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To Pierce or Not to Pierce? When Is the Question. Developing a Federal Rule of Decision for Piercing the Corporate Veil Under CERCLA

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TO PIERCE OR NOT TO PIERCE? *WHEN* IS THE QUESTION. DEVELOPING A FEDERAL RULE OF DECISION FOR PIERCING THE CORPORATE VEIL UNDER CERCLA

In 1980, as part of an ongoing trend in environmental legislation,[1] Congress passed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).[2] CERCLA provides a uniform response mechanism to contend with environmental contamination produced by hazardous substances.[3] The statute's goal, remedial in nature, is the prompt cleanup of hazardous waste sites.[4] Its liability provision[5] shifts response costs to the parties responsible for the

1. The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9657 (1982 & Supp. 1987), emerges as part of a chain of federal environmental legislation. Congress initiated this process with the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1970), the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1972), the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1976), (regulating hazardous waste treatment, storage, and disposal), and the Toxic Substance Control Act, 15 U.S.C. §§ 2601-2671 (1978), (focusing on the production of new chemicals).

2. 42 U.S.C. §§ 9601-9657 (1982 & Supp. 1987), *as amended by* Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499 (Oct. 17, 1986).

3. As its preamble indicates, CERCLA's goal is "[t]o provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." Preamble, Superfund, Pub. L. No. 96-510 (1989).

4. Stafford, *Why Superfund Was Needed*, EPA J., June 1981, at 9. Senator Robert Stafford, a sponsor of the Superfund bill, summarized the motivation behind the Senate bill: Superfund was intended to "respond to emergencies caused by chemical poisons, and to seek to discourage the release of those chemicals into the environment." *Id.* at 10. Moreover, Stafford's comments analogizing Superfund to natural disaster assistance programs reinforce the notion that the Act is fundamentally remedial in scope. *Id.* Thus, rather than establishing standards or regulations for the disposal of hazardous waste, Superfund concentrates on cleaning up the contamination resulting from inadequate disposal practices.

5. 42 U.S.C. § 9607 (Supp. 1987). Section 9607(a) specifies the following:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
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> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from

pollution.

The liability mechanism appears straightforward. It imposes liability on a discrete group of individuals associated with the hazardous waste contamination.[6] Yet when a party seeks recovery from a parent corporation for contamination produced by a subsidiary, courts have difficulty applying the standards. The source of the difficulty lies in interpreting CERCLA's liability provisions in light of traditional corporate law concepts, which dictate an almost unswerving respect for the integrity of the corporate form.[7] Because of this respect for the corporate form, courts hesitate to impose liability upon shareholders, corporate or individual. Exceptions exist, however, and the courts, both state and federal,[8] have developed standards for "piercing the corporate veil."[9]

In developing standards for piercing the corporate veil in the CERCLA context, courts have attempted to fashion a federal rule of decision[10] that will serve the goals of CERCLA while remaining faithful to corporate law tradition. Whether a court is willing to disregard the corporate form often depends on which of these two aspects the court places greater emphasis.

This Note examines the two existing standards for disregarding the corporate entity to impose liability under CERCLA:[11] 1) an alter ego theory based on the general corporate law doctrine; and 2) a direct liability theory based on the statute's "owner/operator" language. Part I describes the statutory framework of CERCLA with particular attention

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which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable . . . .

42 U.S.C. § 9607(a)(1)-(4) (Supp. 1987).

6. *See supra* note 5.

7. A fundamental purpose of incorporating a business enterprise is the advantage of limiting the investors' liability for the debts of the company. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(6) (Supp. 1988); N.Y. BUS. CORP. LAW § 402(b) (McKinney Supp. 1990). For a recent article extolling the economic virtues of limited liability, see Easterbrook & Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985).

8. For a fine overview of state and federal alter-ego standards, see Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853 (1982).

9. This Note utilizes the terms "piercing the corporate veil," "alter ego" liability, "disregard of the corporate entity," and similar phrases interchangeably. The varying terminology implies no semantic difference.

10. United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D.R.I. 1989); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1200-1202 (E.D. Pa. 1989); *In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 30-34 (D. Mass. 1987). *Contra* Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 226 (W.D. La. 1988) (Fifth Circuit standard for alter ego liability identical to state standard).

11. *See infra* Parts II and III.

given to the statute's liability provision. Part II traces the development of the more restrictive alter ego standard. Part III focuses on liability derived from the statute's owner/operator language. Part IV assesses the advantages and disadvantages of these two approaches in light of the goals of CERCLA and the common law alter ego doctrine. After weighing the needs served by the two approaches and in the absence of a clear congressional directive, this Note concludes that the less stringent owner/operator formula is preferable. However, because the balance struck between the two alternatives only narrowly favors the owner/operator standard, this Note further suggests that Congress must clarify the scope of parent liability under CERCLA.

I. THE STATUTORY FRAMEWORK

Beginning in the early 1970s, concern for the environment assumed a focal position in the mind of the American public.[12] As a result, Congress passed, over the course of the past two decades, a series of statutes designed to address environmental problems.[13] CERCLA developed out of deep concern about the absence of national regulation governing hazardous substance releases, particularly from inactive or abandoned sites.[14] Despite the importance of the subject matter,[15] the final bill was

12. The year 1970 initiated what some commentators term "the environmental decade." F. Anderson, D. Mandelker & A. Tarlock, Environmental Protection: Law and Policy 6 (unpublished manuscript). These authors suggest two primary reasons for the sudden surge in environmental awareness: the contamination of suburban communities to which many had fled to escape inner-city pollution and the growth in the chemical industry. *Id.* at 6-7 (citing 10 CEQ ANN. REP. 1-15 (1979)).

A 1980 study commissioned by the Council on Environmental Quality, the Departments of Energy and Agriculture, and the Environmental Protection Agency revealed that the environmental movement has maintained the momentum achieved in the early 1970s. COUNCIL ON ENVIRONMENTAL QUALITY, PUBLIC OPINION ON ENVIRONMENTAL ISSUES 41 (1980). The Council concluded that the Opinion Research Corporation's 1977 advice continued to hold true: "business . . . [must] learn . . . that environmental protection no longer is the exclusive domain of a handful of . . . environmental activists, but the continuing concern of the public as a whole." *Id.* at 43-45.

13. *See supra* note 1.

14. Stafford, *supra* note 4, at 9-10. To a large extent, the public and Congress reacted to a series of environmental disasters: closure of parts of the Great Lakes to commercial fishing due to chemical contamination; the contamination of a large percentage of drinking water and irrigation wells in the San Joaquin Valley from pesticides; and the infamous Love Canal incident. *Id.*

Senator Mitchell, a sponsor of the final bill, stated that Superfund "represents a positive step in controlling the spread of chemical wastes, cleaning up inactive dumpsites as well as ongoing releases of hazardous substances into the environment." 126 CONG. REC. S30,114 (daily ed. Nov. 18, 1980), *reprinted in* 3 ENVIRONMENT AND NATURAL RESOURCES POLICY DIV. A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF

not enacted until the last hours of the 96th Congress and represents a last minute compromise between the Senate and the House.[16]

Hastily and broadly drafted, CERCLA is an ambiguous statute. Moreover, because Congress passed the bill in such limited time, the legislative history provides little guidance to clarify its open-ended provisions.[17] Thus, the courts are left to fill in the gaps.[18]

Section 107 sets forth the terms for liability under CERCLA.[19] The Act creates four broad categories of persons subject to liability: present owners and operators; owners and operators at the time of disposal; persons who arranged for disposal; and transporters who selected the site.[20] Because of the statute's broad language, creative government attorneys

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1980 (SUPERFUND), at 201 (1983) [hereinafter LEGISLATIVE HISTORY OF CERCLA]. *See also* State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1311-12 (N.D. Ohio 1983) (legislative history of the Act indicates concern for existing and abandoned sites).

15. Senator Mitchell underscored the urgent need for such legislation by noting the Surgeon General's suggestion "that toxic wastes may be the most serious threat to public health in our country in the next decades." LEGISLATIVE HISTORY OF CERCLA, *supra* note 14, at 202.

16. LEGISLATIVE HISTORY OF CERCLA, *supra* note 14, at 199.

17. Both courts and commentators recognize that CERCLA's provisions lack clear guidelines and that the legislative history adds little to clarify them. *In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 25-26 n.2 (D. Mass. 1987) (collecting cases); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985). *See also* Reed, *CERCLA 1985: A Litigation Update*, ENVTL. L. REP. (Envtl. L. Inst.) 10,395 (1985) [hereinafter CERCLA 1985]; Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 987 (1986).

CERCLA's amendments in 1986—the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499—failed to clarify the scope of liability in the parent/subsidiary context. Burt, *Cost-Recovery Actions After the Superfund Amendments and Reauthorization Act of 1986*, in MINIMIZING LIABILITY FOR HAZARDOUS WASTE MANAGEMENT 167 (ALI-ABA Apr. 1987) (overview of liability provision changes).

18. *See* Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988) (noting that CERCLA's sponsors intended courts to utilize common law to supplement statutory gaps); United States v. Dart Indus., Inc., 847 F.2d 144 (4th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985). One commentator notes that CERCLA "has been shaped in court more than any other federal pollution control statute." *CERCLA 1985*, *supra* note 17, at 10,395.

19. 42 U.S.C. § 9607(a)(1)-(4) (Supp. 1987). For full text of the provision, see *supra* note 5.

Courts generally construe the provision expansively in order to impose liability and recover cleanup costs. *See, e.g.*, Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671 (D. Idaho 1986) ("Congress did not intend a restrictive reading of CERCLA"); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (establishing standard of strict liability); United States v. A & F Materials Co., 578 F. Supp. 1249, 1255-57 (S.D. Ill. 1984) (establishing joint and several liability); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984) (holding lessees who operated facility liable as owners); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 843-45 (W.D. Mo. 1984) (adopting standard of strict liability), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

20. 42 U.S.C. §§ 9601-9657, *supra* note 5.

often seek to impose liability on parent corporations for contamination caused by their subsidiaries.[21] The courts thus find it necessary to identify the circumstances under which to disregard the subsidiary's corporate form.

A threshold inquiry involves whether to utilize state veil-piercing standards or develop a federal rule of decision. Courts addressing the issue choose federal over state law.[22] Their reason is that the need for even-handed imposition of a nationwide standard of liability outweighs any problems presented by a disregard for state law.[23] However, despite agreement on the need for a federal standard for disregarding the corporate entity, courts are split on the form the rule should take. Courts premise their decision whether to pierce the corporate veil under CERCLA on one of two theories of liability: 1) an alter ego theory or 2) a direct liability theory.[24]

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21. Government attorneys have sought strict, joint and several liability in suits against corporations as well as direct liability of officers and shareholders. *CERCLA 1985*, *supra* note 17, at 10,295, 10,401 n.68 (citing EPA memorandum from Courtney M. Price on Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (unpublished)). Moreover, after the passage of SARA and the addition of a settlement provision, 42 U.S.C. § 9622 (Supp. 1987), the EPA still saw "aggressive use" of its judicial enforcement authority as a significant tool in compelling private party cleanups and cajoling settlement. EPA Memorandum from J. Winston Porter and Thomas L. Adams, Jr. on Interim Guidance: Streamlining the CERCLA Settlement Decision Process (Feb. 12, 1987), *reprinted in* MINIMIZING LIABILITY FOR HAZARDOUS WASTE MANAGEMENT, at 63, 66 (ALI-ABA Apr. 1987).

22. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) held that when a federal statute fails to provide a particular rule of law, federal courts have the authority to fashion a federal common law rule. *See also* United States v. Nicolet, 712 F. Supp. 1193, 1201 (E.D. Pa. 1989) ("when a federal statute is silent as to the choice of law to be applied, but overriding federal interests exist, courts should fashion uniform rules of decision.") (citing Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943)).

23. United States v. Nicolet, Inc., 712 F. Supp. at 1201-1202; United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D.R.I. 1989); *In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 31-32 (D. Mass. 1987) ("One can hardly imagine a federal program more demanding of national uniformity than environmental protection.").

In resolving the state/federal law question, the courts seek guidance from *Kimbell Foods*, which sets forth a three prong test for determining when a federal rule is necessary: first, the need for national uniformity; second, "whether application of state law would frustrate specific objectives of the federal program"; and third, "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Kimbell Foods*, 440 U.S. at 728-29. Interestingly, it was a student who first advocated adopting a federal rule of decision based on the *Kimbell Foods* test. *See* Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 999-1003 (1986).

24. *See infra* Parts II and III.

II. THE COMMON LAW ALTER EGO ANALYSIS

A. Jurisdiction

The applicability of the common law alter ego doctrine to CERCLA's liability provisions initially arose in the jurisdictional context.[25] Non-resident parent corporations became targets of complaints alleging responsibility for environmental contamination attributed to their subsidiaries.[26] Many of these complaints against parent corporations were dismissed for lack of personal jurisdiction.[27] In assessing whether the parent's contacts with the state satisfied personal jurisdiction requirements, the courts focused on the degree of "separateness" between the parent and the subsidiary.[28] Highlighting such factors as the intermingling of finances, the adequacy of the subsidiary's capitalization, and the maintenance of corporate formalities,[29] courts adopted a test analogous to that utilized in the typical veil-piercing situation.[30] If the resident sub-

25. Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27 (E.D. Mo. 1985); United States v. Bliss, 108 F.R.D. 127 (E.D. Mo. 1985). *See also infra* notes 32-42 and accompanying text.

26. In *Bliss*, the government sought recovery from a group of associated corporations: Syntex Corporation, organized under Panamanian law, Syntex Laboratories, Inc. and Syntex (U.S.A.), Inc., both incorporated in Delaware. The government contended that these corporations exercised control over a polluting subsidiary, Syntex Agribusiness. *Bliss*, 108 F.R.D. at 129, 131. The basis for seeking recovery from this group arose from a complex series of corporate acquisitions and reorganizations which created a chain of ownership linking each of the parties. *Id.* at 132. *Wehner* involved a private action for response costs against the same subsidiary. *Wehner*, 616 F. Supp. at 28. Although Syntex (U.S.A.) and Syntex Corporation were both named defendants, the court's decision involved only Syntex Corporation's motion to dismiss. *Id.*

27. *Wehner*, 616 F. Supp. at 30 (dismissing complaint against Syntex Corp.); *Bliss*, 108 F.R.D. at 132-33 (dismissing complaint against Syntex group for lack of personal jurisdiction under "control" theory). The *Bliss* court did find Syntex (U.S.A.) amenable to jurisdiction on a theory of successor corporation liability. *Bliss*, 108 F.R.D. at 133-34.

28. *Bliss*, 108 F.R.D. at 131. The *Bliss* court explained that absent a provision for nationwide service of process, exercise of jurisdiction over a non-resident rests upon the terms of a state's long-arm statute and the constraints of due process. *Id.* at 129. To satisfy those two elements, the non-resident must have minimum contacts with the state in which jurisdiction is sought. *Id.* at 130. When the non-resident is a parent corporation, jurisdiction may rest upon the actions of its subsidiary and a determination that those actions are attributable to the parent. *Id.* at 131. Thus, the jurisdictional inquiry focuses upon the nature of the parent-subsidiary relationship. *Id.* at 131-32. *See also Wehner*, 616 F. Supp. at 29-30.

29. *Wehner*, 616 F. Supp. at 29-30. *Wehner* recognized, however, that even when a subsidiary is wholly-owned by the parent and thus the parent exercises considerable control over the subsidiary, disregard of corporate separateness is not mandated. *Id.* at 29.

The *Bliss* court also appealed to traditional concepts of corporate alter-ego doctrine, indicating that the test for subjecting the parent to jurisdiction is "whether the parent so dominates and controls the subsidiary that the companies lose their separate identities." *Bliss*, 108 F.R.D. at 131. The *Bliss* standard is merely a generalized statement of the factors suggested by *Wehner*.

30. In *Wehner*, the court emphasized the fact that questions of jurisdiction over non-resident

sidiary was merely an extension of the parent, courts imputed the subsidiary's contacts with the state to the parent.[31] Thus, personal jurisdiction over the subsidiary established jurisdiction over the parent.[32]

The seminal case in the jurisdictional context is *In re Acushnet River & New Bedford Harbor Proceedings*.[33] *Acushnet River* arose out of an attempt to recover costs incurred in the cleanup of the Acushnet river and the New Bedford harbor.[34] The government named RTE Corporation (RTE) as one defendant.[35] RTE's wholly-owned subsidiary, Aerovox, Inc. (Aerovox), had contaminated the river and harbor with highly toxic polychlorinated biphenyls.[36] Recognizing that RTE lacked adequate contacts with the forum state, the government attempted to base personal jurisdiction on Aerovox's status as RTE's alter ego.[37]

Drawing upon caselaw from other contexts, the court recognized "public convenience, fairness and equity" as the guiding principles in developing federal common law alter ego standards.[38] Applying these general principles, the court suggested several factors relevant to the alter ego inquiry: undercapitalization of the subsidiary; extensive control by the shareholder; shared property; and absence of corporate formalities

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corporations are controlled by precepts of corporate law; that is, as two separately formed corporations, the parent and subsidiary are presumably distinct entities. *Wehner*, 616 F. Supp. at 29-30. Therefore, the party seeking to exert jurisdiction must show that despite separate incorporation, the actions of the subsidiary are in reality the actions of the parent. *Id.*

31. *Bliss*, 108 F.R.D. at 131.

32. *Id.*

33. 675 F. Supp. 22 (D. Mass. 1987).

34. *Id.* at 22.

35. *Id.* at 25.

36. *Id.*

37. *Id.* at 28. Though finding several factors suggesting unity between the two entities, the district court declined to pierce the corporate veil and exercise jurisdiction over the parent. Specifically, the court found the following: RTE used a centralized cash system in which Aerovox deposited its cash receipts; RTE guaranteed an Aerovox loan; loans to Aerovox from RTE were accomplished without formal loan agreements; large Aerovox expenditures required RTE approval; Aerovox provided RTE with various financial reports; the two companies shared the same law firm; and an umbrella insurance policy purchased by RTE named Aerovox as an insured. *Id.* at 34.

38. *Id.* at 33 (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981)). The *Acushnet River* court also cited Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979), which considered the veil piercing issue in the context of the jurisdiction provision of the Labor Management Relations Act, 29 U.S.C § 185(a) (1947). The *Seymour* court suggested that three elements recur in the federal alter ego doctrine: the extent to which the corporate form is respected by the shareholders, potential unfairness to the parties if the court respects the corporate form, and fraudulent intent in incorporation. *Id.* at 1111. At the same time, the court recognized that one factor may receive more emphasis depending on the facts of the case as well as the policies of the statute under which the suit is brought. *Id.*

and separateness.[39]

The court rejected a standard that placed paramount importance on the underlying goals of the statute,[40] but acknowledged that those policies should play some role in the decision.[41] Specifically, the court suggested that the parent's role in the subsidiary's hazardous waste management program and policies was a key factor in the alter ego analysis.[42]

B. Statutory Construction

Development of a standard for piercing the corporate veil under CERCLA moved beyond the jurisdictional context in *Joslyn Corp. v. T.L. James & Co.*[43] *Joslyn* involved a private action to recover costs associated with the cleanup of a former wood treatment plant.[44] Joslyn Corporation acquired the contaminated plant through the purchase of all the assets of Lincoln Creosoting Co. (Lincoln), a subsidiary of T.L. James Co.[45] Lincoln was dissolved shortly after the sale to Joslyn.[46] After the Louisiana Department of Environmental Quality ordered a clean-up of the plant, Joslyn instituted a suit against T. L. James seeking compensation for the clean-up costs.[47]

As in the personal jurisdiction cases, the district court in *Joslyn* relied upon traditional alter ego factors in evaluating the parent-subsidiary relationship.[48] However, the district court stringently adhered to the basic

39. *Acushnet River*, 675 F. Supp. at 33 (citations omitted). The court flatly rejected the government's argument for a federal common law alter ego standard which would allow veil-piercing when the parent-subsidiary relationship went beyond mere investment. *Id.* at 32. It found such a standard to be completely unsupported by state or federal law. *Id.*

40. *Id.*

41. *Id.* at 33-34. The government advocated a standard for disregarding the corporate form, placing primary importance on equitable principles rather than on the factors articulated by the court. *Id.* at 31-32. The court rejected such a focus as setting too low a threshold for piercing the corporate veil and thus subverting one of the primary purposes of incorporation, limited liability. *Id.* at 32.

42. *Id.* at 33-34.

43. 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990).

44. 696 F. Supp. at 224.

45. *Id.* at 228-30.

46. *Id.* at 230.

47. *Id.* at 223-24.

48. *Id.* at 227. The court concluded that establishing a federal rule of decision for parent liability under CERCLA was unnecessary because the alter ego standard of the Fifth Circuit did not vary substantially from state law. *Id.* at 226.

The court deemed relevant the following factors: commonality of stock, directors or officers;

doctrine of corporate separateness,[49] and attached negligible significance to equitable considerations.[50] After assessing the parent-subsidiary relationship under this more stringent standard, the district court refused to pierce the corporate veil.[51]

On appeal, the Fifth Circuit emphatically affirmed the "mere instrumentality" approach as the appropriate veil piercing standard under CERCLA.[52] The court maintained that departure from the well-entrenched tenet of limited liability[53] requires a clearer congressional directive.[54] Because CERCLA does not explicitly include parent corporations within the definition of owner/operator[55] and the legislative history fails

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shared financial statements; subsidiary undercapitalization; subsidiary's only business comes from the parent; and daily operations are not separate. *Id.* at 227.

49. The *Joslyn* court's analysis takes its cue from cases piercing the veil only when the parent's control over the subsidiary "amounts to total domination . . . to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of" the parent. *Id.* at 227 (quoting Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1103 (5th Cir. 1973)). While the *Acushnet River* court drew upon the policies of the Act and equitable concerns in its analysis, the *Joslyn* court assessed corporate separateness as if in a vacuum. *Compare Acushnet River*, 675 F. Supp. at 33-35 *with Joslyn*, 696 F. Supp. at 225-26. Under this standard, disregard of the corporate entity requires that the parent's misuse of its control over the subsidiary proximately caused the injury. *Joslyn*, 696 F. Supp. at 225-26. The court in *Joslyn* adamantly rejected the theory of direct liability adopted by other courts. *See infra* Part III. It concluded that those courts improperly departed from corporate law principles in the absence of explicit congressional mandate. *Id.* at 225. The court found disregard of the limited liability standard a complete derogation of established corporate law. *Id.*

50. *Joslyn*, 696 F. Supp. at 225. Citing with approval Homan & Crimen, Inc. v. Harris, 626 F.2d 1201, 1208, *reh'g denied*, 633 F.2d 582 (5th Cir. 1980), *cert. denied*, 450 U.S. 975 (1981), the court emphasized that despite the often artificial nature of corporate-shareholder separateness, substance is rarely subordinated to form, and injustice and unfairness are inadequate bases for disregard of the legal fiction. 696 F. Supp. at 225.

51. *Joslyn*, 696 F. Supp. at 231. While Lincoln and T.L. James shared corporate officers and T.L. James controlled the financial affairs of its subsidiary, the court found that the relationship lacked the pervasive unity required to pierce the corporate veil. *Id.* at 230-31.

52. Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990).

53. Echoing the lower court's argument, the Fifth Circuit stated that to find a parent corporation liable as an owner/operator "would dramatically alter traditional concepts of corporation law." *Id.* at 82.

54. *Id.* at 83.

55. *Id.* at 82. The Fifth Circuit clearly found untenable an interpretation of the owner/operator language within section 107 imposing direct liability upon the parent corporation. The court found congressional intent to so expand parent corporation liability lacking in light of the fact that CERCLA defines the term "controlled" in relation to persons formerly associated with facilities conveyed to the government by abandonment, bankruptcy, tax delinquency or otherwise. *Id.* at 83 (citing 42 U.S.C. § 9601(20)(A)(iii)). The statute contains no similar control language with respect to other owner/operators. *Id.* (citing 42 U.S.C. § 9601(20)(A)(ii)).

to resolve the issue,[56] the court felt compelled to adhere to a standard requiring the highest deference to the corporate form.[57] The Fifth Circuit concluded that disregarding the corporate entity is justified only when recognition of the corporate form is tantamount to fraud.[58]

III. THE "DIRECT LIABILITY" THEORY

A. Officer and Shareholder Liability

The direct liability approach originated in cases in which plaintiffs sought recovery from individual corporate directors, officers[59] or shareholders for costs incurred in cleaning up the corporation's hazardous waste.[60] Courts impose liability on individual officers or shareholders

56. *Id.* at 82.

57. *Id.* at 83-84. Not all courts have reached the same conclusion concerning the failure of Congress to address corporate liability under CERCLA. In *United States v. Mottolo*, the court found those same factors, broad language and lack of explicit directive, along with the statute's strict liability framework, to imply that "CERCLA places *no* importance on the corporate form." 695 F. Supp. 615, 624 (D.N.H. 1988) (emphasis added).

58. *Joslyn*, 893 F.2d at 83 ("Veil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate a fraud or avoid personal liability.") (emphasis in original).

The Fifth Circuit's decision reflects an emerging trend toward limiting the scope of liability under Superfund. The Court of Appeals cited with approval a Seventh Circuit decision similarly refusing to expand the definition of owner/operator. *Id.* at 83 (citing Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988)). In *Edward Hines*, the court responded to the argument that the underlying goals of CERCLA should guide its construction of the statute:

> 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 limits. Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement legislative choices.

Edward Hines, 861 F.2d at 157 (citations omitted). Thus, the Seventh Circuit declined to hold a supplier of wood-preserving chemicals liable as an owner/operator even though the supplier built a wood treating plant for a lumber company, trained the lumber company's employees to operate the plant's equipment and allowed the lumber company to use its trademark for the treated wood. The court concluded that, because the lumber company controlled the employees and the manufacture and sale of the treated wood, the supplier was not liable. *Id.* at 156-58.

59. United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 827-28 (W.D. Mo. 1984) ("NEPACCO"), *aff'd in relevant part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987) (shift supervisor, vice-president, founder, and president); United States v. Bliss, 667 F. Supp. 1298, 1302 (E.D. Mo. 1987) (president and vice-president); United States v. Mottolo, 605 F. Supp. 898, 913 (D.N.H. 1985) (president and treasurer); United States v. Wade, 577 F. Supp. 1326, 1330 (E.D. Pa. 1983) (owners of dumpsite and disposal company); United States v. Carolawn Co., 14 Envtl. L. Rep. 20,699 (Envtl. L. Inst.) (D.S.C. June 15, 1984) (officers).

60. New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (officer and stockholder); *Mottolo*, 605 F. Supp. at 913; *NEPACCO*, 579 F. Supp. at 827-28. In these cases the individuals from whom recovery was sought were both corporate officers or directors *and* shareholders.

primarily in two contexts:[61] 1) when the person arranges for disposal[62] or 2) when the person owns or operates a facility.[63]

In the first context, liability under section 107(a)(3) is based on whether the particular individual has specific responsibility for the hazardous waste disposal practices.[64] Section 107(a)(3) allows recovery when the party "arranged for disposal or treatment" or transport of the hazardous waste.[65] Despite the fact that such an arrangement falls within the official's corporate duties and, therefore, arguably is on behalf of the corporation,[66] the courts' broad interpretation of section 107(a)(3)[67] precludes the need to utilize alter-ego theories of liability.[68]

In the second context courts impose liability when the particular individual exerts control over the management of the polluting corporation sufficient to characterize the party as the owner or operator of the facility.[69] While overall control is significant[70] courts weigh heavily the indi-

61. An exception to these two bases for liability is United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983). In *Wade*, the individual corporate officer/shareholder did not own the hazardous waste site itself. Rather, he owned the disposal company which processed the hazardous materials. *Id.* at 1330. The court considered the officer's liability under § 107(a)(4), which imposes liability on transporters. *See supra* note 5. It is unclear why the court chose this particular section. However, the court's analysis does not depart from the theories utilized in the cases considering liability under §§ 107(a)(2) or (3). *See, e.g., Carolawn*, 14 Envtl. L. Rep. at 20,700. In *Wade*, the court concluded that the corporate form could not shield an officer from liability if he or she participates in the wrongful act. 577 F. Supp. at 1341 (citations omitted).

62. 42 U.S.C. § 9607(a)(3) (Supp. 1987). *See supra* note 5.

63. 42 U.S.C. § 9607(a)(1) (Supp. 1987). *See supra* note 5.

64. *NEPACCO*, 579 F. Supp. at 847 (vice-president); *Bliss*, 667 F. Supp. at 1306 (chief executive officer); *Mottolo*, 605 F. Supp. at 914 (president, treasurer and sole shareholder). As noted earlier, specific responsibility could also arise from § 9607(a)(4). *See supra* note 61. Because the analysis does not differ from that issue under § 9607(a)(3), it will not be treated separately. *See* United States v. Wade, 577 F. Supp. 1326, 1341 (E.D. Pa. 1983) (discussion of disposal company owner's liability under § 9607(a)(4)).

65. *See supra* note 5 for the text of section 107(a)(3).

66. Several courts support their interpretation of individual officer liability by drawing upon the common law notion that where an employee participates in wrongful conduct he or she may not seek protection of the corporate shield. *Mottolo*, 605 F. Supp. at 914 (corporate officer may be held liable if he personally participates in the wrongful, injury-producing act); *Carolawn*, 14 Envtl. L. Rep. at 20,700 (no protection for tortious conduct); *Wade*, 577 F. Supp. at 1341 (same).

67. For example, the *NEPACCO* court advocated construing § 9601(21)'s definition of "person" liberally so as to include both the employee and the corporation. *NEPACCO*, 579 F. Supp. at 848.

68. *Id.* at 849; *Mottolo*, 605 F. Supp. at 913-14 (state's failure to raise alter-ego doctrine did not entitle individual to judgment, as liability may be imposed directly under § 9607(a)(3)).

69. The definition of "owner or operator" is found at 42 U.S.C. § 9601(20) (Supp. 1987). The portion relevant to this Note provides:

The term "owner or operator" means . . . in the case of an onshore facility or an offshore

vidual's participation in the hazardous waste management procedures as well.[71]

Although the cases dealing with individual liability premise recovery on different subdivisions of section 107,[72] they all focus upon the individual's relationship to the polluting corporation.[73] Interpreted literally, section 107 links liability to a person's control over the facility's disposal practices, either through participatory ownership[74] or through actual conduct.[75] Therefore, the extent of the person's responsibility for the ac-

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facility, any person owning or operating such facility. . . . Such term does not include a person, who without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.

42 U.S.C. § 9601(20)(A)(ii) (Supp. 1987).

While CERCLA's liability provision, section 107(a)(1), utilizes the conjunctive, "owner *and* operator," courts interpret the phrase in the disjunctive and premise liability solely on the "operator" portion. In New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985), the Second Circuit held that a stockholder who participated in the management of the responsible corporation was liable as an operator under section 107. The court based its analysis on the "owner *or* operator" language found within the definitional provision. *Id.* The court interpreted the section, which exempts from the definition of owner or operator "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility," as an implicit recognition that stockholders who *do* participate in management are liable under CERCLA. *Id.* at 1052 (quoting 42 U.S.C. § 9601(20)(A) (Supp. 1987)). Though acknowledging that the stockholder in question could be held liable as an owner/operator as well, the court restricted its holding to the operator language. *Id. See also Shore Realty*, 759 F.2d at 1037, 1052 (majority shareholder found liable as an operator); *NEPACCO*, 579 F. Supp. at 848-49 (vice-president and majority shareholder found liable as an owner/operator); *Carolawn*, 14 Envtl. L. Rep. at 20,700 (corporate officers operated facility within the general scope of § 107).

70. The *NEPACCO* court focused on the defendant vice-president's capacity and power to control and abate the hazardous waste disposal practices at the site. *NEPACCO*, 579 F. Supp. at 849. This language points to a larger spectrum of potential liability because it suggests that mere ability rather than actual participation in disposal practices is a sufficient ground for responsibility. *Id.* Moreover, the court's acknowledgement that to shield such a corporate officer from liability would frustrate Congress' purpose by "exempting a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA] reinforces this interpretation." *Id.* (quoting Apex Oil Co. v. United States, 530 F.2d 1291, 1293 (8th Cir. 1976)). The scope of the *NEPACCO* decision remains unclear, however, because the vice-president *had* established and directed the facility's waste disposal procedures. *Id.* at 847. *See also Carolawn*, 14 Envtl. L. Rep. at 20,700.

71. *NEPACCO*, 579 F. Supp. at 848; *Carolawn*, 14 Envtl. L. Rep. at 20,700.

72. *See supra* notes 60-70 and accompanying text.

73. *See supra* notes 59-61, 69-70.

74. Courts clearly include establishing or administering a facility's waste disposal program in defining participatory "ownership". *U.S. v. Northernaire Plating Co.*, 670 F. Supp. 742, 747-48 (W.D. Mich. 1987); *Mottolo*, 605 F. Supp. at 913-14. Liability may also arise from control over the general operations of the corporation. *Shore Realty*, 759 F.2d at 1052; *NEPACCO*, 579 F. Supp. at 849; *Carolawn*, 14 Envtl. L. Rep. at 20,700. *See also supra* notes 68-69.

75. *Bliss*, 667 F. Supp. at 1306 (actually arranged for disposal of waste); *Mottolo*, 605 F. Supp. at 914 (personal participation); *NEPACCO*, 579 F. Supp. at 847 (direct responsibility for arranging transportation of waste).

tivities of the corporation emerges as the dominant factor in determining liability. Because the definition of the term "person" within CERCLA includes corporations,[76] courts apply theories of individual shareholder liability in the context of parent corporation liability.[77]

B. Direct Parent Liability

Idaho v. Bunker Hill Co.,[78] extended the theory of liability developed in the individual shareholder/officer cases to corporate shareholders.[79] The court held that a parent corporation is directly liable for its subsidiary's pollution if the parent owns or operates the subsidiary within the meaning of CERCLA.[80] The court's test focused on the parent's capacity to discover hazardous releases and to abate them, and on the parent's power to control the activities of persons responsible for the pollution.[81]

Similarly, in *Colorado v. Idarado Mining Co.*,[82] the court found that the parent was an operator and, therefore, held it directly liable for its

76. CERCLA defines "person" in § 9601(21) as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (Supp. 1987).

77. *See infra* notes 79-94 and accompanying text.

78. 635 F. Supp. 665 (D. Idaho 1986).

79. In *Bunker Hill*, the state sought to impose liability on Gulf Corporation whose wholly-owned subsidiary, Bunker Hill Company, caused the contamination. *Id.* at 670.

80. *Id.* at 672. More recently in Vermont v. Staco, Inc., 684 F. Supp. 822 (D. Vt. 1988), a court employed reasoning similar to that in *Bunker Hill* in holding individual managing shareholders, the parent corporation and a sister subsidiary liable for response costs. Though providing little explanation, the court seemed to consider the control and management exerted over the offending subsidiary as the operative element. *Id.* at 831-32.

81. *Bunker Hill*, 635 F. Supp. at 672. The court concluded in the case at bar that the parent exercised the requisite control over its subsidiary to be considered an owner/operator under CERCLA. *Id.* at 672. The court's decision stemmed from a fact-based analysis similar to that employed in the more stringent alter ego cases. *See supra* notes 25-58 and accompanying text. The *Bunker Hill* court found that the parent controlled its subsidiary's board of directors, required the subsidiary to obtain permission prior to any substantial expenditure for pollution abatement procedures, derived significant financial benefit from the undercapitalized subsidiary's business and could overrule the subsidiary's management decisions. *Id.* at 670.

While the *Bunker Hill* court found the reasoning in *NEPACCO*, persuasive, the district court in *Rockwell International v. IU International Corp.* viewed the definition as too expansive. 702 F. Supp. 1384, 1390 (N.D. Ill. 1988). The *Rockwell* court rejected that portion of the *NEPACCO* decision suggesting that capacity arising solely from financial control is sufficient to hold a parent liable as an owner. *Id.* at 1390 (citing United States v. Mirabile, 10 Chem. & Rad. Waste Lit. Rep. 668, 670-71 (E.D. Pa. 1985)). Expressly declining to address whether the parent could be held liable under a veil-piercing analysis, the court found the parent liable as an operator. *Rockwell*, 702 F. Supp. at 1391.

82. 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578 (D. Colo. April 29, 1987).

subsidiary's pollution.[83] The court relied on several of the factors used in the veil-piercing analysis noted in *Acushnet River*[84] and *Joslyn*.[85] The court also held liable as an operator a sister corporation charged with providing employees for the subsidiary.[86] The court considered CERCLA's purpose in construing its provisions and in determining the standard governing the imposition of liability.[87]

C. *Translating Direct Liability into a Federal Rule*

In *United States v. Nicolet*,[88] the court converted the *Bunker Hill* test for direct parental liability into a federal common law standard for piercing the corporate veil.[89] Promoting the goal of preventing "fraud, illegality or injustice, or . . . [the] defeat [of] public policy"[90] the court articulated a federal rule of decision based on the degree of control ex-

83. *Id.* at 20,579. The parent in *Idarado Mining*, Newmont Mining Corp., was a majority shareholder in the polluting company, Idarado Mining Co. *Id.* at 20,578. In addition, the two companies shared interlocking boards of directors and officers and the parent company provided services to the subsidiary in return for a fee. *Id.*

84. *See supra* notes 33-42 and accompanying text.

85. *See supra* notes 43-58 and accompanying text. In assessing the parent's potential liability as an owner/operator, the court in *Idarado Mining* considered the definition of "person in charge" as found within the Federal Water Pollution Control Act. *Idarado Mining*, 18 Envtl. L. Rep. at 20,578 (citing United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848 (W.D. Mo. 1984)). The court considered the extent of the parent's ownership, the parent's participation in the subsidiary's marketing and contractual practices, and the role of the parent in selecting and controlling the subsidiary's employees. *Idarado Mining*, 18 Envtl. L. Rep. at 20,578 (citing United States v. Conservation Chem. Co., 628 F. Supp. 391, 416-420 (W.D. Mo. 1985)).

86. *Idarado Mining*, 18 Envtl. L. Rep. at 20,599. Although the *Idarado Mining* court looked to factors similar to those in an alter-ego analysis, the fact that it chose to hold the sister subsidiary liable suggests that unlike the *Joslyn* or *Acushnet River* courts it found strict adherence to the corporate fiction inappropriate in the context of CERCLA. The court implies that the factors themselves merely indicate "the degree to which [the parent or sister] participated in the operation." *Id.* at 20,578.

87. *Id.* at 20,579. The court stated "[a]s a practical matter, if mere interposition of a separate corporate entity could insulate against CERCLA liability, it would be far too easy to evade the statute." *Id.*

88. 712 F. Supp. 1193 (E.D. Pa. 1989). In *Nicolet*, the government sought recovery from the current owner of a waste site for the costs of abating the release of asbestos. In addition to the current owner, Nicolet, the government impleaded Turner & Newall ("Overseas"), the parent company of the former owner and operator of the site, Keasbey & Mattison Company ("Keasbey"). *Id.* At the time of the litigation, Keasbey had been defunct for over 20 years. *Id.* By the date set for trial, Nicolet had filed for reorganization and had entered into a settlement agreement with the government. *Id.* at 1195-96.

89. *Id.* at 1202.

90. *Id.* at 1202 (quoting American Bell Inc. v. Federation of Tel. Workers, 736 F.2d 879, 886 (3d Cir. 1984)).

erted by the parent over the management and operations of the subsidiary.[91]

The court, however, failed to indicate the level of control necessary to trigger liability.[92] The court did provide some implicit guidance. First, the court considered the parent's *capacity* to control its subsidiary's hazardous waste disposal practices rather than focusing upon the parent's actual control.[93] Second, the court determined whether the parent somehow benefited from those practices.[94] Thus, the court's discussion suggests that to trigger liability a lower level of unity is needed between the parent and subsidiary than that found in the traditional alter ego doctrine.

IV. EVALUATION OF THE STANDARDS

An examination of the cases that formulate a federal rule of decision for piercing the corporate veil under CERCLA reveals two very different approaches, despite the goal of uniformity. The difference lies not so much in the courts' terminology, but rather the distinction seems to rest, at least in part, on the interrelationship of underlying policy preferences; that is, how a particular court perceives its role in interpreting a statute, and what goals it seeks to further through that interpretation. These factors assume greater significance when the language of the statute fails to provide an explicit directive—for example, CERCLA's liability provision. Thus, the differences between the alter-ego and direct liability standards arise from divergent judicial approaches to interpreting the broad statutory language. The courts' analyses are further divided by the conflict of whether to place greater emphasis on the integrity of the corporate form or on the statute's goal of allowing for the recovery of response costs associated with the cleanup of hazardous waste sites.

Courts that follow the first approach of adhering to the "traditional

91. *Id.* at 1202.

92. Because the *Nicolet* decision involved the defendant's motion to dismiss, the court did not apply its rule to a concrete factual situation. *Id.* at 1196.

93. *Id.* at 1202. The court's standard focuses on the subsidiary's action as an "extension of the parent, subject to its knowledge and involvement." *Id.* (quoting Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209, 1215 (E.D. Pa. 1982)). *See also supra* note 80 and accompanying text (discussing the "capacity to control" standard).

94. *Nicolet*, 712 F. Supp. at 1201. The court emphasized that a primary objective of CERCLA is to ensure that parties do not profit from lax hazardous waste management procedures. *Id.* at 1204 ("Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up." (quoting *Bunker Hill*, 635 F. Supp. at 672)).

common-law standard,"[95] take the position that statutory silence imposes limits on judicial construction. They conclude that the absence of any express congressional directive militates against departure from well-established legal norms.[96] The presence of a clearly recognized principle of law which runs contrary to a broader reading of the statute's language only reinforces their restraint.[97]

The Fifth Circuit's ruling in *Joslyn* represents a classic example of this approach to statutory construction.[98] The court maintains a healthy deference to congressional legislative authority,[99] and its standard for disregarding the corporate entity finds support in other judicial decisions.[100] The opinion aligns parent liability under CERCLA with one of the cardinal objectives of corporate law: limited shareholder liability.[101] Thus, it promotes a standard of liability consistent with the expectations of corporate defendants.

Such a rigid approach, however, takes an unduly narrow view of the equitable considerations underlying alter-ego analysis.[102] Limiting veil piercing to circumstances in which the parent corporation utilizes its subsidiary for fraudulent purposes ignores the objectives of CERCLA.

Though Congress failed to articulate these objectives clearly, they are fully understood and should guide the standard for disregarding the corporate form. Congress envisioned that CERCLA's liability provision would shift the costs of cleanup to those responsible for the environmen-

95. Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990); *In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22 (D. Mass. 1987).

96. *Id.*

97. *See supra* notes 53-57 and accompanying text.

98. Various commentators herald the Fifth Circuit's decision in *Joslyn* as extremely significant, not only as the first appellate court decision on the veil-piercing question, but as a departure from the more liberal trend of holding parent corporations liable. *Inside EPA*, Feb. 9, 1990, at 7; Wall St. J., Jan. 30, 1990, at B6, col. 1. The EPA, although not a party to the case, stated that the court's ruling may present an obstacle to pursuing recovery costs. *Inside EPA*, Feb. 9, 1990, at 7. Moreover, an unidentified source at the EPA expressed concern that the decision would "encourage corporations to seek ways to avoid liability for Superfund cleanup." *Id.* According to *Inside EPA*, the agency and the Department of Justice are currently exploring possible ways to limit the decision's impact on future recovery suits. *Id.*

99. The court states that "[a]ny bold rewriting of corporation law in this area is best left to Congress." *Joslyn*, 893 F.2d at 83.

100. Berger v. Iron Workers Reinforced Rodmen Local 210, 843 F.2d 1395 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 3155 (1989); United States v. Jon-T Chem., Inc., 768 F.2d 686 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986).

101. *See supra* note 7 and accompanying text.

102. *See supra* note 41 and accompanying text.

tal contamination,[103] regardless of fault. The *Joslyn* standard subverts this goal by requiring such a high degree of unity between the parent corporation and its subsidiary.

Congress clearly viewed CERCLA as a means of cleaning up inactive or abandoned waste sites.[104] The successful implementation of that objective depends on the ability to obtain the necessary financial resources to fund the cleanup.[105] Due to the nature of the targeted sites, the corporation which caused the actual contamination often no longer exists. As a result, the costs of the cleanup fall upon either the government or the subsequent owner,[106] neither of whom contributed to the hazardous waste problem.[107] If the defunct corporation was a subsidiary of an existing parent company, the innocent parties financing the cleanup have almost no recourse against the parent corporation under the stringent veil piercing test posited by the Fifth Circuit.[108] Such a result runs contrary to notions of fairness and equitable treatment under the law and to the intentions of Congress.

Courts that seek to develop an alter ego standard consistent with the framework of the statute accept a lower threshold for imposing liability

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103. *See supra* note 93. *See also* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671-72 (D. Idaho 1986) (citing United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984)).

104. *See* Preamble, Superfund, Pub. L. No. 96-510 (1980). For the text of the preamble, see *supra* note 3.

105. The EPA originally envisioned Superfund as the primary source of necessary funding with recovery from potentially responsible parties through litigation taking a secondary role. *Superfund: A Major Task Ahead*, EPA J., June 1981, at 11 (interview with Michael B. Cook, first Deputy Assistant Administrator, Office of Hazardous Emergency Response). However, the high costs of cleanup resulted in the recognition that a large portion of the financing would have to come from the private parties responsible for the contamination. *See* EPA Memorandum on Interim CERCLA Settlement Policy from Lee M. Thomas, Courtney M. Price and F. Henry Habicht, II (Dec. 5, 1984), *reprinted in* ENVIRONMENTAL LITIGATION at 497 (ALI-ABA June 1986); Marzulla, *Department of Justice Enforcement Strategies*, ENVIRONMENTAL LAW 75, 78 (ALI-ABA Feb. 1986).

106. *See, e.g., Joslyn*, 696 F. Supp. at 230; *Nicolet*, 712 F. Supp. at 1196.

107. The inequity of this situation is underscored by the potential enormity of cleanup costs. On average, cleanup of a Superfund site costs from $30 million to $100 million. The EPA projects that over 2,100 Superfund sites will exist by the year 2,000 and estimates the cost of fully cleaning up those sites at a half a trillion dollars. Cahan, Gutterridge, Havel, & Crough, *Environmental Aspects of Secured Transactions*, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS 149, 152 (M. Bernstein, R. Carrick & S. Spracker, Co-chairmen 1989).

108. This scenario parallels the actual circumstances at issue in *Joslyn*. *See supra* notes 43-47 and accompanying text. The attorney for Joslyn noted "We think this result is highly inequitable. A company that didn't profit from the polluting activities may have to pay for the cleanup and the parent company can walk away." Wall St. J., Jan. 30, 1990, at B6, col. 1.

on the parent corporations.[109] For these courts the breadth of the terms as well as the remedial purposes of the Act dictate an expanded construction of CERCLA's liability provision.[110] Rather than construing the statute's silence on the terms of parent liability as signaling restraint, they view it as an invitation to develop rules which better effectuate Congress' goals.[111]

The *Nicolet* opinion is the "direct liability" counterpart to *Joslyn*. The *Nicolet* court premised its standard not only on the language and goals of the statute, but also on a tradition of affording greater emphasis to equitable factors in alter-ego cases.[112] That tradition underscored the creation of an alter-ego test guided by the statute under which it is applied.[113] Thus, the *Nicolet* court found that the terms of section 107, which permit the imposition of liability directly upon parent corporations as owners or operators,[114] along with the goal of requiring those benefiting from disposal activities to assume responsibility for cleanup costs, counsels a veil piercing standard reflecting equitable factors.[115]

Unlike the common law approach, the *Nicolet* standard permits courts to hold a broader class of parent corporations liable for pollution caused by their subsidiaries. While the *Joslyn* approach is underinclusive, the *Nicolet* standard does not represent that problem's corollary. *Nicolet* perhaps extends liability beyond strict traditional bounds, but it retains deference to the integrity of the corporate form by requiring the parent to exercise or to be in the position to exercise control over the subsidiary's hazardous waste management practices before imposing liability.[116]

The *Nicolet* court's formulation of a federal rule for disregarding the corporate entity is preferable. Such a standard promotes a more equita-

109. *See supra* notes 59-96 and accompanying text.

110. *See supra* notes 19, 64, 73, 86 and accompanying text.

111. *See* United States v. Nicolet, 712 F. Supp. 1193, 1201 (E.D. Pa. 1989) ("Congress expected the courts to develop a federal common law to supplement the statute.") (quoting Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86, 91 (3d Cir. 1988)); United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988). For a view considering limitations on that expectation, see Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988).

112. *Nicolet*, 712 F. Supp. at 1202 (citations omitted).

113. In formulating an alter-ego standard, courts should consider the statute's purpose to "determine whether [it] places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine." Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986) (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981) (citations omitted)). The *Alman* court considered piercing the corporate veil under ERISA.

114. *See supra* note 68.

115. *Nicolet*, 712 F. Supp. at 1202.

116. *Id.*

ble imposition of liability, narrowing the circumstances under which innocent parties or the public will bear the burden not only of environmental degradation, but of the costs of rectifying that harm.[117] In addition, a standard imposing liability at a lower level of unity between parent and subsidiary may deter the use of inadequate waste management practices. The threat of liability should encourage parent corporations exerting managerial control over their subsidiaries to implement safer, more effective procedures. Finally, because of the wide-ranging health and safety implications involved courts must strike a balance in favor of funding environmental cleanup as opposed to preserving the principles of corporate limited liability.

CONCLUSION

The existence of two approaches for veil piercing under CERCLA defeats the fundamental purpose of developing a federal rule of decision: uniformity of result. True uniformity requires an explicit congressional mandate. Because of the fact-specific nature of alter-ego analysis, a rule setting forth the exact terms of parent liability is not the answer. Rather, Congress should clarify in general terms the importance of protecting the corporate form. For clarity Congress should alter the statute's owner/operator language[118] to include[119] shareholders who participate in the management of a facility's operations. Such an amendment would suggest a broader scope of potentially responsible parties. At the same time such an alteration affords the courts considerable discretion to evaluate shareholder liability within a variety of discrete factual contexts. This is only one possible alternative. For ultimate resolution of the veil piercing controversy, Congress will need to address *who* should bear the costs of hazardous waste contamination.

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117. *See supra* notes 59-96 and accompanying text. Perhaps the only way to entirely prevent innocent parties from assuming liability in the parent-subsidiary situation is to impose liability on the parent when the subsidiary is incapable of financial contribution regardless of the former's involvement. The federal government advocated this rule in its amicus brief filed in *Joslyn*. Wall St. J., Jan. 30, 1990 at B6, col. 1.

118. 42 U.S.C. § 9601(20)(A) (Supp. 1987).

119. Congress drafted the language in terms of the exclusion of shareholders who fail to participate in management of the facility. *See supra* note 68 for the text of § 9601(20)(A). Changing the language to an affirmative inclusion establishes stronger grounds for expanding the scope of liability.