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Nancy Kubasek
Bowling Green State University

Brent Nicholson
Bowling Green State University

POTENTIALLY RESPONSIBLE PARTIES UNDER CERCLA: SHOULD PARENT CORPORATIONS AND SUCCESSORS-IN-INTEREST BE INCLUDED?

NANCY KUBASEK* AND BRENT NICHOLSON**

I. INTRODUCTION

As of 1989, the Environmental Protection Agency (EPA) had identified over 30,000 potentially contaminated sites[1] that may require cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[2] and under the 1986 Superfund Amendments and Reauthorization Act (SARA).[3] The average cost of a cleanup is now approaching $25 million.[4]

Most of the $1.6 billion authorized by CERCLA[5] and the $8.5 billion authorized by SARA[6] were intended to come from tax revenues.[7] In accordance with a "polluter pays" philosophy, however, Congress also has authorized the EPA to impose liability on "potentially responsible parties" (PRPs).[8] Since 1980, PRPs have agreed to contribute over $642 million toward cleanups of 444 sites.[9] The EPA also has recovered over $51 million in actions against PRPs and has suits pending for another $254 million.[10]

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* Associate Professor of Legal Studies, Bowling Green State University. B.S. 1978, Bowling Green State University; J.D. 1981, University of Toledo. Professor Kubasek has authored and co-authored numerous books and articles and has given various presentations.

** Assistant Professor of Legal Studies, Bowling Green State University. B.S.B.A. 1976, Bowling Green State University; J.D. 1979, Ohio State University. Professor Nicholson has co-authored other articles in various tax journals.

1. ENVIRONMENTAL PROGRESS AND CHALLENGE: EPA UPDATE 95 (1988) [hereinafter EPA UPDATE].

2. Pub. L. No. 96-510, 94 Stat. 2767 (1980)(codified as amended at 42 U.S.C. § 9601-9657 (1988)).

3. Pub. L. No. 99-499, 100 Stat. 1613 (1986)(amending CERCLA which is codified at 42 U.S.C. § 9601-57 (1988)).

4. Freeman, *Two Recent Decisions Restrict Superfund Vicarious Liability*, NAT'L L.J., April 16, 1990, at 24, col. 1.

5. 42 U.S.C. § 9631 (1982)(repealed 1986).

6. See D. HAYESS & C. MACKERRON, SUPERFUND II: A NEW MANDATE (1987) for a discussion of the funding of SARA.

7. Under SARA, funding from taxes would include $2.75 billion from a tax on petroleum, $1.4 billion from a tax on raw chemicals, and $2.5 billion from corporate income tax. *Id.* at 2.

8. 42 U.S.C. § 9607(a) (1988).

9. EPA UPDATE, *supra* note 1, at 96.

10. *Id.*

CERCLA was a compromise statute, hastily enacted by the Ninety-Sixth Congress in December, 1980.[11] Consequently, the definition of "PRP" was not carefully drafted, leaving the interpretation of the phrase, as well as many other ambiguities, largely to the courts.[12]

Congress had the opportunity to amend the definition of PRPs in 1985 when SARA was passed. It chose not to take such action.[13] The most plausible interpretation of Congress' failure to act is that Congress approved of the judicial interpretation of the phrase.[14] The plausibility of this explanation is strengthened by the absence of any discussion of this issue in the debates in the *Congressional Record.*

From the time of CERCLA's enactment until 1989, the courts have been interpreting the term "PRP" in an increasingly broad manner, drawing an ever expanding number of parties into its circle of responsible parties.[15] Two recent cases, however, have caused commentators, as well as those in the business community, to wonder whether a new trend toward a narrower definition of the term is developing.[16] In these two cases, *Joslyn Manufacturing Co. v. T. L. James & Co.*,[17] and *Anspec Co. v. Johnson Controls, Inc.*,[18] the courts refused to extend liability to, respectively, parent corporations and successors-in-interest. In early January 1991, the Sixth Circuit Court of Appeals overturned the lower court decision in *Anspec*,[19] giving an initial indication that these two decisions were mere aberrations and giving some degree of solace to those who believe a broad interpretation of the term "PRP" is both necessary and reflective of congressional intent.

The significance of the *Joslyn* and *Anspec* decisions and their implications for the business community are examined in this article. The first two sections provide the necessary background for an understanding of the major cases in question by, respectively, examining the history of piercing the corporate veil and reviewing the history of imposing liability on successors-in-interest. The next section offers a

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11. New York v. Shore Realty, 759 F.2d 1032, 1039-40 (2d Cir. 1985).

12. *See* Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86 (3d Cir. 1988).

13. See *infra* text accompanying notes 99 to 135 for a discussion of the minor changes relevant to responsible parties made by SARA.

14. No other alternative interpretations seem very likely. It is possible that Congress did not approve of the judiciary's actions, but did not believe the matter was important enough to spend time debating. The complete absence of any mention of dissatisfaction with the court's interpretation makes this explanation unlikely.

15. *See infra* text accompanying notes 141-251.

16. *See* Josyln Mfg. Co. v. T. L. James & Co., 893 F.2d 80 (5th Cir. 1990) and Anspec Co. v. Johnson Controls, Inc., 734 F. Supp. 793 (E.D. Mich. 1989), *rev'd*, 922 F.2d 1240 (6th Cir. 1991).

17. 893 F.2d 80 (5th Cir. 1990).

18. 734 F. Supp. 793 (E.D. Mich. 1989), *rev'd*, 922 F.2d 1240 (6th Cir. 1991).

19. 922 F.2d 1240 (6th Cir. 1991).

brief overview of the legislative history of CERCLA and SARA. The fourth section traces the judicial interpretation of the term "PRP" and focuses on some of the broader decisions. Finally, the fifth section offers analysis of the validity of the *Joslyn* and *Anspec* decisions and attempts to ascertain their impact on future CERCLA litigation.

II. COMMON LAW BACKGROUND ON LIABILITY

While corporations generally enjoy limited liability, two common law doctrines have been applied by the courts to increase the scope of liability. The first is the doctrine of piercing the corporate veil. The second is the doctrine of successor liability. As discussed below, the courts apply these doctrines to impose liability on shareholders and on parent corporations.

A. Piercing the Corporate Veil

> The general rules of law with respect to the piercing of the corporate veil and disregarding the corporate entity are well established, but they offer very little aid when it comes to the decision of a particular case. The decisions are framed in broad principles and there are various theories and there are various theories used to justify the piercing.[20]

One of the significant advantages of the corporate form of business over general partnerships, proprietorships, and joint ventures is the attribute of limited liability.[21] This attribute provides the shareholder/owner with the assurance that his own assets will not be exposed to the contract or tort claims asserted against the corporation.[22] Shareholder liability and, hence, risk of loss are limited to the amount of the investment in the enterprise.[23] While a limited partnership affords a similar liability limitation to its limited partners, the price of the limitation is a prohibition on active management of the partnership's affairs.[24] In contrast, the shareholders of a corporation often are involved actively in the corporation as officers, directors, or employees.[25]

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20. National Bond Fin. Co. v. General Motors Corp., 238 F. Supp. 248, 255 (W.D. Mo. 1964), *aff'd*, 341 F.2d 1022 (8th Cir. 1965).

21. 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 20 (perm. ed. 1990).

22. *Id.*

23. *Id.*

24. L. SOLOMON, D. SCHWARTZ, & J. BAUMAN, CORPORATIONS LAW & POLICY 111-12 (2d ed. 1988).

25. *Id.*

The American legal and political systems have adopted the concept of limited liability for corporate shareholders as a means of encouraging economic growth.[26] By giving shareholders protection from liability, investment and risk-taking are enhanced and, consequently, so are jobs and wealth.[27] This concept of limited liability also serves, in some measure, to allocate risk between a corporation and its creditors by limiting the sources and amounts available for a claimant's recovery.[28]

The concept of limited liability, however, is not absolute. Courts have formulated means for disregarding the corporate form in some instances to impose contract or tort liability on shareholders.[29] This process is frequently and graphically called "piercing the corporate veil" or "disregarding the corporate entity."[30] The New York Court of Appeals has stated that piercing the corporate veil may be necessary to "prevent fraud or achieve equity."[31] In other words, while policy reasons dictate the creation of limited liability for corporate shareholders, policy reasons also may dictate its circumvention.

State and federal courts have formulated numerous theories to justify piercing the corporate veil in appropriate circumstances. In the area of veil-piercing involving parent corporations and their subsidiaries,[32] courts have utilized an agency theory, an instrumentality theory, or a common identity theory (a commonality of officers, shareholders, and directors as between the parent and subsidiary) to disregard the corporate form.[33] The theories are quite similar in their reliance on the idea that domination of the subsidiary by the parent justifies imposing parental liability.

Under the instrumentality theory, where a subsidiary acts as a mere "instrumentality"—or "adjunct" or "alter ego"—of the parent, the separateness of the entities will be ignored.[34] This instrumentality theory generally requires that the parent not only control but completely dominate the finances, policies, and practices of the subsidiary.[35]

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26. Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 988-98 (1986).

27. *Id.*

28. *Id.*

29. *See* 1 W. FLETCHER, *supra* note 21, § 41.

30. *Id.*

31. Bartle v. Home Owners Coop., 309 N.Y. 103, 127 N.E.2d 832 (1955).

32. A parent corporation is one which owns more than 50% of the voting stock of another corporation, called the subsidiary. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

33. Annotation, *Liability of Corporations For Contracts of Subsidiary*, 38 A.L.R.3d 1102 (1971) and Annotation, *Liability of Corporations For Torts of Subsidiary*, 7 A.L.R.3d 1343 (1966).

34. 1 W. FLETCHER, *supra* note 21, § 43.10.

35. *Id.*

Furthermore, the domination must be used to further a wrongful act, and the wrongful act must proximately result in injury.[36]

Parental domination and control has led some courts to characterize the subsidiary as an agent of the parent rather than as an instrumentality of it, thus creating parental liability under the principles of agency law.[37] This formulation does not disregard the subsidiary's existence as does the instrumentality formulation; it acknowledges the existence of both parent and subsidiary and holds the parent bound by the subsidiary's actions.[38] This judicial hairsplitting between "agents" and "instrumentalities" seems merely a distinction without much of a difference.

The identity theory is intended to do justice where, in reality, two corporations are one because of a commonality of officers, directors, or shareholders.[39] Thus, the identity theory requires a showing of

> such a unity of interest and ownership that the independence of the corporation had in effect ceased or had never begun, [such that] an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.[40]

Generally, total stock ownership of one corporation by another, coupled with an identity of officers and directors between the two, is not alone sufficient to pierce the corporate veil.[41] A recent Indiana decision, however, intimated the contrary.[42]

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36. *Id.*; Lowendahl v. Baltimore & Ohio Ry., 247 A.D. 144, 287 N.Y.S. 62, *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936).

37. Phoenix Canada Oil Co. v. Texaco, Inc., 658 F. Supp. 1061, 1084 (D. Del. 1987), *aff'd*, 842 F.2d 1466 (3d Cir. 1988), *cert. denied*, 488 U.S. 908 (1988); Satellite Fin. Planning Corp. v. First Nat'l Bank of Wilmington, 633 F. Supp. 386, 400 (D. Del. 1986); Hollander v. Henry, 186 F.2d 582, 584 (2d Cir. 1951)(quoting then Judge Cardozo in Berkey v. Third Ave. Ry., 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926))("Domination may be so complete, interference so obstrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent."); House of Koscot Dev. Corp. v. American Line Cosmetics, Inc., 468 F.2d 64, 67 (5th Cir. 1972); *see also* 1 W. FLETCHER, *supra* note 21, § 43.30; H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 148 (3d ed. 1983).

38. 1 W. FLETCHER, *supra* note 21, § 43.30.

39. *Id.*

40. Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc., 187 Conn. 544, 447 A.2d 406, 413 (1982)(quoting Saphir v. Neustade, 177 Conn. 210, 413 A.2d 843 (1979)).

41. United States v. Jon-T Chem., Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986); Nelson v. International Paint Co., 734 F.2d 1084, 1092 (5th Cir. 1984); Miles v. American Tel. & Tel. Co., 703 F.2d 193, 195 (5th Cir. 1983).

42. Stacey-Rand, Inc. v. J.J. Holman, Inc., 527 N.E.2d 726 (Ind. App. 1988)(citing Merriman v. Standard Grocery Co., 143 Ind. App. 654, 242 N.E.2d 128 (1969)).

Factors which have influenced courts to pierce the veil between parent and subsidiary corporations include the following: (1) a commonality of property or employees between the entities; (2) lack of observance of corporate formalities by the subsidiary;[43] (3) inadequate capitalization at the commencement of the enterprise or as a result of a systematic syphoning of the subsidiary's profits; (4) filing of consolidated financial statements and tax returns; (5) parental financing of the subsidiary; (6) lack of subsidiary business other than from the parent; (7) parental use of subsidiary property; and (8) common stock ownership.[44] The more factors present, the greater the likelihood that the subsidiary's liabilities will be visited upon the parent. In fact, one seeking a pathway through the judicial circumlocution of veil-piercing would be advised to concentrate on these factors and the equities of the situation rather than on theoretical formulations.

Noted corporate commentator Robert W. Hamilton asserts that the corporate identity is more likely to be ignored in tort, as opposed to contract, cases and in parent/subsidiary cases, as opposed to those cases involving human shareholders.[45] Hamilton additionally maintains that inadequate capitalization is more relevant in tort cases than in contract cases and that good policy reasons support this concept.[46] In contract cases, the plaintiff, at least theoretically, has had an opportunity to negotiate its financial protection through personal signatures, collateral, and sinking fund requirements, for example.[47] If these devices are not sufficient, the plaintiff may opt not to deal at all with the corporation.[48] In other words, risk of loss supposedly has been allocated by and between the parties on a voluntary and informed basis. This opportunity to negotiate, protect, and allocate is generally not present in tort cases.[49] If veil-piercing is not permitted in tort cases, the risk of loss may be borne by the injured party.

Subsidiary corporations that have been pierced merely result in another corporation incurring liability rather than an individual share-

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43. This includes, for example, failing to hold and record corporate meetings, to properly incorporate, and to keep separate corporate books and records.

44. *Jon-T Chem.*, 768 F.2d at 691-92; H. HENN & J. ALEXANDER, *supra* note 37.

45. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979 (1971). In this article Hamilton argues that decisions about piercing the corporate veil should be based on the policies involved with the underlying issues rather than legalistic ideas about the nature of corporations. Thus, depending on the issue involved, a separate corporate entity may or may not exist. *See also* 1 W. FLETCHER, *supra* note 21, § 41.85; Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 112-13 (1985).

46. Hamilton, *supra* note 45, at 986.

47. *Id.* at 986-88.

48. *Id.*

49. *Id.*

holder exposing personal assets to plaintiff claims.[50] No one has incurred unlimited personal liability. This may explain the greater likelihood that courts will ignore corporate separateness in the parent/subsidiary context.[51]

Complicating the analysis somewhat is the dichotomy between federal law and state law. Traditionally, corporate law has been, and remains, primarily the domain of the states.[52] Some federal courts, however, have taken the position that when a federal statute is involved, the court will look at both the congressional intent and the statutory purpose and, as a function of the federal common law, pierce the corporate veil to promote "public convenience, fairness and equity."[53] Courts sometimes ignore the choice of law issue entirely or assert that the result would not differ under either state or federal common law in a given case.[54]

Care should be taken to distinguish cases where liability is imposed on a parent corporation for its own actions versus derivative liability through a subsidiary. In the former instance, the corporate veil will not be pierced.[55] Instead, the parent entity simply will be liable for its own actions.[56] Where a commonality of identity of corporate officers between the parent and the subsidiary exists, liability may be particu-

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50. *Id.* at 992.

51. *Id.*; Easterbrook & Fischel, *supra* note 45, at 111.

52. R. HAMILTON, CORPORATIONS 2, 160-189 (4th ed. 1990).

53. *See, e.g.*, Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986)(involving veil-piercing in the context of the Employee Retirement Income Security Act and "[a]llowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct Congress wanted to prevent."); *see also* Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974)(upholding FCC veil-piercing to treat an individual and his wholly-owned corporation as one license applicant under the Communications Act of 1934 and thus deny the corporation the right to operate a one-way radio paging station)("The courts have consistently recognized that a corporate entity may be disregarded in the interests of public convenience, fairness and equity."); Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981)(a Clean Air Act exemption case quoting with approval *Capital Tel.*); *see also* Bangor Punta Operations, Inc. v. Banger & Aroostook R.R., 417 U.S. 703, 713 (1974)(where the Supreme Court pierced the corporate veil to deny maintenance of an action under the Clayton Act and Securities Exchange Act of 1934 against a prior owner for alleged mismanagement)("Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy.").

54. *Jon-T Chem.*, 768 F.2d at 690 n.6. For the argument that a federal rather than state-by-state standard should be utilized for piercing the veil in CERCLA cases see Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986). *Contra*, Judge Kennedy's concurring opinion in Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1248-51 (6th Cir. 1991).

55. *See e.g.*, Bartle v. Home Owners Coop., 309 N.Y. 103, 127 N.E.2d 832 (1955).

56. *Id.*

larly difficult to determine.[57] Under these circumstances, whether an officer is acting on behalf of the parent or the subsidiary is unclear.[58]

B. *Successor Liability*

The area of successor liability may be divided easily into liability of successor corporations upon merger or consolidation and liability of successors upon the purchase of another corporation's assets.[59] The structure of a corporate purchase transaction may affect significantly the liability exposure of a successor for the actions or inactions of its legal predecessor.[60] Despite the label attached to a transaction by the parties, courts occasionally have recharacterized transactions to reflect their true nature more accurately.

In a merger, two corporations join their assets, the merged corporation dissolves, and the merging corporation survives and continues in business.[61] In a consolidation, two corporations form a new corporation, transfer their assets to the new corporation, and then the two original corporations dissolve.[62] Usually, the surviving corporation in a merger or the new corporation in a consolidation owns the combined assets and is liable for the tort and contract claims assertable against the dissolved entity or entities.[63] This result often is specified by statute.[64]

Unlike the result obtained in a merger or consolidation, a different result occurs in an asset purchase. Where one corporation purchases all, or substantially all, of the assets of another corporation for adequate consideration, the acquiring corporation generally does not risk liability for the debts and claims of the selling corporation.[65] This risk-free feature makes an asset purchase more attractive than a merger, consolidation, or stock purchase.[66]

Like the general rule involving nonliability of parent corporations for claims against their subsidiaries, the general rule of nonliability

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57. *Id.*

58. For what continues to be good advice on the conduct of parent-subsidiary relations, see Douglas and Shanks, *Insulation From Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 196-97 (1929).

59. *See* 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7102 (perm. ed. 1990).

60. *See* 1 W. FLETCHER, *supra* note 21, § 48.

61. 15 W. FLETCHER, *supra* note 59, § 7041.

62. BLACK'S LAW DICTIONARY 309 (6th ed. 1990).

63. *See* cases collected at 15 W. FLETCHER, *supra* note 59, §§ 7117, 7121; *see also* 19 AM. JUR. 2D *Corporations* § 2715 (1986).

64. 15 W. FLETCHER, *supra* note 59, § 7041; 19 AM. JUR. 2D, *supra* note 63, § 2716.

65. 15 W. FLETCHER, *supra* note 59, § 7122; 19 AM. JUR. 2D, *supra* note 63, §§ 2704-15.

66. 15 W. FLETCHER, *supra* note 59, § 7122.

for asset purchasers has been subjected to several exceptions.[67] One exception is where an express or implied agreement to assume the liabilities exists.[68] Implied agreements, of course, depend on the facts and circumstances of each case, but relevant factors have included admissions by officers or agents of the purchasing corporation or harsh results to the creditors of the selling corporation.[69]

A second exception is where a purchase is, in effect, a de facto merger or consolidation.[70] A de facto characterization arises when the parties label a transaction as an asset purchase but the following is true: (a) continuity of the selling corporation's management, personnel, physical location, assets, and operations exists; (b) the selling corporation is dissolved but continuity of its shareholders exists (resulting from the purchasing corporation buying the assets with its own stock which then comes to be held by the selling corporation's shareholders); and (c) the purchasing corporation assumes the operating debts of the selling corporation.[71]

A third exception has been found when the transaction was a fraudulent effort to evade liabilities.[72] Factors which may lead to a finding of fraud include inadequate consideration, continuation of the transferor business, and a continuity of officers and shareholders from the transferor to the transferee corporations.[73] A final exception is found when the purchasing company is a mere continuation of the transferor corporation, i.e., the seller undergoes a change in form but not in sub-

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67. *See generally*, 15 W. FLETCHER, *supra* note 59, § 7122-25; 19 AM. JUR. 2D, *supra* note 63, § 2704-15; H. HENN & J. ALEXANDER, *supra* note 37, § 341; *see also* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 (1973); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990); United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990); *In re* Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 1010 (D. Mass. 1989); Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985).

68. Ladjevardian v. Laidlaw-Coggeshell, Inc., 431 F. Supp. 834 (S.D.N.Y. 1977); Hoche Prods. v. Jayark Films Corp., 256 F. Supp. 291 (S.D.N.Y. 1966). In *Ladjevardian* a defendant's motion for summary judgment was denied in part because the assumption of debit and credit balances of customer brokerage accounts might have resulted in an implied assumption of liabilities. In *Hoche Prods.*, pretrial affidavits of a successor corporation's attorney and accountant revealed an intention to assume the liabilities of the predecessor. Thus, a finding of implied assumption is more likely when the predecessor is terminated or exists as a shell corporation than if it continues as a viable entity. *See Ladjevardian*, 431 F. Supp. at 840; Blackinton v. United States, 6 F.2d 147 (8th Cir. 1925). *See also* 15 W. FLETCHER, *supra* note 59, § 7124.

69. *See* 15 W. FLETCHER, *supra* note 59, § 7124.

70. *See* Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 310 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1457-58 (11th Cir. 1985). *See also* 15 W. FLETCHER, *supra* note 59, § 7124.20.

71. *See* 15 W. FLETCHER, *supra* note 59, § 7124.20.

72. *See* cases collected at 49 A.L.R.3d 881 (1973). *See also* 15 W. FLETCHER, *supra* note 59, § 7125.

73. *See* 15 W. FLETCHER, *supra* note 59, § 7125.

stance.[74] This typically means that the same officers, directors, and shareholders who served the selling company serve the purchasing company.[75]

The California Supreme Court created an additional exception called the "product line exception"[76] which, although not widely accepted, has been followed by a handful of other courts. The product line exception holds a purchasing corporation strictly liable for product defects of previously manufactured products where the purchaser continues to manufacture the seller's product line.[77] In *Ray v. Alad Corp.*, a corporation which had purchased the assets of another and had continued to manufacture the same product using the same equipment, designs, and personnel was held strictly liable for injuries resulting from a defectively manufactured product which had been made and sold prior to the acquisition.[78] The court found none of the traditional exceptions applicable.[79] The *Alad* court created the product line exception because of the successor's better ability to spread the product liability risk, and the possible preclusion of a plaintiff's ability to recover.[80] Furthermore, because the successor benefits from the product's goodwill, the court found that the successor likewise should bear the risks and burdens attendant to the product.[81]

Finally, an exception discussed in at least five CERCLA cases and adopted by the Supreme Court in labor law cases is the "substantial continuity," "continuing business enterprise," or "continuity of enterprise" exception.[82] In mid-1990, the Ninth Circuit in *Louisiana-Pa-*

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74. Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1458-59 (11th Cir. 1985); Dayton v. Peck, Stowe & Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984) (quoting Leannais v. Cincinnati, Inc., 565 F.2d 437, 440 (7th Cir. 1977))("The key element of a 'continuation' is a common identity of the officers, directors and stockholders in the selling and purchasing corporation."); Estey & Assocs. v. McCulloch Corp., 663 F. Supp. 167 (D. Or. 1986); Explosives Corp. of Am. v. Garlam Enters. Corp., 615 F. Supp. 364 (D.C.P.R. 1985)(contending that while common ownership and management are crucial elements in determining continuation, other factors such as a continuation of the sellers practices and policies and the sufficiency of the purchase price should also be considered); Ladjevardian v. Laidlaw-Coggeshell, Inc., 431 F. Supp. 834 (S.D.N.Y. 1977). *See also* 15 W. FLETCHER, *supra* note 59, § 7124.10.

75. *See* 15 W. FLETCHER, *supra* note 59, § 7124.10.

76. Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977).

77. *Alad*, 19 Cal. 3d at 34, 560 P.2d at 11, 136 Cal. Rptr. at 582.

78. *Id.* at 26, 560 P.2d at 5-6, 136 Cal. Rptr. at 576-77.

79. *Id.* at 28, 560 P.2d at 7, 136 Cal. Rptr. at 578.

80. *Id.* at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80.

81. *Id.*

82. The seminal cases outside CERCLA for this exception are Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974) and Turner v. Bituminous Casualty Co., 397 Mich. 406, 244 N.W.2d 873 (1976); *see also* Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985). The United States Supreme Court utilized this exception in Golden State Bottling v. NLRB, 414 U.S. 168 (1973), to enforce a reinstatement and backpay order of the NLRB against a successor employer.

cific Corp. v. Ascarco, Inc. endorsed the view that Congress intended CERCLA to impose successor liability and that the imposition of liability under CERCLA should be governed by federal law.[83] The court in *Louisiana-Pacific* stated that the federal law, in turn, should be determined by the traditional rules followed by most states.[84] On the facts of the case before it, the court in *Louisiana-Pacific* found the de facto merger exception inapplicable because of a lack of continuity of shareholders and expressly declined to decide whether to adopt either the product line or the continuing business enterprise exceptions.[85] The other traditional exceptions likewise were held inapplicable to the facts.[86]

While not expressly adopted by the Ninth Circuit in *Louisiana-Pacific*[87] for CERCLA cases, the continuity of enterprise exception was adopted by that court for cases under the Federal Insecticide, Fungacide, and Rodenticide Act.[88] A Kentucky district court, in *United States v. Distler*, however, utilized the continuity of enterprise exception to find liability under CERCLA.[89] The exception also was used to impose CERCLA liability on a successor in *United States v. Carolina Transformer Co.*[90] and in *United States v. Mexico Feed & Seed Co.*[91] Although a Minnesota district court discussed the exception in a 1989 CERCLA liability case, the court declined to adopt it at that time.[92] The Minnesota district court felt that CERCLA's objectives were served adequately in that case by the traditional rule formulation.[93]

The Court held such action to be within the Board's authority because it had struck an appropriate balance between the interests of the successor, the public, and the employee and had thus furthered the purposes of the National Labor Relations Act. The Board finding of a "continuing business enterprise" (no interruption or substantial changes in operations, employees, or supervisory personnel) was a sufficient nexus to require compliance. A fact to note for its relevance to the possible use of this case to support CERCLA liability is that the successor in *Golden State* had notice of the order at the time of acquisition and was party to a subsequent backpay specification hearing. It is likely that a successor under CERCLA will not have such notice. Another Supreme Court case utilizing this exception but not finding a substantial continuity of the business enterprise is Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974).

83. 909 F.2d. 1260 (9th Cir. 1990).

84. *Id.* at 1263.

85. *Id.* at 1265-66.

86. *Id.*

87. 909 F.2d 1260 (9th Cir. 1990).

88. Oner II, Inc. v. EPA, 597 F.2d 184 (9th Cir. 1979)(regarding the Federal Insecticide, Fungicide, and Rodenticide Act).

89. 741 F. Supp. 637, 642-43 (W.D. Ky. 1990).

90. 739 F. Supp. 1030, 1038-39 (E.D.N.C. 1989).

91. 764 F. Supp. 565, 572-73 (E.D. Mo. 1991).

92. Sylvester Bros. Dev. Co. v. Burlington No. R.R., 32 E.R.C. 1122 (D.C. Minn. 1990).

93. *Id.* at 1125.

In applying the "continuity of enterprise" exception, courts look for the following: (1) continuity of employees, supervisory personnel, and physical location; (2) production of the same product; (3) retention of the same name; (4) continuity of assets and business operations; and (5) a holding out to the public as a being a continuation of the previous enterprise.[94] Both the *Distler*[95] and *Louisiana-Pacific*[96] opinions describe the continuity of enterprise exception as an "expanded" version of the mere continuation exception because it eliminates the identity of ownership requirement of the mere continuation exception. By the same token, the continuity of enterprise exception is viewed as less far-reaching than the product line exception.[97]

The reasoning behind the first four exceptions honors the substance of the transaction rather than the form. The product line and continuity of enterprise exceptions, however, are based more on public policy. Their application entails consideration of the successor's better ability to spread the risk, the linkage of product benefits and burdens, and a plaintiff's possible inability otherwise to recover damages when a seller goes out of business entirely.[98] While these public policy reasons are traditionally applied in a corporate law context, they are likewise attractive in CERCLA liability cases.

III. CERCLA AND SARA: A BRIEF HISTORY

Many credit former President Jimmy Carter with the introduction of CERCLA.[99] The bill he introduced during the early days of the Ninety-Sixth Congress,[100] however, was not, in fact, the bill that became law.[101] The bill that actually became law was introduced by a bipartisan group of senators on November 24, 1980,[102] and was passed by a roll call vote of 78 to 9.[103] The Senate voted to strike all of the language after the enacting clause of the original House bill, inserting in its place the language of the newly amended Senate bill.[104]

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94. *See Mozingo*, 752 F.2d at 175; *see also Distler*, 741 F. Supp. at 642-43.

95. 741 F. Supp. at 642.

96. 909 F.2d at 1265; *see also Mozingo*, 752 F.2d at 175.

97. *Mozingo*, 752 F.2d at 175; Polius v. Clark Equip. Co., 608 F. Supp. 1541, 1545 (V.I. 1985). On appeal, however, the Third Circuit in Polius v. Clark Equip. Co., 802 F.2d 75, 82 (3d Cir. 1986), rejected the use of the continuity of enterprise theory "because it too proposes an ill-considered extension of liability to an entity having no causal relationship with the harm."

98. *See Alad*, 19 Cal. 3d at 31, 560 P.2d at 8-9, 136 Cal. Rptr. at 579-80.

99. Koch, *House Passes Carter's Superfund Plan*, 38 CONG. Q. WKLY. 2819 (Sept. 27, 1980). His bill originally was accepted by the House, but then replaced.

100. S. 1341, 96th Cong., 1st Sess. (1979).

101. Koch, *supra* note 99.

102. S. 1480, 96th Cong., 2d Sess., 126 Cong. Rec. 30,897 (1980).

103. *Id.* at 30,956. Twelve senators abstained from voting. *Id.*

104. *Id.* at 30,987.

On December 3, 1980, Representative James J. Florio moved to "suspend the rules and concur in the Senate amendments to the [House] bill."[105] Under the suspension, no amendments to the bill were allowed.[106] After forty minutes of discussion, the bill passed by a vote of 274 to 94, with 64 not voting.[107] Hence, very little legislative history exists on which one can rely. The most one can do to understand the congressional intent behind CERCLA is to examine the hearings and committee reports regarding the alternative "Superfund" bills that have been under consideration for a number of years.[108]

The main provisions of CERCLA provided for the creation of a $1.6 billion Superfund that would allow the federal government to clean up the nation's most hazardous waste sites and respond to emergency spills other than oil spills.[109] Eighty-six percent of the funding was to come from taxes on oil and certain chemical substances. The remainder was to come from federal appropriations.[110]

The section of CERCLA that is of greatest relevance to this article, however, is section 107(a),[111] which provides that certain PRPs could be held strictly liable for cleanup costs under the Act. Those who may be held liable include the following:

> (1) the owner and operator of a vessel or a facility;
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances; and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites selected by such person, from which there is a release, or a

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105. 126 Cong. Rec. 31,950 (1980).
106. *Id.*
107. *Id.* at 31,981.
108. These bills include H.R. 7020 introduced on April 2, 1980, and S. 1480, introduced on July 11, 1979.
109. S. WOLF, POLLUTION LAW HANDBOOK 227-28 (1988).
110. *Id.* at 227.
111. Pub. L. No. 96-510, 94 Stat. 2767 (1980)(codified as amended at 42 U.S.C. § 9607(a) (1988)).

> threatened release which causes the incurrence of response costs, of a hazardous substance. . . . [112]

Congress further provided that parties are not "owners or operators" if they merely hold indicia of ownership primarily to protect a security interest unless they also participate in the management of the facility.[113] CERCLA provides that an owner is not generally liable if the property was contaminated by a party other than one with whom the owner had a contractual relationship.[114]

Surprisingly, very little debate was conducted over the provisions regarding who should be held responsible.[115] The reason why little debate was conducted can be summarized by the statement of Senator James M. Jeffords: "The people are not interested in technicalities. They are interested in the serious problem of hazardous waste. Let's help the people now and take care of the technicalities later."[116] Thus, by its failure to consider the "technicalities of the Act," Congress essentially left the definition of PRPs to the courts. In fact, when Senator Jennings Randolph introduced the bill, he stated that "[i]t is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law."[117]

In 1985, when Congress enacted SARA to reauthorize the Superfund, it had the opportunity to refine the definition of a "PRP." It did not do so. This inaction implies that Congress agreed with the interpretations of the courts.[118]

The primary debates over the reauthorization focused on issues related to funding.[119] The amount allocated under CERCLA for the initial Superfund was clearly inadequate.[120] As Senator Max Baucus pointed out, "[t]here is a need for a greatly expanded Superfund Program. . . . Cleanup is proceeding at a slower pace than anticipated. It is apparent that more money is needed. The less money that is devoted to this program, the longer it will take to address the problem of hazardous waste."[121] Clearly, the appropriate time to discuss the defini-

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112. *Id.*

113. *See* 42 U.S.C. § 9601(20)(a) (1988).

114. *See* 42 U.S.C. § 9607(b)(3) (1988).

115. *See* 126 Cong. Rec. 31,950 (1980); *see also* 126 Cong. Rec. 30,897 (1986).

116. Koch, *Compromise Superfund Proposal Cleared*, 38 CONG. Q. WKLY. 3,509 (Dec. 6, 1980).

117. 126 Cong. Rec. 30,932 (1980).

118. *See infra* text accompanying notes 138-250 for a discussion of this line of interpretation wherein the courts broadly interpreted the term "PRP."

119. *See* 131 Cong. Rec. S11,830-03 (1985).

120. *Id.*

121. *Id.*

tion of "PRP" was during the debate on funding. No such discussions took place, however. Congress ultimately decided to increase the size of the Superfund to $8.5 billion,[122] with $300 million estimated to come from cleanup costs recovered from responsible parties.[123] Congress, through SARA, also expanded public participation under the Act,[124] strengthened cleanup standards,[125] clarified provisions relating to natural resource damage,[126] and encouraged settlements with PRPs.[127]

SARA, however, provided only a minor clarification of the term "PRP."[128] The definition of "owner or operator" was expanded to include state and local governments explicitly.[129] Indirect changes to the definition of PRPs also were made relating to the defense that damage was done by a third party with whom the owner did not have a contractual relationship.[130] SARA clarified the definition of a "contractual relationship" by providing that persons who acquire property by inheritance or bequest are not deemed to be contractually related to their predecessors.[131] SARA also created the "innocent purchaser" defense,[132] which states that if someone acquires property with no knowledge of any contamination and exercises due care in making a diligent inquiry into the property's environmental conditions, the purchaser cannot be held liable when hazardous substances later are located on the property.[133]

As stated previously, the primary debates over SARA focused on funding.[134] The subcommittee on finance would not allow general revenues to support more than 13% of the Superfund total because of a belief that "the public should not be forced to pay for environmental problems caused by private corporations."[135] Hence, the funding me-

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122. WOLF, *supra* note 109.

123. *Id.*

124. *See* 42 U.S.C. § 9613(i) (1988); *see also* 42 U.S.C. § 9622(d)(2) (1988).

125. *See* 42 U.S.C. § 9621 (1988).

126. *See* 42 U.S.C. § 9607(f) (1988).

127. *See supra* note 6, at 19, 49-55.

128. *See* 42 U.S.C. § 9601(21) (1988); *compare* 42 U.S.C. § 9601(20)(b) (1988).

129. *Id.*

130. *See* 42 U.S.C. § 9607(b)(3) (1988).

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

132. *See* 42 U.S.C. § 9601(35)(A)(i) (1988). For further information about this defense, see Note, *The Price of Innocence—Landowner Liability Under CERCLA and SARA*, 6 TEMP. ENVT. L. & TECH. J., 117-31 (1987); J. LEIFER, EPA'S INNOCENT LANDOWNER POLICY: A PRACTICAL APPROACH TO LIABILITY UNDER SUPERFUND (1987).

133. This change can be seen as a tightening of the standards for who can be held responsible under the act because it removes liability from a significant number of otherwise responsible parties. This defense has been raised in a number of cases since the passage of SARA.

134. *See supra* note 119 and accompanying text.

135. 131 Cong. Rec. S12,158-02 (1985).

chanisms indicate a desire on the part of Congress to place liability on those responsible for the creation of the problem and not on the general public. The legislative history, however, does not indicate whether imposing liability on successor and parent corporations furthers this goal.

IV. A Brief Overview of the Courts' Interpretations of CERCLA

As previously noted, CERCLA was not a carefully drafted statute.[136] Although Congress knew it wanted hazardous waste sites cleaned up, legislators were divided on how to accomplish this goal.[137] Hence, the courts have been crafting the specifics of the law.

In the absence of more specific language in the statute or of clearer evidence of congressional intent in the *Congressional Record*, the EPA has urged an expansive reading of the statute.[138] In most instances, the EPA has been extremely persuasive.[139] Given the ambiguity of CERCLA, one would have expected a substantial amount of litigation. Very few cases, however, have interpreted CERCLA, especially at the appellate level.[140]

A. Shore Realty *& Contemporaneous Cases*

The seminal case interpreting liability under CERCLA is *New York v. Shore Realty Corp.*[141] The case is cited most frequently for its liberal resolution of the issue of whether strict liability is the appropriate standard under CERCLA.[142] The majority opinion in this Second Circuit decision stated the following:

> Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [CERCLA] compromise. Section 9601(32) provides that liability under CERCLA "shall be construed to be the standard of liability under Section 311 of the Clean Water Act," which courts have held to be strict liability . . . and which Congress understood to impose such liability.[143]

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136. *See supra* text accompanying notes 11-12.

137. *See supra* text accompanying notes 99-135.

138. Bayko & Share, *Stormy Weather on Superfund Front Forecast as 'Hurricane Sara' Hits*, Nat'l L.J. Feb. 16, 1987, at 24.

139. *Id.*

140. *Id.*

141. 759 F.2d 1032 (2d Cir. 1985).

142. *Id.*

143. *Id.* at 1042.

The liability found by the court in *Shore Realty* is not absolute but has been limited by "defenses for causation solely by an act of God, an act of war, or acts or omissions of a third party other than an employee or agent of the defendant or whose act or omission occurs in connection with a contractual relationship with the defendant."[144]

Shore Realty also is important because it initiated a long line of cases liberally interpreting which parties were liable under CERCLA.[145] In *Shore Realty*, the court found the owners of the Shore Road hazardous waste site liable under section 107(a)(1) as "owner[s] or operator[s] of the site."[146] The defendant, Shore Realty, had argued unsuccessfully that the firm was not liable because it had neither owned the site at the time of the disposal nor caused the presence or release of hazardous waste at the site.[147] Shore Realty claimed that the statutory definitions of owner or operator are ambiguous and, therefore, must be interpreted as "owner at the time of disposal," as stated in section 107(a)(2).[148] The court, however, held that the statutory definitions are not ambiguous.[149] The court reasoned that Congress intended to address different owners differently.[150] Thus, the court concluded that section 107(a)(1) applies to current owners, while section 107(a)(2) applies to former owners.[151]

Shore Realty also argued unsuccessfully that its case was analogous to *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*,[152] and that Shore Realty should be treated the same as the development company in *Cadillac Fairview* and not be held liable.[153] In *Cadillac Fairview*, the United States District Court for the Central District of California ruled that the property development company was not liable under CERCLA because it had not owned the property when hazardous waste had been disposed on it.[154] In that case, the court found that the development company had bought the property after the disposal had ceased and before the private party who brought the cost

144. *Id.*; *see also* 42 U.S.C. § 9607(b) (1988).

145. *See, e.g.*, Guidance v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556 (W.D. Pa. 1989); United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 111 S. Ct. 752 (1991); United States v. Burns, No. C-88-94-L (D.N.H. Sept. 12, 1988).

146. 759 F.2d at 1044.

147. *Id.* at 1043.

148. *Id.* (citing 42 U.S.C. § 9607(b)(1988)).

149. *Id.* at 1044.

150. *Id.*

151. *Id.*

152. 21 Env't Rep. Cas. (BNA) (D.C. Cal. 1984), *rev'd in part*, 840 F.2d 691 (9th Cir. 1988).

153. 759 F.2d at 1044.

154. 21 Env't Rep. Cas. (BNA) at 1113.

recovery action had assumed ownership of the land.[155] This was indeed a more narrow interpretation.

One year after *Cadillac Fairview*, however, a district court in South Carolina broadly interpreted section 107 of CERCLA. In *United States v. Carolawn Chemical Co.*, the court held that a chemical company that had held title to a hazardous waste disposal site for only one hour was liable as an owner and operator under section 107(a).[156] The court rendered its decision despite the company's claim that it had acted only as a "conduit" in the transfer of title to the site and had no true ownership interest in the property.[157]

In another South Carolina case, *United States v. South Carolina Recycling and Disposal, Inc.*, the court found the owners of a site liable because the landowners had a contractual relationship with the operators of the site who were allegedly responsible for the hazardous wastes.[158] On appeal, the chemical manufacturing company that had leased the site also was held liable.[159] The company was found liable under section 107(a)(2) as an "owner and operator," as well as under section 107(a)(3) because it had arranged for the disposal or treatment of its wastes at a facility owned or operated by another person.[160] In addition, the company was held liable under section 107(a)(4) because it had transported hazardous substances to the site.[161]

Other unlikely parties have been found to be owners under section 107(a)(1). For example, in *United States v. Burns*,[162] the district court found the trustee of a realty trust liable as an owner. More recently, a federal appeals court ruled that a lender who holds a security interest in a corporation that owns a contaminated site may be liable if the lender is able to "affect hazardous waste disposal decisions" at the site.[163]

While most of the issues of liability arise with regard to the definition of "owner or operator," the question of who can be held liable under section 107(a)(3) also has been the subject of litigation resulting in the inclusion of a broad range of liable parties. In the early case of

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155. *Id.*

156. 21 Env't Rep. Cas. (BNA) 2124, 2128-29 (D.S.C. 1984).

157. *Id.*

158. 653 F. Supp. 984 (D.S.C. 1984).

159. *See* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

160. *Id.* at 168; 653 F. Supp. at 1005.

161. 858 F.2d at 169-71; 653 F. Supp. at 1005.

162. No. C-88-94-L (D.N.H. Sept. 12, 1988).

163. United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

New York v. General Electric Co.,[164] a New York district court offered an expansive interpretation of section 107(a)(3), providing that sellers of materials containing hazardous waste could be held liable for cleanup costs, even though the seller had no direct connection with the buyer's use of the hazardous material.[165]

In *General Electric*, the defendant corporation sold used transformer oil contaminated with polychlorinated biphenalys (PCBs) to the operator of a dragstrip, who used the oil for dust control.[166] The court rejected the company's argument that the company did not "contract or arrange to have its own waste taken from the site for disposal or treatment."[167] General Electric (GE) claimed that "Congress never intended to make a supplier liable for the subsequent action of a purchaser in the ordinary course of a business other than waste disposal."[168] The court pointed out that GE contracted with the dragstrip to have the oil removed, with either actual or imputed knowledge that the oil would be deposited on the land surrounding the dragstrip.[169] The court also recognized that GE had made other contracts for the disposal of its oily waste.[170] Thus, the court rejected the company's argument, stating that the legislative history of CERCLA made it clear that parties could not "contract away" their liability.[171] GE's argument is a plausible construction, and a less liberal judge could have interpreted the statute in the manner GE suggested. Subsequent cases on this issue have continued the broad interpretation.[172]

A final issue of interpretation under section 107(a) is whether individuals either acting on behalf of a corporation or owning a corporation (shareholders) can be held personally liable. Initially, the courts appeared eager to impose liability as broadly as possible. In *United States v. Carolawn Co.*,[173] the district court held the former officers of a chemical company, the waste generator, and the waste hauler jointly and severally liable under CERCLA. In holding the officers individually liable, the court reasoned that because the company officials had

164. 592 F. Supp. 291 (N.D.N.Y. 1984).
165. *Id.* at 297.
166. *Id.* at 293.
167. *Id.* at 297.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *See, e.g.*, United States v. A. & F. Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); Dedham Water Co. v. Cumberland Dairy Farms, 805 F.2d 1074 (1st Cir. 1986); United States v. Hooker Chem. & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1988).
173. 21 Env't Rep. Cas. (BNA) 2124 (D.S.C. 1984).

at one time owned the site as individuals and were responsible for managing hazardous waste activities, they should be held liable for the response costs incurred, notwithstanding the corporate character of the business.[174]

In *United States v. Mottolo*,[175] the president, and principal shareholder, of a chemical company argued that he was not a "person" under CERCLA because he did not own or possess hazardous materials. The court, in holding the president personally liable under the Act, stated that persons who arranged for or disposed of hazardous waste under the Act did not need actually to own the hazardous substances to be liable.[176] *Mottolo* demonstrates a further expansion of the number of parties on whom liability may be imposed. In *Carolawn*, the liable parties were both owners and operators.[177] In *Mottolo*, the parties were considered to be operators without being owners.[178]

Even when interpreting the defenses to liability under CERCLA, the court has narrowly construed them to expand the number of parties held liable under the Act. In the 1989 case of *Guidice v. BFG Electroplating and Manufacturing Co.*,[179] a Pennsylvania district court denied summary judgment to a bank that had foreclosed on industrial property which was later found to be contaminated. The court held that by taking the sheriff's deed to the property, the bank had forfeited its right to use the creditor's exception to the liability of an owner or operator.[180] Thus, by restricting the use of exceptions, the court in fact liberally defined the scope of liability.

Hence, it appears that the courts, in carrying out their mandate to fill in the technicalities of CERCLA have done so in a very liberal fashion. Occasionally, a court has tried to restrict the applicability of section 107(a), but the trend has been to find liability whenever possible. Against this background, the discussion now turns to the specific questions of liability of successors-in-interest and parent corporations.

B. A Departure from Shore Realty

In the latter part of 1989 and early part of 1990, several federal courts announced rulings involving parent and successor liability under CERCLA, two of which seemed to take a restrictive view towards

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174. *Id.* at 2131-32.
175. 605 F. Supp. 898 (D.N.H. 1985).
176. *Id.* at 913-14.
177. 21 Env't Rep. Cas. (BNA) at 2131.
178. 605 F. Supp. at 898.
179. 732 F. Supp. 556 (W.D. Pa. 1989).
180. *Id.* at 563.

extending liability to parent and successor corporations. The Fifth Circuit in *Joslyn Manufacturing Co. v. T.L. James & Co.*,[181] and the U.S. District Court for the Eastern District of Michigan in *Anspec Co. v. Johnson Controls, Inc.*,[182] declined to impose liability and urged congressional direction on the future extent of liability for parent and successor corporations. The Sixth Circuit Court of Appeals, however, recently reversed *Anspec*.[183] Two other federal district court decisions, *United States v. Kayser-Roth Corp.*[184] and *United States v. Distler*,[185] decided in October, 1989, and February, 1990, respectively, take a more liberal view. A Ninth Circuit case from July, 1990, endorsed the more liberal stance but found no successor liability based on the facts of that case.[186]

Joslyn involved an appeal from a district court grant of summary judgment in favor of defendant T.L. James & Co. (James).[187] James was the parent company of Lincoln Creosoting Company, Inc. (Lincoln) which was responsible for the infusion of creosoting chemicals into certain land areas and waterways.[188] Joslyn Manufacturing purchased the Lincoln assets in 1950 and owned and operated the creosoting plant for nineteen years until it was sold to a succession of owners.[189] Lincoln was formally dissolved in December, 1952.[190] Joslyn Manufacturing sought contribution for mandated cleanup costs from James and several subsequent owners under both CERCLA and Louisiana law.[191] In granting James' summary judgment motion, the district court held that liability under CERCLA could not be imposed on a parent corporation without piercing the corporate veil and that the facts in the case were not sufficient as a matter of law to justify such piercing.[192]

In upholding the district court, the Fifth Circuit expressly declined to follow the *Shore Realty*[193] line of cases and refused to impose CERCLA liability on a parent corporation for the liability of a subsidiary

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181. 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

182. 734 F. Supp. 793 (E.D. Mich. 1989), *rev'd*, 922 F.2d 1240 (6th Cir. 1991).

183. *Id.*

184. 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

185. 741 F. Supp. 637 (W.D. Ky. 1990).

186. *See* Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990).

187. 893 F.2d at 80.

188. *Id.* at 81-82.

189. *Id.*

190. *Id.*

191. *Id.* at 82.

192. 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

193. *See supra* text accompanying notes 141 to 180.

without piercing the corporate veil.[194] The court refused to read section 107(a) liberally, stating simply that "if Congress wanted to extend liability to parent corporations, it could have done so, and it remains free to do so."[195] Further, in response to the argument that a liberal reading of the liability provision was consistent with Congress' objective for CERCLA, the court quoted approvingly from the 1988 Seventh Circuit decision in *Edward Hines Lumber Co. v. Vulcan Materials Co.*[196] The court stated that "to the point that courts could achieve 'more' of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits."[197] In short, absent a specific congressional directive or appropriate facts for piercing the corporate veil, the Fifth Circuit was not inclined to ignore the entrenched common law doctrine of limited liability of shareholders, even corporate ones.

Based on that position, the Fifth Circuit declined to pierce the corporate veil, believing the facts did not warrant it.[198] The appellate court upheld the lower court's determination that James had insufficient domination and control over Lincoln so that Lincoln "manifest[ed] no separate corporate interests of its own."[199] Factors which both courts found relevant were that Lincoln kept its own books and records, obeyed the formalities of the corporate form, kept its daily operations distinct from James, owned its own property, filed separate tax returns, paid its own bills, and had its own employee benefits.[200] These factors were more convincing than the factors of 100% stock ownership of Lincoln by James, a number of common directors and officers, inter-company loans including a loan for the initial capitalization of Lincoln, some influence by James on the hiring and firing of Lincoln officers, and common corporate officers working out of James' offices.[201]

Thus, in a comparatively brief opinion, the Fifth Circuit declined to follow a liberal reading of CERCLA liability for parent corporations and stated that "veil-piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetuate a fraud or avoid personal liability."[202] The court took the stance that the genesis of

194. *Joslyn*, 893 F.2d at 82.
195. *Id.* at 83.
196. 861 F.2d 155 (7th Cir. 1988).
197. *Joslyn*, 893 F.2d at 83.
198. *Id.* at 84.
199. *Id.*
200. *Id.* at 83; 696 F. Supp. at 231.
201. 696 F. Supp. at 230-31, 233.
202. *Joslyn*, 893 F.2d at 83.

change from traditional common law notions of limited shareholder liability must come from Congress, not the courts.[203] A petition for review of the *Joslyn* case has been denied by the United States Supreme Court.[204]

The district court opinion in *Anspec* evidences a similar, though even more dramatic, reluctance to engage in judicial law-making. The *Anspec* decision granting the defendants' motion to dismiss was surprising because it involved the liability of successor corporations in a merger context, a seemingly settled area even outside of its applicability under CERCLA.[205] In *Anspec*, the district court dismissed the plaintiff's claim for contribution for cleanup costs, stating that "successor corporations are not listed as one of the potentially responsible parties under CERCLA."[206] Further, the court rejected the *Smith Land & Improvement Corp. v. Celotex*[207] view that Congress intended the courts to develop a federal common law surrounding CERCLA, asserting that "Congress only intended that the courts develop federal common law for those CERCLA provisions that were ambiguous."[208] While agreeing that development of a federal common law was necessary with regard to strict liability, joint and several liability, and rights of contribution, the court believed that CERCLA's definition of PRPs was clear.[209] Although expressing concern that its approach may result in some not too difficult circumvention of the statute, the court maintained that Congress was the appropriate agent for change.[210] Because none of the successors were owners or occupiers of the contaminated site, nor generators or transporters of hazardous waste, the court dismissed the CERCLA claim and the pendent state claims against them.[211]

Anspec is a noteworthy decision because the court could have imposed liability under the traditional notions of successor liability.[212] Instead, the court seemed to invite evasion of liability, in direct contravention of the *Smith Land* argument that congressional intent sup-

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203. *Id.* at 82-83.
204. 111 S. Ct. 1017 (1991).
205. 734 F. Supp at 795; *see also supra* text accompanying notes 59-98.
206. 734 F. Supp. at 795.
207. 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989)(applying the doctrine of successor liability in CERCLA cases).
208. *Anspec*, 734 F. Supp. at 795.
209. *Id.*
210. *Id.* at 796.
211. *Id.*
212. *See supra* text accompanying notes 59-98.

ports extension of liability to successors.[213] Additionally, although one defendant, upon merger, had assumed the assets and liabilities of the polluting corporation, the claim against that defendant was nevertheless dismissed.[214]

On January 4, 1991, the Court of Appeals for the Sixth Circuit reversed the district court decision in *Anspec*.[215] The Sixth Circuit's opinion is interesting because it walks the middle ground between *Smith Land* and its progeny on the one hand, and the *Anspec* district court decision on the other. The court of appeals followed *Smith Land* and *Louisiana-Pacific Corp. v. Asarco, Inc.*[216] in finding successor liability under CERCLA but declined to create a federal common law in doing so.[217] Instead, the court reached the same result by the more conservative means of statutory construction.[218]

The Sixth Circuit, in its *Anspec* decision, agreed with the lower court that the responsible party section of CERCLA was unambiguous.[219] The appeals court found, however, that although not ambiguous, the provision was "textually incomplete." [220] Although Congress had not stated explicitly that successor corporations were to be liable, the court nevertheless held that Congress had intended to include successor liability within the meaning of the word "corporation."[221] The court inferred this "intention" from "the universally accepted rule that a reference to liability of corporations includes successors."[222]

The appellate court in *Anspec* found additional support for imposing liability on successors. By referring to the general rules of statu-

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213. *See In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1010, 1014 (D. Mass. 1989)("Moreover, this Court observes that a ruling that the successor liability doctrine has no viability in the CERCLA context would be an invitation to corporations, both polluters and their acquirors, to avoid liability for past pollution through formalistic corporate slight of hand. . . . Congress could not have intended such a result."); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989)("Congressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost. 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."); United States v. Distler, 741 F. Supp. 637, 640 (N.D. Ky. 1990)("The statute does not define 'corporation' and the court finds it unlikely that Congress intended to abrogate the common law doctrine of successor liability implicitly. CERCLA is remedial in nature and the court should not interpret section [107(a)] in any way that apparently frustrates the statute's goals.").

214. 734 F. Supp. at 795.

215. 922 F.2d 1240 (6th Cir. 1991), *rev'g*, 734 F. Supp. 793 (E.D. Mich. 1989).

216. 909 F.2d 1260 (9th Cir. 1990).

217. 922 F.2d at 1245.

218. *Id.*

219. *Id.* at 1246.

220. *Id.*

221. *Id.*

222. *Id.*

tory construction contained in the United States Code, the court determined that the term "company," with reference to corporations, includes successors and assigns.[223] Finally, the *Anspec* court asserted that the notion of successor liability was consistent with the congressional intentions of enhancing hazardous waste site cleanup and of placing the costs and responsibilities for the cleanup on those most nearly responsible for creating the problem.[224]

Another noteworthy point of departure from other circuits was that, on remand of *Anspec*, the Sixth Circuit instructed the district court to apply Michigan law to the resolution of the successor liability and, if necessary, to the parental liability issues.[225] As previously noted, other courts have adopted a federal, rather than a state, standard.[226] Judge Kennedy emphasized the appropriateness of using state law in her concurrence in *Anspec*.[227] She maintained that no sufficiently compelling requirement of national uniformity overrode the traditional view of corporate law as state law.[228] Further, she maintained that the state laws regarding successor liability were very similar.[229]

C. *After* Anspec *and* Joslyn

Despite the apparent conservatism of the *Joslyn* and district court's *Anspec* decisions, these cases hardly can be described as a trend. Approximately two weeks after the *Anspec* district court decision, the Rhode Island District Court decided *United States v. Kayser-Roth Corp.*, which imposed CERCLA liability on a parent corporation both directly and by piercing the corporate veil.[230] In addition to finding liability, the *Kayser-Roth* opinion discussed the federal versus state choice of law issue.[231] The court squarely resolved the issue in favor of a federal common law for CERCLA cases to assure national uniformity, although the court acknowledged little difference between the two as far as piercing the corporate veil is concerned.[232]

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223. *Id.* at 1247 (citing 1 U.S.C. § 5 (1988)).
224. *Id.*
225. *Id.* at 1248.
226. *See supra* text accompanying notes 53-54.
227. *Id.*
228. *Id.* at 1249.
229. *Id.*
230. 724 F. Supp. 15 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).
231. *Id.* at 19-20.
232. The court quoted approvingly, "One can hardly imagine a federal program more demanding of national uniformity than environmental protection. . . . The need for a uniform

In contrast to the *Joslyn* decision, the *Kayser-Roth* court found that a parent corporation may be liable under CERCLA even absent veil-piercing if the parent exercises control over the management and operations of the subsidiary "sufficient to [be] . . . a de facto operator."[233] Although the court did not use the language of agency law, the court's discussion of the control element is reminiscent of a principal's liability for the acts of its agents.[234] Sufficient control was found by virtue of Kayser-Roth's control over its subsidiary's financial and budget matters, its required approval of the subsidiary's expenditures over $5000, its placement of its employees in almost all officer and director positions of its subsidiary, and its funneling of governmental contacts, including the handling of environmental matters, through the parent.[235]

The court further found that these same factors assisted Kayser-Roth in maintaining "overwhelming pervasive control" over the subsidiary sufficient to pierce the corporate veil and thus impose liability as an owner.[236] On that point, the court adopted a much more liberal view than *Joslyn*. Citing the need to honor congressional intent and the consequent need for an expansive reading of CERCLA, Judge Boyle had little difficulty finding that "public convenience, fairness and equity" required piercing the veil, though the judge obviously felt Kayser-Roth's control was dominant enough to pierce the veil even under a more difficult standard.[237] In a footnote, the *Kayser-Roth* court quoted favorably from the *Shore Realty* case to the effect that section 107(a) should not be construed to frustrate statutory goals "in the absence of a specific congressional intent otherwise."[238] Thus, the *Kayser-Roth* and *Shore Realty* courts indicated that a liberal statutory construction is appropriate until Congress states differently. The *Joslyn* court, on the other hand, indicated that a strict statutory construction should be applied until Congress dictates otherwise.

Kayser-Roth was affirmed on appeal to the United States Court of Appeals for the First Circuit.[239] That court found Kayser-Roth liable

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federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside." 724 F. Supp. at 20 (quoting *In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 31 (D. Mass. 1987)).

233. 724 F. Supp. at 22.

234. *Id.*

235. *Id.* at 24.

236. *Id.*

237. *Id.* at 22-24.

238. *Id.* at 23 n.6 (quoting New York v. Shore Realty, 759 F.2d 1032, 1045 (2d Cir. 1985)).

239. 910 F.2d 24 (1st Cir. 1990), *aff'g*, 724 F. Supp. 15 (D.R.I. 1989), *cert. denied*, 111 S. Ct. 957 (1991).

as an operator of a facility by virtue of its ownership and pervasive involvement with the culpable subsidiary.[240] While declaring it unusual for a parent to be an operator of a subsidiary and declining to set the standard for determining when a parent becomes an operator, the court did state that "at a minimum, it requires active involvement in the activities of the subsidiary."[241] The court distinguished *Joslyn* as a case involving owner, rather than operator, liability—an issue the First Circuit declined to address in light of its finding of operator liability.[242] The United States Supreme Court denied the petition for review of *Kayser-Roth*.[243]

In February 1990, a Kentucky district court specifically declined to follow the *Anspec* district court decision, which had not been reversed yet. Instead, that court followed the *Smith Land* holding regarding the applicability of successor liability in CERCLA cases.[244] The Kentucky court in *United States v. Distler* based its decision on the belief that Congress intended a federal common law to develop around section 107, that the words "persons" and "corporations" were ambiguous and thus in need of judicial interpretation, that Congress did not intend to supplant the common law successor liability doctrine, and that successor liability furthered the statutory purpose of placing cleanup costs on those responsible for the waste rather than on the public at large.[245]

Distler is a notable case for the test used in imposing liability. The case involved an asset purchase that, by the court's analysis, did not fall within any of the traditional exceptions for imposing liability on a purchaser.[246] According to the court, because a commonality of identity did not exist between the selling and purchasing corporations, the test for imposing liability failed.[247] The court then employed the "substantial continuity exception," although it had been effectively rejected by the Sixth Circuit in a case interpreting Kentucky law just three years earlier.[248] The court indicated that the U.S. Supreme Court

240. *Id.* at 27.
241. *Id.*
242. *Id.*
243. 111 S. Ct. 957 (1991).
244. United States v. Distler, 741 F. Supp. 637 (W.D. Ky. 1990).
245. *Id.* at 640.
246. See *supra* text accompanying notes 67-75 for a listing of the traditional exceptions.
247. 741 F. Supp. at 642.
248. The Sixth Circuit held that the expansion of the mere continuation exception represented by Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974), was not appropriate since Kentucky had, by case decision, adopted the traditional four exceptions discussed *supra* notes 67-75 and accompanying text. Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145 (6th Cir. 1987).

had utilized the substantial continuity exception in labor cases.[249] This public policy-justified exception was applicable to impose liability under the *Distler* facts because the purchasing corporation "retained essentially the same employees and management, operated out of the same physical facilities and produced the same product line, held itself out to the public as the same company, retained the same operating assets, and succeeded to all liabilities necessary to the orderly transition of ownership."[250] Thus, *Distler* stands for a liberal reading of the CERCLA liability provisions. As a result of the Sixth Circuit opinion in *Anspec*, however, *Distler* would have a different result if decided today. With *Anspec*'s directive to utilize state law, Kentucky's use of the four traditional exceptions would mean no "substantial continuity" exception and thus, by the *Distler* court's own admission, no liability.[251]

V. CONCLUSION

Without a decision by the United States Supreme Court or action by Congress, whether successors-in-interest and parent corporations are responsible parties under CERCLA will remain uncertain and subject to differing interpretations by the courts. In light of the Supreme Court's denial of certiorari in *Joslyn* on February 19, 1991,[252] a Supreme Court ruling seems unlikely. Because of the criteria the Supreme Court uses to determine whether to hear a case, the likelihood of a high court decision seems even more remote. One important criterion the Court considers in determining cases to hear is the number of instances in which a similar issue arises. Relatively few cases have arisen questioning the definition of PRPs, so it is unlikely that the Court would use its resources on such a matter. Another significant criterion the Supreme Court uses when deciding whether to hear a case is whether the lower courts have reached conflicting decisions. Until recently, very little disagreement has existed among the districts as to the appropriate interpretation of liability under CERCLA. The circuit court's reversal of *Anspec* further reduces the relatively recent disagreement among the districts. Only if the disagreement becomes

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249. *Distler*, 741 F. Supp. at 643 (citing Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973)); *see supra* text accompanying notes 82-97.

250. 741 F. Supp at 643. Curiously, despite quoting the California case of Ray v. Alad Corp., 19 Cal. 2d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977), which introduced the product line exception, the *Distler* court, in a footnote, noted that the government had not argued that exception and one is left to assume the court is not utilizing it. *Id.* at 642 n.5.

251. The *Distler* use of the substantial continuity exception in a CERCLA case was endorsed in United States v. Mexico Feed & Seed Co., 764 F. Supp. 565, 572-73 (E.D. Mo. 1991).

252. 111 S. Ct. 1017 (1991).

significantly more widespread would the Court be likely to hear such a case.

Clearly, the legislative history of CERCLA, brief as it is, reveals a Congressional intent to provide funding to clean up hazardous waste sites with as little imposition of costs on the general public as possible. Obviously, in situations involving hazardous waste dumped years ago, many of those who are most responsible for the waste are no longer in existence. Hence, if the goal is to impose the burden on those more closely related to the problem than the general public, the largest pool of PRPs is needed. In light of the liberal interpretations of CERCLA in the past, Congress' refusal to amend the statute seems to indicate a preference for a continuing liberal interpretation. These factors indicate that the lower court decision in *Anspec*, as well as the appellate court ruling in *Joslyn*, will be viewed as aberrations and most courts will continue to interpret the statute broadly.

The circuit court's decision overturning that of the district court in *Anspec* provides support for the belief that a broad interpretation of the statute will prevail. For those who wish to see a continuing broad interpretation of PRPs, the only distressing aspect of the decision was that the circuit court did not assert the need for federal common law in this area. The court reversed the case by applying state law. Certainly, embracing a federal common law that holds that the term "corporations" in section 107 includes successor corporations would guarantee the broadest interpretation of the statute.

Another reason to presume that a liberal interpretation will prevail is simply practical necessity and a furtherance of public policy. As an increasing number of sites requiring cleanup are found, the costs of cleanup obviously will far exceed the cost originally estimated at the time of CERCLA's enactment and even the cost estimated at the time of SARA's passage. One commentator recently pointed out that, "[p]ublic policy dictates that CERCLA section 107(A)(3) be given an ever increasingly liberal interpretation to keep up with the increasing incidence of hazardous substance contamination and decreasing willingness of hazardous substance generators to contribute their fair share to clean up the damage caused by their products."[253]

Broadening the scope of liability offers another potential advantage. The wider the net of liability extends, the more careful people will be in their land transactions. This added care may lead to the

253. Thornhill, *The Aceto Case: Suppliers of Hazardous Substances Being Held to their Common Law Duties*, 20 Env't Rep. (BNA) 1148, 1150 (1989). While this article focused on the specific expansion of only one aspect of section 107(a), the rationale is applicable to all four sections.

earlier detection of potential problems. The earlier these hazards are detected, the less costly their cleanup may be.

In situations involving either successors-in-interest or parent corporations, as the previous section demonstrates, the issue is seen by some courts as a matter of the degree to which the courts should engage in "judicial legislating." Many of Reagan's federal appointees are reluctant to interpret statutes liberally. This more conservative makeup may lead to a less liberal interpretation of the term "PRP," especially if President Bush appoints additional jurists with similar philosophies. A restricted interpretation of section 107(a), however, seems so far from Congressional intent that if the courts did reverse their tendency toward a liberal interpretation, Congress probably would act to make its intent explicit in the statute.

Perhaps the most convincing evidence of the aberrational nature of the *Joslyn* and *Anspec* decisions, however, is that they have not been followed. As pointed out in the previous section, *Kayser-Roth* was decided in direct contravention of *Joslyn*, quoting *Smith Realty* in favor of a liberal interpretation. In addition, a district court in Kentucky failed to follow *Anspec* in the *Distler* case. *Anspec* itself was overturned by the circuit court. In light of *Kayser-Roth*, *Distler*, and other recent liberal interpretations of CERCLA's liability provisions, a restrained view of the *Joslyn* decision seems to be the wisest approach.