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Issue Ripe for Supreme Court Review: Whether Congress Intended to Alter the Common Law Principles of Corporate Limited Liability When Enacting CERCLA,

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An Issue Ripe For Supreme Court Review: Whether Congress Intended to Alter the Common Law Principles of Corporate Limited Liability When Enacting CERCLA

by Constance S. Chandler and Rebecca J. Grosser

I. INTRODUCTION

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[1] CERCLA was intended to address the inadequacies of prior environmental legislation.[2] Congress' fundamental purposes in enacting CERCLA were: "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."[3] The statute aims to achieve prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the pollution.[4]

The concept of limited liability was established to insulate corporate owners from the risks associated with owning a business, thereby, allowing commerce and free enterprise to flourish.[5] Unless otherwise provided for in the state constitution, a statute or the corporate charter, "stockholders are not personally liable for wrongful corporate conduct unless they participate therein" either actively or passively.[6] Corporate directors and officers also receive similar protection.[7] Likewise, a parent corporation is typically regarded as an entity distinct from its subsidiaries. A parent is protected from the liabilities of its subsidiary by the corporate veil unless circumstances require that the veil be pierced and that the corporate form be disregarded. Parent liability generally occurs only when a parent actively controls or dominates the subsidiary.[8]

When considering the liability of parent corporations for the environmental torts of their subsidiaries, the issue is often whether the applicable standard of liability derives from direct application of the statutory definitions of CERCLA or from common law principles of corporate law.[9] Under the direct liability theory, the parent is directly liable under CERCLA provided that it exercised sufficient control over the subsidiary to classify itself as an "operator." Under the indirect liability theory, a court can only hold a parent corporation liable when the facts support a piercing of the corporate veil.[10]

Currently, a conflict exists between federal appellate courts as to which standard of liability is applicable. For example, in *United States v. Cordova Chemical Company of Michigan*,[11] the United States Court of Appeals for the Sixth Circuit determined that a parent corporation is liable for the environmental contamination of a site owned by its subsidiary only if facts exist which allow the corporate veil to be pierced. With this opinion, the Sixth Circuit adopted the narrow view of liability for parent corporations expressed by the Fifth Circuit, but it disagreed with the First, Second, Third, Fourth, Seventh, Eighth, and Eleventh Circuits. *Cordova* highlights the differing opinions on whether Congress intended to alter the common law principles of corporate limited liability when enacting CERCLA.

II. LEGAL BACKGROUND

A. Legislative History

Traditionally, corporate owners have been protected by limited liability.[12] Limited liability is considered a fundamental characteristic of the corporate form.[13] Corporate owners are typically regarded as entities distinct from the corporation itself, and are protected from its liabilities by the corporate veil unless circumstances require that the veil be pierced and that the corporate form be disregarded.

In 1980, Congress enacted CERCLA in an effort to address perceived inadequacies of earlier environmental legislation.[14] CERCLA

[1] 42 U.S.C. §§ 9601-75 (1995).

[2] U.S. v. A & F Materials Co., Inc., 578 F. Supp 1249, 1252 (S.D.Ill. 1984), *discussing the Resource Conservation & Recovery Act (RCRA).*

[3] H.R. Rep. No. 253 (III), 99th Cong., 1st Sess. 15, *reprinted in* 1986 U.S. Code Cong. & Admin. News 3038.

[4] J.V. Peters & Co. v. Administrator, 767 F.2d 263, 264 (6th Cir. 1985).

[5] Lynda J. Oswald and Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 262 (1992).

[6] 18 C.J.S. *Corporations* § 427 (1990).

[7] 19 C.J.S. *Corporations* § 544 (1990).

[8] Oswald and Schipani, *supra* note 5, at 302.

[9] *Id.* at 301.

[10] Brown, *infra* note 187, at 821.

[11] 59 F.3d 584 (6th Cir. 1995), *vacated reh'g, en banc, granted*, 67 F.3d 586, (6th Cir. 1995).

[12] *See, infra* note 172.

[13] Oswald and Schipani, *supra* note 5, at 262.

[14] *Id.*

contains three mechanisms designed to rectify the regulatory weaknesses of earlier legislation.[15] First, the Environmental Protection Agency (EPA) has the power to react to hazardous substances that pose an "imminent and substantial danger" to the public by seeking an injunction or by implementing a cleanup program.[16] Second, CERCLA provides for strict, joint and several liability directing that those responsible for environmental contamination be held financially accountable for cleanup costs.[17] Finally, Congress created the "Superfund," which is a trust fund used by the EPA to cover the expenses associated with the immediate cleanup of hazardous substances prior to contribution by the responsible parties who are unable to pay the costs of cleanup or cannot be found.[18]

Congress enacted CERCLA to promote the cleanup of hazardous and potentially hazardous waste sites.[19] CERCLA is enforced by requiring polluters to pay for expenses associated with cleanup of the pollution.[20] CERCLA liability attaches if: (1) a release has occurred, (2) at a facility, (3) causing a plaintiff to incur response costs, and (4) the defendant is a responsible party as defined under section 107(a).[21] There are four bases for imposing liability: present ownership or operation of a hazardous waste disposal site,[22] past ownership or operation when the hazardous substance was disposed,[23] the generation of hazardous waste,[24] or the transportation of such waste.[25] "Owner or operator means...any person owning or operating such facility...,"[26] and "person" is defined broadly to include a firm, corporation, or commercial entity, among other things.[27]

Section 107(a) may attach to a corporate owner in two ways. The first basis for liability of a corporate owner is direct liability under the "operator" language of CERCLA's section 107(a).[28] The second basis for liability is through common law veil-piercing.[29]

Veil-piercing may occur when a corporate owner is found to have formed a corporation to perpetrate a fraud or when an owner is found to have dominated the corporation.[30] For example, the courts will disregard the corporate form when it is found that a subsidiary was formed for an illegal, fraudulent, or unjust purpose.[31] In addition, the courts may pierce the corporate veil under the "alter ego" theory.[32] A two-pronged test is applied to determine whether peircing is appropriate under this theory.[33] The test requires: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow."[34] The first prong may be satisfied by a showing of domination and control of the corporation by the corporate owner.[35] Factors used to determine domination include stock ownership, identity of officers and directors, financing of the corporation,

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Tippins v. USX Corp.*, 37 F.3d 87, 92 (3rd Cir. 1994).

[20] U.S. v. Alcan Aluminum Corp., 964 F.2d 252, 259 (3d Cir. 1992).

[21] 42 U.S.C. § 9607(a).

[22] CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) imposes liability upon the owner and operator of a vessel or facility

[23] CERCLA § 107(a)(2), § 9607(a)(2) applies to any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed.

[24] CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) defines a generator as "any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances[.]"

[25] A transporter is "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person[.]" CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4).

[26] 42 U.S.C. § 9601(20)(A)(ii).

[27] 42 U.S.C. § 9601(21).

[28] *Cordova*, 59 F.3d at 589.

[29] *Id.*

[30] Oswald and Schipani, *supra* note 5, at 302.

[31] *Id.* at 295-296.

[32] *Id.* at 296.

[33] *Id.*

[34] Autonotriz del Golfode California v. Resnick, 306 P.2d 1, at 3 (1957).

[35] Oswald and Schipani, *supra* note 5, at 296.

responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and the origin of the corporation's business assets.[36]

Corporate officers and directors are personally liable for torts committed by them, whether or not the tortious act was performed in an official capacity.[37] In addition, under the doctrine of respondeat superior, if an officer is acting on behalf of the corporation in the commission of the tort, both the corporation and the individual may be held liable.[38] Supposing the officer or director is also a shareholder of the corporation, the individual liability imposed is not based on the liability derived from a piercing of the corporate veil.[39] Rather, the liability is based upon the officer's participation, direction, knowledge or acquiescence in the tort[40] and is imposed on the individual's status not as an owner of the corporation, but as an employee.[41]

B. Judicial Background

1. Officer and Director Liability

Courts have developed three tests for determining if personal liability of a director or officer is justified: authority to control, personal participation, and prevention.[42] The authority to control test adopted by the Second and Ninth Circuits[43] relies on whether or not the officer had the authority or the ability to direct the corporation's actions with regard to the CERCLA violation rather than active involvement in the breach.[44] The personal participation (or actual control) test requires that the officer or director have personally participated in the CERCLA violation.[45] This theory has been adopted by the Fourth, Fifth, Seventh, Eighth and Eleventh Circuit Courts of Appeals.[46] The final test creates an incentive for corporate officers to involve themselves in environmental decision-making because the test weighs any efforts taken by individuals to avoid or alleviate the harm, whether or not successful, before assessing liabilty.[47] Liability will be imposed if an "individual in a close corporation could have prevented or significantly abated the release of hazardous substances."[48] The Twelfth and Thirteenth Circuits have not adopted the authority to control, personal participation, or prevention test for officer liability.

a. Authority to Control

First, some courts have developed and imposed an authority to control standard of liability.[49] This standard was adopted by the court in *Nurad, Inc. v. William E. Hooper & Sons Co.*[50] In this case, plaintiff Nurad sought to impose §107(a)(2) liability upon previous tenants of a waste disposal site.[51] The lease agreements did not authorize the tenants to use the portions of the site that the court found to be the contaminated areas.[52] The Court of Appeals for the Fourth Circuit refused to impose operator liability upon these tenants because they had no authority to exercise control over the contaminated area.[53] Specifically, the court upheld the district court's proposition that although one need not exercise actual control to invoke operator liability, it is necessary that the authority to control is present.[54]

The authority to control standard was also the basis of

[36]*Id.* at 302-304. In Missouri, to peirce the corporate veil, the corporation must be controlled and influenced by perosns or another corporation, evidence must establish that the corporate identity was used to defeat a public convenience, to justify a wrong, or to perpetrate a fraud, and th ewrong must be proximate cause fo injury to third persons who dealt with the corporation. Edward D. Gevers Heating & Air Conditioning Co. v. R. Webbe Corp., 885 S.W. 2d 771 (Mo. Ct. App. 1994).

[37]3A W. Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATION § 1135 (rev. ed. 1986).

[38]Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3rd Cir. 1978).

[39]Oswald and Schipani, *supra* note 5, at 274.[40]*Id.*

[41]*Id.*

[42]*Id.* at 275, 282, and 291.

[43]*See e.g.* State of New York v. Shore Realty Corp., 759 F.2d 1032, (2d Cir. 1985) and Kaiser Aluminum & Chem. Corporation v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992), *both imposing operator liability.*

[44]Oswald and Schipani, *supra* note 5, at 282.

[45]*Id.* at 275.

[46]*See e.g.* U.S. v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992), Riverside Mkt. Dev. Corp. v. Int'l Bldg. Products, Inc., 931 F.2d 327 (5th Cir. 1991), Sidney S. Arst Co. v. Piperfitters Welfare Educ. Fund, 25 F.3d 417, 422 (7th Cir. 1994) *imposing operator liability;* U.S. v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726 (8th Cir. 1987), Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993), *imposing generator liability.*

[47]*Id.* at 291.

[48]Kelley v. ARCO Indus. Corp., 723 F. Supp 1214, 1220 (W.D. Mich. 1989).

[49]Lansford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209, 1220-21 (3rd Cir. 1993).

[50]Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992).

[51]*Id.* at 841.

[52]*Id.* at 843.

[53]*Id.*

[54]*Id.* at 842.

imposing liability upon a stockholder and officer in *State of New York v. Shore Realty Corp.*[55] In *Shore Realty*, the Second Circuit relied on §9601(20)(A)[56] to imply that a managing and owning stockholder is liable as an owner or operator under CERCLA.[57] Defendant LeoGrande was the officer and stockholder of Shore Realty Corporation, the corporate owner of the hazardous waste storage site.[58] Although LeoGrande did not personally own the hazardous disposal site and the disposal had occurred prior to Shore Realty ownership, he was found personally liable because his position placed him in control of the facility operation when the hazardous substance was released into the environment.[59]

b. Personal Participation

The second test developed by courts for determining if personal liablity of a director or officer is justified is the personal participation standard. In *United States v. Ward*,[60] the court imposed liability upon the corporate officers who participated in arranging for the hazardous waste disposal.[61] However, the court did not impose liability upon officers who had personally arranged for disposal but did not know the exact location of disposal.[62] Allowing corporate officers who have authorized and participated in the generation of hazardous substances, but do not know the location of the site to escape liability is contrary to the purposes of CERCLA.[63] This exception would allow an otherwise responsible generator to walk away from its destruction by "closing their eyes to the method in which their hazardous wastes are disposed."[64] The Eighth Circuit subscribed to this same test in *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.* (NEPACCO II).[65] In NEPACCO I,[66] the court found Lee a shareholder and officer liable under §107(a)(3) as a generator because he "had the responsibility to and did arrange for the disposal of hazardous waste."[67] Lee's role in the disposal of the hazardous waste was to prescribe the desired characteristics of a disposal site to Ray, the plant manager.[68] Ray visited the site and reported his findings to Lee.[69] This particular site was the site involved in the case.[70] On appeal, the Eighth Circuit noted the strict liability imposed on generators under CERCLA[71] and upheld Lee's liability for his role in arranging for the disposal of the hazardous waste.[72] The Court emphasized that Lee was liable not as a shareholder, but due to his actual, personal participation in the disposal of hazardous substances.[73]

In addition to creating generator liability, the personal participation test has also been used as a standard for imposing transporter liability.[74] In *U.S. v. USX*, suit was brought against USX Corporation, the principal shareholders and directors, White and Carite, and three other affiliated companies.[75] One of the White-Carite companies acknowledged the dispatch of trucks containing 55-gallon drums of hazardous waste to a site now contaminated with the same substance contained within the drums.[76] The Third Circuit held that the district court's use of "an authority to control" standard for the

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[55]Shore Realty Corp., 759 F.2d at 1052.

[56]42 U.S.C. § 9601(20)(A) (1995) excludes from the definition of owner or operator, a stockholder who does not manage the corporation.

[57]*Shore Realty*, 759 F.2d at 1052.

[58]*Id.* at 1037.

[59]*Id.* at 1037-39. *See also* United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992) and Bowen Eng'g v. Estate of Reeve, 799 F.Supp. 467, 473-74 (D.N.J. 1992).

[60]*United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985), *cert. denied*, 459 U.S. 835 (1982).

[61]*Ward*, 618 F. Supp at 894. *See also* U.S. v. Northernaire Plating Co., 670 F. Supp. 742 (W.D.Mich. 1987).

[62]*Id.* at 895.

[63]*Id.*

[64]*Id.*

[65] United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 743 (8th Cir. 1986) (NEPACCO II), cert. denied, 459 U.S. 848 (1987).

[66] United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 848 (W.D.Mo. 1984) (NEPACCO I).

[67]*Id.*

[68]*Id.* at 830.

[69]*Id.*

[70]*Id.*

[71]*NEPACCO II*, 810 F.2d at 743.

[72]*Id.*

[73]*Id.* at 744.

[74]United States v. USX, 68 F.3d 811 (3d Cir. 1995).

[75]*Id.* at 815. In addition, suit was filed against three other companies in which White and Carite were the sole shareholders or were wholly owned affiliates of White-Carite owned companies companies. *Id.* at 816.

[76]*Id.* The hazardous substance leaked from the drums, causing soil and groundwater contamination. *Id.*

imposition of transporter liability upon White and Carite was in error, and remanded the case for further determination using an actual participation test.[77]

In reaching its holding, the court echoed the established principle of limited liability for corporate officers who do not participate in the liability-creating conduct.[78] The court felt that this principle is inherent in CERCLA, thus Congress must have intended to limit liability to those who control the day-to-day operations of the corporation.[79] The *USX* Court rejected the proposition that the same standard of liability should apply to generators, operators, and transporters as corporate officers under §107(a) because CERCLA's language does not permit traditional concepts of limited liability to be ignored.[80] The concept of limited corporate liability was judicially established at the time CERCLA was enacted, and actual participation in the wrongful conduct was required.[81] Normal rules of statutory construction dictate that Congress must specifically state an intent to change a judicial rule.[82] Congress did not specify that shareholders are to be personally liable for releases of hazardous substances from disposal sites selected by their companies.[83] Congress also failed to word §107(a)(4) to impose liability upon "owners or operators of a transporter."[84]

With this standard, the *USX* Court asserted to enforce §107(a)(4) consistent with traditional concepts of limited shareholder liability. However, the holding was not limited to those transporters who personally participated in the transportation of hazardous substances.[85] Rather, if the officer is aware of the acceptance of materials for transport and of the company's substantial participation in the selection of the disposal site, he or she would be liable under §107(a)(4).[86] Furthermore, if the officer who had the authority to make the disposal decision, had actual knowledge that another had made the disposal selection, and acquiesced in the decision, he or she would be individually liable.[87]

c. Prevention

The third test for the imposition of liability upon corporate officers is prevention. Under this standard, liability will be imposed if an "individual in a close corporation could have prevented or significantly abated the release of hazardous substances."[88] In *Kelley v. ARCO Industries*, the court rejected the strict liability imposed by CERCLA, stating it was too harsh to impose across the board.[89] The *ARCO* court instead lists the following factors for consideration: authority to control waste handling practices, responsibility undertaken for waste disposal practices, responsibility neglected and affirmative attempts to prevent unlawful hazardous waste disposal.[90] Once the court determines that the individual was in a position to prevent the environmental harm, the court weighs any efforts taken to avoid or alleviate the harm, whether or not successful, in assessing the officer's liability.[91]

d. Summary

In summary, the goal of the prevention test is to persuade corporate officers to become involved with hazardous waste disposal decisions.[92] The *ARCO* court stated that the prevention test furthers CERCLA's purposes by encouraging officers to become increasingly responsible as their corporate responsibilities increase,[93] rather than closing their eyes to potential violations.[94]

The personal participation test is consistent with traditional corporate law doctrines.[95] Traditionally, for an officer to be liable for tortious acts, he or she must be personally involved.[96] The actual control test implemented by the courts for CERCLA liability is analogous to the traditional test for tort liability.[97]

[77] *Id.* at 814, 825.
[78] *Id.* at 822.
[79] *Id.*
[80] *Id.* at 824.
[81] *Id.*
[82] *Id.* (quoting Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986)).
[83] *Id.*
[84] *Id.*
[85] *Id.* at 825.
[86] *Id.*
[87] *Id.*
[88] *ARCO*, 723 F. Supp. at 1220.
[89] *Id.* at 1219.
[90] *Id.*
[91] *Id.* at 1220.
[92] Oswald and Schipani, *supra* note 5, at 292.
[93] *ARCO*, 723 F.Supp. at 1220.
[94] *Id.* The court argues that this is the result obtained under the actual control test.
[95] Oswald and Schipani, *supra* note 5, at 282.
[96] *Supra* note 7.
[97] Oswald and Schipani, *supra* note 5, at 282.

On the surface, it seems as if the authority to control test relaxes traditional liability by requiring less than personal participation in the CERCLA violation to impose personal liability.[98] Upon further examination, it would be discovered that courts have not applied the test in such a manner.[99] The courts have required more than general managerial control of the corporation, looking for control of the hazardous waste disposal decisions.[100] Also, the imposition of liability upon an officer who has the authority to control, but fails to do so is consistent with traditional corporate law doctrines.[101]

2. Parent Corporation Liability

Courts have found parent corporations liable for the environmental torts of its subsidiaries based on one of two theories. The first basis for liability is through common law veil-piercing. The second basis for liability of a parent corporation is direct liability under the "operator" language of CERCLA's §107(a). Courts imposing this theory are in conflict about the level of involvement the parent corporation must exercise over the subsidiary. Some courts hold that a parent's capacity to control the subsidiary's activities is enough, while others hold that the parent must exercise actual control over the subsidiary.[102]

a. Indirect Liability

In *Joslyn Manufacturing Co. v. T.L. James & Co.*, the Fifth Circuit became the first federal appellate court to address the liability of parent corporations for the environmental torts of its subsidiaries.[103] There, the current owner filed action to hold a parent corporation liable under CERCLA for actions of its subsidiary, a former owner of the site.[104] The *Joslyn* court held that CERCLA did not impose direct liability on parent corporations for violation of their wholly owned subsidiaries.[105] Thus, the Fifth Circuit adopted a narrow view of liability for parent corporations.

In the *Joslyn* decision, the court held that CERCLA does not define "owners" or "operators" as including the parent company of offending wholly-owned subsidiaries.[106] Also, the court concluded that the legislative history did not indicate that Congress intended to alter corporation law.[107] The court relied primarily on the fact that the parent corporation could not automatically be deemed an "owner" of an offending facility of its subsidiary.[108] The *Joslyn* court observed that the "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[109] The court found nothing in the language of CERCLA nor the legislative history revealing a Congressional intent to alter common law principles of corporate liability.[110] The court decided that without an expressed Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern its analysis.[111] The court noted "if Congress wanted to extend liability to parent corporation it could have done so, and it remains free to do so."[112] Thus, the *Joslyn* court held that a parent corporation is subject to liability only if the facts justify piercing the corporate veil, such that the subsidiary is the mere alter ego of the parent corporation.[113]

In its recent decision, *United States v. Cordova Chemical Company of Michigan*, the United States Court of Appeals for the Sixth Circuit agreed with the *Joslyn* court.[114] In *Cordova*, the Sixth Circuit determined that a parent corporation is liable for the environmental contamination of a site owned by its subsidiary only if facts exist which allow the corporate veil to be pierced. The court reversed the district court's holding that a parent corporation is directly liable as an "operator" under CERCLA §107(a). Thus, the court adopted the narrow view of operator liability for parent corporations expressed by the Fifth

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[98] *Id.*, at 290.
[99] *Id.*
[100] *Id.* at 291.
[101] *Id. See also supra* note 6.
[102] *Compare* Idaho v. Bunker Hill Company, 635 F. Supp. 66795 (D. Idaho 1986) with United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).
[103] Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).
[104] *Id.*
[105] *Id.* at 80.
[106] *Id.* at 81.
[107] *Id.* at 82-83.
[108] *Id.*
[109] *Id.* (citing Midlantic Nat'l Bank v. New Jersey Dept. Of Environmental Protection, 474 U.S. 494 (1986)).
[110] *Id.* at 82.
[111] *Id.* at 83.
[112] *Id.*
[113] *Id.* at 82-83.
[114] *Cordova*, 59 F. 3d at 584.

Circuit.

In *Cordova*, brought pursuant to CERCLA, the environmental damage occurred over a period of decades and over several ownership changes.[115] In May and June 1991, the district court conducted a fifteen-day bench trial to determine which parties were responsible for the clean-up costs related to pollution at the site.[116] The district court found both CPC and Aerojet liable as operators for the disposal of hazardous substances that occurred while their subsidiaries operated the site.[117] The district court concluded that a parent corporation is directly liable under §107(a)(2) as an operator when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste.[118]

The central concern on appeal was the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred during the ownership of a subsidiary.[119] The Sixth Circuit Court of Appeals adopted a stricter standard than did the district court for imposition of such liability. The Sixth Circuit concluded that a parent corporation incurs operator liability pursuant to §107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met.[120] Therefore, the court reversed and remanded the decision for further proceedings.[121]

In reaching that decision, the Sixth Circuit first reviewed the remedial purpose of CERCLA.[122] The court observed that Congress enacted CERCLA as a "remedial statute designed to protect and preserve public health and the environment."[123] It noted that generally courts will not interpret a remedial statute in a manner that would frustrate the statute's goals in the absence of specific congressional intent to the contrary.[124] The court expressed that the goals of Congress with respect to CERCLA liability are difficult to discern, and commented that even the district court recognized, "some of CERCLA's provisions are vague and its legislative history sparse."[125] Thus, the *Cordova* court reasoned that the liability provision concerning operators should be construed so that financial responsibility for clean-up operations falls upon those entities who created the environmental problem.[126] In other words, the court concluded that "the widest net possible ought not be cast in order to snare those who are either innocently

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[115]*Id.* Beginning in 1957, chemicals were manufactured by a series of owners at a site located in Dalton Township, Michigan. The initial owner, the Ott Chemical Company ("Ott I"), controlled the site from 1957 until 1965. The Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site in 1965. In 1972, the Story Chemical Company ("Story") acquired the site from Ott II and continued to operate it until 1977, when bankruptcy ended operations. Cordova Chemical Company ("Cordova/California"), a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), purchased the site in 1977 from the Story bankruptcy trustee. Cordova Chemical Company of Michigan ("Cordova/Michigan"), a subsidiary of Cordova/California, acquired ownership of the site in 1978. Cordova/Michigan retains ownership, although manufacturing operations at the site ceased in 1986. *Id.* at 586-587.

[116]*Id.* at 586. Tests conducted in 1964 confirmed that the groundwater flowing underneath the site was contaminated. The principal cause of the contamination was the use of unlined lagoons as a means of chemical waste disposal. This practice spanned the period from 1959 until at least 1968. However, the lagoon seepage did not constitute the sole source of pollution that occurred during the ownership of Ott I and Ott II. Chemical spills from train cars, from chemical drums, and from other sources resulted in further contamination. From 1965 until 1974, purge wells were operated intermittently in an attempt to alleviate the groundwater pollution problem. During the period that the Cordova companies owned and operated the site, waste was neither buried nor dumped into the ground. Also, the unlined lagoons were no longer used as a means of chemical waste disposal. Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility. *Id.* at 587.

[117]*Id.* at 589. The district court rejected the contention that MDNR incurred liability as either an operator or as an arranger. *Id.* at 591. Both Aerojet and Cordova/California were held liable as present owners of the site under §107(a)(1); Cordova/California was held liable as a former owner pursuant to §107(a)(2). *Id.* at 592.

[118]CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 573 (W.D. Mich. 1991).

[119]*Cordova*, 59 F.3d at 586.

[120]*Id.* at 590.

[121]*Id.* The appellate court did affirm the trial court's holding that MDNR was not liable as either an operator nor an arranger. *Id.* at 591. One judge of the *Cordova* court dissented. The dissenting judge concluded that a parent corporation may face potential liability as an operator of a contaminating facility because the plain language of §107(a)(2) indicates that Congress intended to impose liability on any entity actually operating a facility. *Id.* at 593-594.

[122]*Id.* at 588.

[123]*Id.* (citing *Kayser-Roth*, 910 F.2d at 26.)

[124]*Id.*

[125]*Id.* (citing *CPC Int'l*, 777 F.Supp. at 571).

[126]*Id.*

[127]*Id.* at 589.

or tangentially tied to the facility at issue."[127]

Next, the *Cordova* court stated that it was not persuaded that Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form when enacting CERCLA.[128] It reached this decision by reviewing two provisions of CERCLA. First, the "owner or operator" of an onshore facility is defined as "any person owning or operating such a facility.[129] Second, the court noted that when the facility has been conveyed to the government, the definition differs.[130] The definition then includes "any person who owned, operated or otherwise controlled activities at such facility."[131] The *Cordova* court determined that the drafters of the statute distinguished an operator from a person who "otherwise controlled" a facility.[132] Therefore, the court concluded that when a parent corporation actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporate law, nothing in CERCLA indicates that the parent has assumed the role of operator.[133]

In addition, the *Cordova* court noted that the district court's approach presented a number of problems. First, it replaced the relatively bright line provided by the doctrine of piercing the corporate veil, which typically requires a fraudulent purpose, with a nebulous "control" test.[134] The court was concerned with when, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to in a manner that triggers operator liability.[135] The appellate court concluded that the factors enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offered little guidance.[136] The court noted that those activities were not grounds traditionally relied upon to pierce the corporate veil.[137]

The second problem the court stated was that the threat of unlimited liability would likely deter private sector participation in the cleanup of existing sites.[138] In the *Cordova* case, the Michigan Department of Natural Resources ("MDNR") actively sought a private sector partner to take over and assist in the remediation of the site.[139] Aerojet indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of the agreement with the MDNR and the use of subsidiaries.[140] The court concluded that to restrain such sensible and legitimate precautions in favor of an unpredictable "control" test would actually contravene the public interest by discouraging businesses from becoming involved in such projects.[141]

b. Direct Liability

In the same year as the Fifth Circuit decided *Joslyn*, the First Circuit decided *United States v. Kayser-Roth Corp.*[142] However, despite the Fifth Circuit's decision protecting limited liability, the First Circuit asserted that a parent corporation could be liable under CERCLA for the acts of its subsidiary as an "operator" of an offending facility. In *Kayser-Roth*, the government was seeking cleanup costs from Kayser-Roth Corporation, the parent company of Stamina Mills Inc.[143] There, the court held that a parent corporation could be held liable as an operator of a subsidiary because CERCLA was a remedial statute designed to protect and preserve the public health and the environment.[144] The court determined that CERCLA must be construed liberally to avoid frustration of its beneficial legislative purpose.[145]

In its opinion, the court resolved that Congress, by including a category in addition to owners, implied that a person who is an

[128] *Id.*
[129] 42 U.S.C. § 9601(20)(A)(ii).
[130] *Cordova*, 59 F. 3d at 589.
[131] 42 U.S.C. § 9601(20)(A)(iii).
[132] *Cordova*, 59 F. 3d at 589.
[133] *Id.*
[134] *Id.* at 590.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] 910 F.2d 24, at 25 (1st Cir. 1990).
[143] *Id.* A spill of trichloroethylene occurred at the Stamina Mills textile plant. *Id.*
[144] *Id.* at 26
[145] *Id.*
[146] *Id.*
[147] *Id*

operator of a facility is not protected from liability by the legal structure of ownership.[146] In addition, the legislative history provided no indication that Congress intended "all persons" who are "operators" to exclude parent corporations.[147] Thus, the court determined that the statute when viewed in accordance with its legislative purpose and history revealed no reason why a parent corporation could not be held liable as an operator under CERCLA.[148] The district court noted that for a company to be an "operator" within the statutory meaning it must have "active involvement in the activities of the subsidiary."[149] Several factors were relied upon in determining that the parent exercised pervasive control over the subsidiary: (1) monetary control over accounts; (2) restriction of subsidiary's financial budget; (3) mandate that it conduct governmental contact for the subsidiary; (4) approval of the subsidiary's lease arrangements; (5) approval of capital transfers, and (6) placement of parent personnel in many subsidiary director and officer positions.[150]

The First Circuit was not persuaded by *Joslyn*.[151] The court determined that the *Joslyn* opinion was concerned primarily with owner rather than operator liability.[152] Also, the court observed that the *Joslyn* court framed its issue as whether to "impose direct liability on parent corporations for the violations of their wholly owned subsidiaries."[153] The court observed that Kayser is liable for its activities as an operator not for the activities of its subsidiary.[154]

Recently, the U.S. Court of Appeals for the Second Circuit, in *Schiavone v. Pearce*,[155] adopted the *Kayser-Roth* theory. There, the court decided that a parent corporation may be liable under CERCLA for environmental contamination caused by a subsidiary if the parent exercised sufficient control over the subsidiary.[156] The court recognized that holding a parent independently liable for the activities of a subsidiary may not be consistent with traditional rules of corporate liability, but observed that such direct liablity is nonetheless compatible with CERCLA's goals. The court noted that Congress enacted CERCLA with the purpose of ensuring "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions."[157] In addition, the court stated that one of CERCLA's primary goals is to extend liability to all those involved in creating harmful environmental conditions.[158]

The Second Circuit found support for imposing operator liability directly on a parent corporation not only from legislative intent, but also from statutory language.[159] The court found the most compelling argument to be Congress' inclusion of both terms, "owner" and "operator."[160] The court determined that owner liability is distinct from parent operator liability.[161] The court stated, "A finding of owner liability invokes the parent-subsidiary relationship and can be made only in circumstances that permit corporate veil piercing."[162] However, the court concluded that proof of operator liability looks to the independent actions of the parent corporation, evidenced through its control over the polluting site.[163] An additional justification raised by the court was CERCLA's definition of "person."[164] The court stated that Congress, by defining "person" broadly, indicated an intent to hold a corporation liable for the environmental violations of its subsidiaries, if it is otherwise determined to have operated the

[148] *Id.*

[149] *Id.* at 27.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* (citing *Joslyn*, 893 F.2d at 81).

[154] *Id.*

[155] Schiavone v. Pearce, 79 F.3d 248 (2nd Cir. 1996).

[156] *Id.* The question of what control must be exercised by the parent corporation has received differing judicial responses. Some courts require actual control to sustain a finding of operator liability. Lansford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209, 1220 (3rd Cir. 1993); *Kayser-Roth*, 910 F.2d at 27. Other courts deem merely the authority to control sufficient. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 836-37 (4th Cir. 1992).

[157] *Schiavone*, 79 F.3d at 253. (quoting S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980), *reprinted in* 1980 U.S.C.A.A.N. 6119 and in 1 CERCLA, Legislative History, at 320 (1980)).

[158] *Id.*

[159] *Id.* at 254.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 255.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Cordova*, 59 F.3d at 595.

facility.[165]

c. Summary

All the circuits, except two, that have addressed this issue have found that a parent corporation is directly liable under §107(a)(2) without regard to common law veil piercing.[166] At least three circuits have held that a parent corporation may be held directly liable as an operator under §107(a)(2) without any consideration of veil-piercing.[167] Two other circuits held a parent corporation directly liable as an operator not because the parent corporation actually controlled the subsidiary, but rather because it had the authority to do so.[168] In addition, the Tenth Circuit applied the *Kayser-Roth* standard to impose operator liability on a company director directly, and not under state corporation law veil piercing standards.[169] It is only the Fifth Circuit and the Sixth Circuit that adopted a narrower view of operator liability for parent corporations.[170]

III. COMMENT

Cordova highlights the ultimate issue which is whether Congress intended to excuse a corporate owner, officer, or director who is in fact operating a contaminating facility from direct liability, if it is doing so in the name of a corporation.[171] The majority of federal circuit courts have ruled that if the corporate owner exercises sufficient control over the corporation it may be liable under CERCLA for environmental contamination caused by the corporation.[172] The Fifth and Sixth Circuits adhere to the narrower veil-piercing rule that a corporate owner is only liable if standards for piercing the corporate veil are met.[173] The Ninth and Tenth Circuits have not ruled on specific issue of corporate owner liability. This conflict reflects the differing opinions on whether Congress intended to alter the common law principles of limited liability when enacting CERCLA. One of the basic tenets of corporate law is limited liability. The law regards the corporate owner as a legal entity "separate and apart" from the corporation.

The proposition that direct liability for a corporation owner under CERCLA §107(a) violates traditional notions of limited liability is correct. However, the enactment of CERCLA was a reaction to an emergency situation, which did not exist at the time traditional notions of corporate law were developed. CERCLA was enacted to remediate the existence of extensive environmental contamination; and to protect and preserve the public health and the environment.

Limited liability fails to achieve CERCLA's purposes. Veil-piercing looks to factors such as fraud and insufficient capitalization that do not necessarily advance environmental goals. It encourages corporate owners to focus on insulating themselves from the corporation's actions rather than taking steps to avoid polluting the environment. Furthermore, since corporation law varies from state to state, observing the formalities each state requires consumes valuable resources.

Moreover, nothing in CERCLA's language suggests that Congress intended to exclude corporate owners from operator liability. "Person" is defined broadly as a firm, a corporation, and a commercial entity, among other things.[174] Furthermore, CERCLA is a remedial statute and should be construed broadly to include all culpable parties. Thus, if a corporate owner is found to be an operator-in-fact, then CERLCA was meant to provide direct liability upon that individual.

Consequently, Congress must have intended to alter the common law principles of limited liability when enacting CERCLA. Otherwise, the purposes of the statute to preserve and protect the public interest and environment would not be accomplished.

However, the conflict does not end with whether to impose direct or indirect liability. Courts imposing the direct liability theory are in conflict about the level of involvement the corporate owner must exercise. Operator, generator and transporter direct liability under CERCLA have been imposed by courts using three different standards: authority to control, personal participation ("actual control"), and prevention.

In developing and

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[167] *Id.* at 594-595. (*see, Kayser-Roth*, 910 F.2d at 24; Lansford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209 (3rd Cir.1993); and Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993)).

[168] *Id.* at 595. (*see* Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992) and *Kaiser Aluminum*, 976 F.2d 1338 (9th Cir. 1992)).

[169] *Id.* (*see* FMC Corp. v. Aero Indus., Inc., 998 F.2d 842 (10th Cir. 1993)).

[170] *Id.* (*see Joslyn*, 893 F.2d at 80 and *Cordova*, 59 F.3d at 584).

[171] *Cordova*, 59 F.3d at 594.

[172] *See Kayser-Roth*, 910 F.2d at 24; *Schiavone*, 79 F.3d at 248; *Landsford-Coaldale*, 4 F.3d at 1209; *Nurad*, 966 F.2d at 837; Sidney S. Arst Co.v. Pipefitters Welfare Educ., 25 F.3d at 417 (7th Cir. 1994); United States v. TIC Inv. Corp., 68 F.3d 1082 (8th Cir. 1995); and *Jacksonville Elec.*, 996 F.2d at 1107.

[173] *See Joslyn*, 893 F.2d at 80 and *Kayser-Roth*, 910 F.2d at 24.

[174] 42 U.S.C. § 9601(21).

implementing the "actual control" test, courts have not been consistent with the policy of CERCLA. CERCLA was enacted with a dual purpose: to promptly cleanup hazardous waste sites and to impose cleanup costs onto responsible parties.[175] The statute itself does not contain a causation standard, but instead states that the standard of liability is to be the same standard as that of the Clean Water Act.[176] Prior to the enactment of CERCLA, that standard had been construed by the courts as one of strict liability.[177]

For instance, the actual control test imposed by the Third Circuit in *U.S. v. USX* is inconsistent with the purposes of CERCLA.[178] The test promotes the imposition of liability onto some, but not others. In the context of a close corporation such as the White-Carite companies, it is unlikely that given the nature of the business they were engaged in, that White and Carite did not know the risks. For White and Carite to escape liability merely because they did not have any actual control over the hazardous waste disposal decision allows all future officers of close corporations to escape liability merely by hiring someone else to manage the corporation. Congress enacted CERCLA with the purpose of ensuring that those repsonsible for any damage, environmental harm, or injury bear the costs of their actions. One of its primary goals is to extend liability to all those involved in creating harmful environmental conditions.

But, the alternative authority to control test may reach too far across the boundaries of traditional corporate law. One commentator has explained the ease of meeting the authority to control test as:

> Every parent corporation, by virtue of the power it wields over its subsidiary, could control that subsidiary's activities, including those activities relating to its environmental matters and the operation of a facility. A literal application of the capacity to control test would thus lead to a finding of parent liability in every case involving a CERCLA violation by a subsidiary.[179]

Thus, perhaps the prevention test articulated by the *ARCO* court is an excellect compromise.[180] Under this standard, liability is imposed upon a corporate owner, officer, or director when that individual could have prevented or significantly abated the release of hazardous substances.[181] This test prompts corporate individuals to become involved with hazardous waste disposal decisions because the test weighs any efforts taken to avoid or alleviate the harm, whether or not successful, in assessing liability.[182] The prevention test furthers CERCLA's purposes by encouraging corporate individuals to become involved, rather than closing their eyes to potential violations.

In conclusion, courts should hold corporate owners, officers, and directors directly liable under CERCLA §107 because adhering to the notions of limited liability fails to achieve the purposes of CERCLA. Nothing in the language of CERCLA suggests that Congress' definitions of "operator" and "person" excluded corporate owners, officers, or directors. Furthermore, courts should apply the prevention test to determine if the individual is in fact operating, generating, or transporting. This test promotes fairness because corporate individuals are shielded from liability so long as they take steps to prevent environmental violations.[183] Also, the test promotes safety because corporate individuals will carefully monitor and improve the safety of the corporation's environmental operations.[184]

V. CONCLUSION

The Supreme Court has previously denied certiorari to consider this issue in *Joslyn*[185] and *Kayser-Roth.*[186] However, it should not be acceptable for federal courts to be operating under different interpretations of CERCLA, a federal

[175]General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415. 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

[176]42 U.S.C. § 9601(32).

[177]Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 599 (1993). In fact, a strict liability standard was deleted in the final version. *Id.* at 598, n.77.

[178]*Id.*

[179]Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order In The Chaos Of Pervasive Control*, 72 WASH. U. L. Q. 223, 260 (1994).

[180]*ARCO*, 723 F. Supp. at 1214.

[181]*Id.* at 1220.

[182]*Id.*

[183]Richard S. Farmer, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769, 801 (1994).

[184]*Id.*

[185]498 U. S. 1108 (1991).

[186]498 U. S. 1084 (1991).

statute enacted to create uniform environmental control and regulation. Courts have used three approaches to address corporate owner liability under CERCLA §107.[187] Some courts have analyzed corporate owner liability indirectly as owners.[188] Other courts have analyzed corporate owner liability directly as operators.[189] Finally, still another court has anlyzed corporate owner liability indirectly as an operator.[190] The use of three different approaches to analyze the same issue, and the resulting unsettled case law illustrates the confusion and inadequacy of the direct/indirect liability in its present state.[191]

In addition, the holding of *Cordova* highlights the inconsistency when piercing the corporate veil. The *Cordova* court applied state veil-piercing laws.[192] Some courts apply state standards for veil-piercing, while other courts apply federal standards for veil-piercing. It would be wise to eliminate this inconsistency by mandating that all courts apply direct liability under CERCLA. Then, all courts would be applying the same standard, resulting in uniformity. Also, a uniform federal standard would eliminate forum shopping by eliminating the benefit of considering each state's veil piercing standards before deciding where to file suit.[193]

The next time this issue comes before the Supreme Court, the Court should grant certiorari and assert a uniform rule of law.

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[187]John M. Brown, *Parent Corporation's Liability Under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries*, 31 TULSA L. J. 819, 837 (1996).

[188]*See Joslyn*, 837 F.2d at 80.

[189]*See Kayser-Roth*, 910 F.2d at 24.

[190]*See Cordova*, 59 F.3d at 584.

[191]Brown, *supra* note 187, at 837.

[192]*Cordova*, 59 F.3d at 591. During rehearing, the Sixth Circuit is deciding what, if any, role state corporate law should play in determining liability. 1995 DEN 237 d17.

[193]Brown, *supra* note 187, at 838.