operating facilities following foreclosure, the only limitation on their exemption from CERCLA liability is that they refrain from acting as generators or transporters of hazardous substances.³⁶²

The EPA does not provide any clear explanation of its expansive application of the secured creditor exemption to creditors holding title pursuant to a foreclosure. This construction is inconsistent both with the exemption's language and intent³⁶³ and with the case law developed thus far. This expansion is also inconsistent with the EPA's own definition of the exemption's scope prior to the creditor's foreclosure. During that period, the EPA states that a creditor is liable for response costs only if it acts as an operator.³⁶⁴ The EPA does not explain why Congress would have intended that the exemption would have a different meaning in the pre- and post-foreclosure contexts.³⁶⁵

359. 56 Fed. Reg. at 28,809. The lender may rely on the exemption only if it continues to act only to protect its security interest. *See supra* notes 327-34 and accompanying text for the EPA's definition of this requirement for the exemption.

360. To avoid stating that the creditor may "operate" the facility after foreclosure, the EPA transforms the intransitive verb "function" into a transitive verb and provides that the creditor may "function" the facility after foreclosure. *See id.*

361. This result is effected by the language of the regulation which provides that following foreclosure the creditor may "function[] the enterprise [i.e., the facility] . . . without incurring liability under CERCLA section 107(a)(1)." *Id.*

362. *See id.* at 28,806 (stating in the preamble that "although a security holder may be exempt from liability as an owner or operator of a facility under section 107(a)(1) or section 107(a)(2) [during the post-foreclosure period], liability may still attach under section 107(a)(3) [generator liability] or section 107(a)(4) [transporter liability]."

363. *See supra* notes 88-106 and accompanying text.

364. *See supra* text accompanying notes 350-58.

365. In the preamble, the EPA indicates that one circumstance exists in which a lender that has foreclosed on a loan may be liable for its operation of the facility acquired. Liability may result when the lender acts in a way that augments, rather than minimizes, the risk posed by the hazardous substances at the site. *See* 56 Fed. Reg. at 28,805. Discussing foreclosure and liquidation, the EPA states that "steps taken to prevent or minimize the risk of a release or threat of release of hazardous substances are not considered

In sum, the EPA's regulation defining the scope of the secured creditor exemption is likely to lead both litigants and courts to focus again on the wrong questions and to arrive at the wrong conclusions about whether lenders holding indicia of ownership are liable as owners for CERCLA cleanups.

IV. CONCLUSION

This article has identified the important policies underlying CERCLA and the comprehensive liability scheme adopted by Congress. In construing direct liability under CERCLA, neither the case law nor the EPA regulations have been sufficiently attentive to these purposes or to the usefulness of referring to these policies to resolve difficult questions of liability. A review of the cases defining the scope of CERCLA liability shows that courts, as well as litigants, are not focusing on the proper factors in litigating questions of liability. With respect to parent corporation liability in particular, greater focus on the actual conduct of parent corporations would allow courts to avoid the difficult question of whether CERCLA has modified the standard for piercing the corporate veil.

Because the burden of CERCLA liability on potentially responsible parties can be substantial, courts have a responsibility to impose liability in a manner consistent with the statutory liability scheme. This article identifies areas of concern which warrant a more careful integration of the Act's central purposes into judicial application of the liability scheme and suggests how courts might conform more closely to the scheme Congress established.

evidence of management participation." *Id.* (footnote omitted). "Precisely because a security holder in charge of a facility may need to take affirmative action with respect to the hazardous substances that are known to be present, such mitigative actions are not considered to be evidence of participation in management." *Id.*

The EPA offers only a terse explanation of this position, which it recognizes as establishing a standard of reasonable care for lenders operating facilities following foreclosure. The EPA asserts that "mitigative or preventative measures that are environmentally responsible are considered to be actions that preserve and protect the value of the facility and, hence, protect the security interest. Accordingly, such actions are not considered evidence of participation in management." *Id.* This explanation is not convincing for a number of reasons. First, participating in the management of a facility and protecting a security interest are not mutually exclusive. More importantly, however, CERCLA was intended to impose a new standard of strict liability for activities related to the disposal of hazardous wastes. *See supra* notes 39-52 and accompanying text. The EPA's explanation fails to state clearly why a different liability standard should be applied only in the situation where secured creditors have foreclosed and obtained title to facilities.