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Corporate Officer Liability as an "Operator" Under CERCLA: The *Kelley v. Tiscornia* Analysis

CLAY M. STEVENS*

In 1979, the Michigan Department of Natural Resources (MDNR) and the Environmental Protection Agency (EPA) sent notice to Auto Specialties Manufacturing Company (AUSCO) that landfills located on two company-owned sites were not in compliance with state regulations.[1] A leachate test performed in 1981 showed that levels of cadmium and lead exceeded local drinking water standards.[2]

In *Kelley v. Tiscornia*, the MDNR sought cleanup costs for the two sites from the corporate officers of AUSCO, Lester, James, and Edward Tiscornia,[3] under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[4] The United States District Court for the Western District of Michigan denied motions for summary judgment by both plaintiffs and defendants.[5] The court considered the question of whether individual corporate officers may be held liable for their actions as "operators" under CERCLA. Furthermore, if held liable, what standard is proper to determine whether liability attaches to the Tiscornias in this case.[6]

The *Tiscornia* court concluded that individual corporate officers could be potentially responsible parties (PRPs) under CERCLA, even though corporate officers are not listed under the statutory definition of "persons" to which the Act applies.[7] The court

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[1] Kelley v. Tiscornia, 827 F. Supp. 1315 (W.D. Mich. 1993).

[2] *Id.* at 1319.

[3] *Id.* at 1318.

[4] CERCLA §§101-405, 42 U.S.C. §§ 9601-9675 (1988).

[5] *Tiscornia*, 827 F. Supp at 1325.

[6] *Id.*

[7] *Id.* at 1322. Under CERCLA, an owner or operator refers to "any person," and "person" is defined as "an individual, firm, corporation, association, partnership, consor-

examined four tests for determining whether liability attaches to corporate individuals as "operators" in connection with CERCLA violations committed by the corporation.[8] The "direct participation" test was found to be most appropriate because "[t]his standard recognizes that the statute includes as responsible parties those that may be found liable under traditional corporate law principles."[9] This test attaches liability to corporate individuals who directly participate in the decision making regarding hazardous waste disposal.[10] Since the application of this test involves a fact question, the court reasoned that summary judgment for either party was inappropriate.[11]

This comment will address the issue presented by the *Tiscornia* case: What are the appropriate methods of determining an individual corporate officer's potential liability as an "operator" for the polluting acts of his corporation under CERCLA. Courts addressing this question have found liability using methods ranging from the traditional corporate law notions[12] to standards based on

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tium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." CERCLA §101(20)(A), (21), 42 U.S.C. § 9601(20)(A), (21) (1988).

[8] *Id.* at 1323.

[9] *Id.* at 1324. "[T]he Court finds that the direct control or participation test, which holds individuals accountable for their own tortious acts, is the appropriate standard to be used in assessing operator liability." *Id.*

[10] *Id.* at 1324-25.

[11] *Tiscornia*, 827 F. Supp. at 1325. "Because the evidence as now presented is subject to conflicting interpretations and credibility determinations must be made, summary judgment is improper." *Id.* The *Tiscornia* defendants had hired specialists to dispose of the waste properly and claimed to have made only policy decisions concerning hazardous waste disposal. However, minutes of the Executive Committee meetings showed that environmental topics were discussed at 111 out of the 435 meetings. The details of these discussions were not available for the record, *id.*

[12] There are two primary methods of bypassing the limited liability protection of the corporate entity for corporate individuals: piercing the corporate veil and individual tortious act liability. *See generally* HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES, chs. 7, 9 (3rd ed. 1983). Piercing the corporate veil refers to the disregard of the corporation's legal status which gives immunity to corporate officers or entities from liability for wrongful corporate activities. *See* BLACK'S LAW DICTIONARY 1147 (6th ed. 1990). Several courts have applied only traditional corporate law to CERCLA actions against corporate individuals. *See* Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 224 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991). The court rejected, in dicta, any finding of corporate officer liability for environmental cleanup costs without first piercing the corporate veil because there is no express Congressional directive in CERCLA to bypass traditional business law doctrine. *Joslyn*, 696 F. Supp. at 224-25.

an individual's control[13] or direct participation[14] in hazardous waste disposal and that individual's ability to prevent[15] a hazardous release. In some cases, the standard may have reached the level of strict liability.[16]

Part II of this comment gives a general overview of CERCLA. Part III discusses the facts and findings of the *Kelley v. Tiscornia* case as a way of interpreting the status of federal law concerning corporate officer liability as a CERCLA "operator." Part IV presents an analysis of the *Tiscornia* court's rationale, some opinions of commentators, and observations and recommendations for Congress' reauthorization of CERCLA in 1994.

I. CERCLA OVERVIEW

In 1980, Congress hastily enacted CERCLA to facilitate the cleaning up of existing toxic waste sites through adequate funding and enforcement authority.[17] Congress designed CERCLA to address the uncontrolled growth of waste sites and to remedy environmental problems that have occurred as a result of negligent waste disposal practices.[18] The primary goals of CERCLA were to provide a system to accelerate the cleanup of hazardous waste sites and to force those responsible to bear the costs of that cleanup.[19] CERCLA liability applies to sites where there has been a release of a hazardous substance or pollutant.[20] The government

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[13] *See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 744 (8th Cir. 1986) [hereinafter *NEPACCO II*]. In *NEPACCO II*, the vice-president, manufacturing supervisor and main shareholder were found liable as "arrangers" of hazardous substances under § 107(a)(3) because of their ability to exert individual control over the hazardous waste disposal practices, *id.*

[14] New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

[15] *Kelley v. Thomas Solvent Corp.*, 727 F. Supp. 1532, 1543 (W.D. Mich. 1989).

[16] *See* Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65 (1992); Carolyn Rashby, United States v. Maryland Bank & Trust Co.: *Lender Liability Under CERCLA*, 14 ECOLOGY L.Q. 569 (1987).

[17] Cindy A. Wolfer, *Piercing The Corporate Veil Under CERCLA: To Control or Not to Control—Which Is the Answer?*, 59 U. CIN. L. REV. 975, 976 (1991).

[18] United States v. Price, 577 F. Supp. 1103, 1109 (D.N.J. 1983).

[19] *See* Richard G. Stoll, *Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) in* ENVIRONMENTAL LAW HANDBOOK 101 (9th ed. 1987); Wolfer, *supra* note 17.

[20] CERCLA defines "release" to be "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . . ." CERCLA §101(22), 42 U.S.C. § 9601(22) (1988).

can draw from two sources to pay for the hazardous waste cleanup: the Superfund[21] and PRPs through private action suits.[22]

The CERCLA statutory language is broadly phrased to include PRPs who may be liable for cleanup costs incurred.[23] The Act specifically provides that "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" will be liable for any and all cleanup costs.[24]

The courts have had to struggle to reconcile this language with traditional corporate law principles based on the theory of limited liability.[25] CERCLA's legislative history has not aided in interpreting Congressional intent as to whether traditional corporate law is to be followed or abandoned in CERCLA's enforcement.[26] This basic problem has led to varying methods of attach-

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A substance is hazardous if it is already regulated by other environmental statutes such as the Clean Air Act, Clean Water Act, Toxic Substances Control Act or the Resource Conservation and Recovery Act. 42 U.S.C. § 9601(14).

A "pollutant or contaminant" is to "include . . . any element . . . which . . . upon exposure, ingestion, inhalation, or assimilation into any organism, . . . will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions . . . or physical deformations, in such organisms or their offspring . . . ." 42 U.S.C. § 9601(33).

[21] Funds for cleanup costs are raised by a special tax which Congress established for CERCLA and which originally raised $1.6 billion in 1980. Stoll, *supra* note 19, at 104. The special tax enacted by Congress in 1980 for CERCLA was levied mostly against polluting-type industries, *id.* at 152. The 1986 amendments to CERCLA added $9 billion to the fund, raised over 5 years, *id.*

[22] *Id.* at 113. Costs recoverable from PRPs include the government's own investigation costs, cleanup planning and design costs, as well as the actual cleanup costs, *id.*

[23] *Id.* Section 9607(a) of CERCLA imposes strict liability on four classes of parties:

(1)The owners and operators of facilities at which there is a release or threatened release of hazardous substances;

(2)Any person who owned or operated such a facility at any time in the past when hazardous substances were disposed of;

(3)Any person who "arranged for" the treatment or disposal of hazardous substance at the facility; and

(4)Any person who transported hazardous substances to the facility.

42 U.S.C. § 9607(a).

[24] 42 U.S.C. § 9607(a)(2) (emphasis added).

[25] *See generally* Lauri A. Newton, *The Prevention Test: Promoting High-Level Management, Shareholder, and Lender Participation in Environmental Decision Making Under CERCLA*, 20 ECOLOGY L.Q. 313 (1993).

[26] *See* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984). "CERCLA is . . . a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions . . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation." *Id.*

ing "owner or operator" liability not only in cases of corporate officer liability, but also with shareholder liability,[27] successor corporation liability,[28] lender liability,[29] and parent-subsidiary liability.[30]

The question of how to reconcile CERCLA with traditional corporate law concerning the liability of corporate officers is especially important in light of CERCLA's potential reauthorization and amendment in 1994. The impact is substantial because implementation of a liability standard against an individual corporate officer may cause financial ruin while use of another standard can absolve the individual of all liability. Furthermore, any standard of conduct required under CERCLA, either in its present form or with the upcoming changes, must balance the interests involved. These interests include providing for fairness, remedy, and punishment to promote environmentally-safe conduct and follow the stare decisis of traditional corporate law.

II. THE *KELLEY V. TISCORNIA* APPROACH TO CORPORATE OFFICER LIABILITY

The decision in *Kelley v. Tiscornia* reflected a hybrid approach to CERCLA liability in an unresolved area of environmental law through corporate and statutory law. In *Tiscornia*, the district court evaluated existing concepts of traditional corporate law, statutory interpretation, and the "control" and "prevention" standards which were judicially developed to follow the Congressional intent in enacting CERCLA.[31] The court concluded that liability should be determined via the "direct participation" test which is similar to a plain-meaning statutory interpretation of CERCLA.[32] This approach least offends traditional corporate law principles since it can be likened to a corporate officer tort committed in the

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[27] Elizabeth A. Glass Geltman, *Shareholder Liability for Improper Disposal of Hazardous Waste*, 95 COM. L. J. 385, 399 (1990).

[28] David C. Clarke, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300, 1333 (1990).

[29] Sean P. Madden, Note, *Will the CERCLA Be Unbroken? Repairing the Damage after Fleet Factors*, 59 FORDHAM L. REV. 135 (1990).

[30] Douglas Henderson, Comment, *Environmental Law as Corporate Law: Parent-Subsidiary Liability under CERCLA and the Kayser-Roth Aftermath*, 7 J. MIN. L. & POL'Y 293, 294 (1992).

[31] Kelley v. Tiscornia, 827 F. Supp. 1315, 1323 (W.D. Mich. 1993).

[32] *Id.* at 1324-25.

officer's individual capacity.[33] However, the "direct participation" standard requires a fact determination concerning the level of involvement of the corporate officer in the polluting activity.[34] As such, the court denied summary judgment motions by both parties and allowed the trial to continue fact finding for this purpose.[35]

A. The Facts

The three defendants, Edward, Lester, and James Tiscornia, were voting shareholders as well as officers of the Auto Specialties Manufacturing Company.[36] Since 1977, each of the Tiscornias served as members of the AUSCO Executive Committee, which was responsible for management and property decisions of the corporation.[37] The defendants disposed of their waste on two corporation property sites during the late 1970s and early 1980s.[38] The Tiscornias claimed that the Executive Committee merely set policy in environmental matters and did not manage or participate in those matters.[39] The Executive Committee ensured that people were in place to comply with the environmental policy and that waste disposal was performed by employees hired for that purpose.[40] It was undisputed that the Tiscornias each had corporate officer duties and that "baghouse dust" was disposed in the landfills.[41] A leachate test performed in 1981 on the sites showed samples which exceeded drinking water standards for cadmium and lead.[42]

The court in *Tiscornia* found two issues involved in the case: whether a release or threatened release of a hazardous substance had occurred and whether the defendants were responsible parties.[43] In responding to the first question, the defendants claimed that at the time of disposal, baghouse dust was not deemed hazardous under state law.[44] The court responded by pointing out the

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[33] *Id.* at 1324.
[34] *Id.*
[35] *Id.* at 1325.
[36] *Tiscornia*, 827 F. Supp. at 1318.
[37] *Id.*
[38] *Id.* at 1318-19.
[39] *Id* at 1319.
[40] *Id.*
[41] *Tiscornia*, 827 F. Supp. at 1320.
[42] *Id.*
[43] *Id.*
[44] *Id.*

retroactive nature of CERCLA and stated that compliance with state regulations was not a valid defense.[45] Since the only valid defenses were "acts of God, acts of war [sic], and acts or omissions of third parties,"[46] the court held that a hazardous release had been established.[47]

For the Tiscornias to be PRPs under CERCLA section 9607(a)(2),[48] the court had to determine whether they were "owners or operators."[49] Since CERCLA does not specifically address application of the statute to corporate officers, the *Tiscornia* court considered whether the Tiscornias could be held individually liable and if so, by what standards that liability should attach.[50]

B. Can Liability Attach to Corporate Officers Even Though They Are Not Specifically Defined as PRPs Under CERCLA?

The Sixth Circuit had set precedent under general owner or operator CERCLA liability only in the area of owner liability.[51] In so doing, they had applied owner liability only to sole shareholder corporations as in *Donahey v. Bogle*.[52] Noting this, the *Tiscornia* court determined that since the corporation of the defendant officers had multiple shareholders, the defendant's liability could only exist under operator status.[53]

The *Tiscornia* court determined that corporate officers could be held liable as CERCLA operators even though the statute omits any specific reference to corporate officers as potentially lia-

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[45] *Id.* at 1320-21 (citations omitted).

[46] *Tiscornia*, 827 F. Supp. at 1320 (quoting J.V. Peters & Co., Inc., v. Administrator, Envtl. Protection Agency, 767 F.2d 263 (6th Cir. 1985)).

[47] *Id.* at 1321.

[48] Under owner or operator liability, those persons potentially liable include "[a]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . ." CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2) (1988).

[49] Kelley v. Tiscornia, 827 F. Supp. 1315, 1321 (W.D. Mich. 1993).

[50] *Id.*

[51] Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993).

[52] *Id.*

[53] *Tiscornia*, 827 F. Supp. at 1321. The court distinguished *Donahey* from the Tiscornias' situation by concluding that liability was established in *Donahey* on the owner status of the defendant as the sole shareholder and director of the corporation, *id.* The court stated that the Tiscornias could not fulfill the owner status required by *Donahey* unless they were all three merged into one person and the existence of outside shareholders was ignored. Therefore, the only statutory basis of individual liability would be as operators. *Id.*

ble persons.[54] The court reasoned that corporate officers could be potentially responsible persons just as successor corporations had been judicially determined PRPs under CERCLA even though they are omitted from the statutory definition.[55] The rationale was that CERCLA's definition of "person" was never intended to be exhaustive.[56] In the *Tiscornia* court's own words:

> [T]he Court finds that holding accountable those persons, including corporate officers, responsible for creating the harm, is consistent with both the purpose for which Congress enacted CERCLA, and cases interpreting CERCLA by the Sixth Circuit. Corporate officer liability, like corporate successor liability, is a long-standing and universal doctrine of law which is not to be ignored.[57]

III. STANDARDS BY WHICH CORPORATE OFFICER LIABILITY AS AN OPERATOR MAY ATTACH UNDER THE *TISCORNIA* ANALYSIS

Since CERCLA liability could apply to corporate officers, the *Tiscornia* court then turned to determining the appropriate standard under which that liability would attach.[58] The court examined four standards: (1) piercing the corporate veil; (2) direct control over or participation in wrongful conduct; (3) the prevention test; and (4) the capacity to control test.[59]

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[54] *Id.* at 1322.

[55] *Id.*

[56] The court compared the *Tiscornia* facts to the analysis of corporate successor liability in Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991), a recent Sixth Circuit case. *Tiscornia*, 827 F. Supp. at 1322-23. In *Anspec*, the court reasoned that omission of successor corporations from the definition of potentially responsible persons was only a matter of the definition being "textually incomplete." *Anspec*, 922 F.2d at 1246. The court reached this conclusion because the legislative intent of Congress in passing CERCLA was to give the term "corporation" its universally accepted meaning and that the rules of construction of the United States Code specifically provide that the word "association," when used in reference to a corporation, includes successor corporations. *Anspec*, 922 F.2d at 1246.

Anspec also stated that policy reasons dictated a finding of successor liability since the legislative purpose of CERCLA was to provide "the federal government with the tools immediately necessary for a swift and effective response to hazardous waste sites" and "that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." *Anspec*, 922 F.2d at 1247.

[57] *Tiscornia*, 827 F. Supp. at 1322-23.

[58] *Id.* at 1323.

[59] *Id.* at 1323-25.

A. Traditional Corporate Law: Piercing the Corporate Veil

The *Tiscornia* court noted that traditional corporate law allows liability to attach to officers by either piercing of the corporate veil[60] or by the tortious acts of the corporate individual.[61] Piercing the corporate veil is the classic means of bypassing the shield of corporate limited liability.[62] Under this theory, the corporate veil is not pierced unless corporate formalities are substantially ignored, the corporation is grossly undercapitalized, or the corporate purpose is to evade existing obligations (i.e., fraud).[63] However, judicial interpretation of CERCLA has taken an expansive approach to liability, stating that in order to prevent frustrating the legislative purposes of CERCLA, courts put "no [special] importance upon the corporate form."[64] This implication that CERCLA and federal common law may disregard traditional corporate principles when imposing CERCLA liability has caused some debate.[65] Some commentators resist this idea vehemently,

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[60] *See* HENN & ALEXANDER, *supra* note 12, at 347. The corporate veil, i.e., limited liability for corporate individuals, is not pierced unless corporate formalities are ignored, the corporation is undercapitalized, or some type of fraud is involved, *id.*

[61] *See* Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259 (1992). Tort law holds individuals liable for torts committed as a result of their personal actions, *id.* at 270. Although the corporate form provides limited liability to shareholders and officers, it does not relieve personal liability of an individual simply because he/she is acting within an agent-principle relationship, *id* at 271. Therefore, corporate officers can be held liable for their tortious acts, regardless of whether they acted while within their official capacity, *id.* This liability of corporate officers is independent of the corporation's liability and arises as a result of the officers' personal participation in the tort by way of "affirmative actions of direction, sanction, or cooperation in the wrongful acts of commission or omission." *Id.*

[62] *See generally* HENN & ALEXANDER, *supra* note 12, at ch. 7. The basic tenet of corporate law is that the corporation is an entity itself and that shareholders and officers of the corporation have limited liability to the extent of their investment in the corporation, *id.* The purpose of limited liability is to encourage capital formation in the free enterprise system. Limited liability allows investors to take risks which are calculated and which do not expose their personal assets to pay off debts of the corporation. Wolfer, *supra* note 17, at 978 (citing Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 CHI. L. REV. 89, 94 (1985) and Henry Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259 (1967)).

[63] *See* HENN & ALEXANDER, *supra* note 12, at 347.

[64] *See* United States v. Kayser-Roth Corp., 724 F. Supp. 15, 24 (D.R.I. 1989) (citing United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988)); New York v. Shore Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).

[65] *See* Smith Land and Improvement Corp. v. Celotex Corp., 851 F.2d. 86, 91 (3d Cir. 1988) (holding that Congress intended federal common law to develop in the CERCLA arena); *see also* Healy, *supra* note 16, at 109 (stating that corporate law has no bearing on CERCLA liability and that the only relevant question under the plain statutory

insisting that it will upset the delicate balance of law and economics.[66]

Although several cases involving corporate officer liability under CERCLA have used the piercing the corporate veil theory,[67] those officers were also owners as defined under CERCLA. Therefore, as pointed out by the *Tiscornia* court, the application of piercing is most likely limited to CERCLA owner status.[68] At least one commentator agrees, stating that piercing the corporate veil is used to access owners, not operators. Hence these techniques do not apply at all to a determination of officer liability.[69] The *Tiscornia* court further observed that the Fifth Circuit recognized distinct tests for owner as opposed to operator status under CERCLA.[70]

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meaning is whether the defendant fits the described category, after which liability is imposed or not on that basis).

[66] Wolfer, *supra* note 17, at 999. "If federal courts continue to use normal relationships between a parent and subsidiary to justify the extension of liability under CERCLA, companies may stop investing in businesses that handle toxic chemicals. Limited liability of corporate shareholders is a well-entrenched policy in our capitalistic society that should be left untouched without a clear congressional mandate to do otherwise." *Id.* at 1000.

[67] The Fifth Circuit stated in Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990), that "without an express Congressional directive to the contrary, common law principles of corporate law, such as limited liability, govern our court's analysis." *Id.* at 83. The court affirmed the district court below in stating that cleanup costs could not attach to officers unless piercing the corporate veil had occurred, *id.*

[68] Kelley v. Tiscornia, 827 F. Supp. 1315, 1324 (W.D. Mich. 1993); *see* Oswald & Schipani, *supra* note 61.

[69] *Oswald & Schipani, supra* note 61, at 274-75. "The notion of 'piercing' should simply be expunged from CERCLA analysis of officer liability as an irrelevant theory. Determination of officer liability under CERCLA should focus instead upon the officer's direct liability for their personal actions and upon CERCLA's statutory language." *Id.* at 275.

[70] The Fifth Circuit standard established in *Joslyn* required veil piercing for owner status liability to attach, but used a different standard in Riverside Mkt. Dev. Corp. v. Int'l Bldg. Products, Inc., 931 F.2d 327 (5th Cir. 1991). The court specified that operator status was determined by whether there was direct participation in the improper waste disposal by the officer, *id.*

B. The Direct or Personal Participation Standard

The direct participation test developed by *New York v. Shore Realty Corp.*[71] and *United States v. Northeastern Pharmaceutical & Chemical Co., Inc. (NEPACCO II)*[72] held that corporate officers may be liable for cleanup costs if they are found to have "personally participated in conduct that violated CERCLA."[73] In *Shore Realty,* the officer was held to have incurred operator liability under CERCLA because he was illegally operating a company site as a waste storage facility and actively allowed new waste to be stored at the site.[74]

The *Tiscornia* court ultimately embraced the direct participation standard as the appropriate standard for assessing operator liability of corporate officers.[75] The basis for this decision was that the direct participation test followed traditional corporate law principles while also best effectuating CERCLA's general statutory preference for strict liability.[76] Specifically, the court stated that it allowed corporate individuals to be held accountable for their own tortious acts,[77] utilizing the "individual tort" method of bypassing the limited liability of the corporate entity, mentioned *supra.*

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[71] New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985). In *Shore Realty,* a corporation acquired property where hazardous waste had been illegally stored. The officer who managed the corporation knew that the illegal storage was continuing and failed to stop it, *id.* As a result, he was held liable as an operator because of his "direct participation" in the harm resulting, *id.*

[72] United States v. Northeastern Pharmaceutical & Chem. Co., 810 F. 2d 726 (8th Cir. 1986), *cert. denied,* 484 U.S. 848 (1987). The NEPACCO plant manufactured hexachlorophene, a disinfectant, which gave off various hazardous and toxic by-products. Edwin Michaels, president and shareholder, formed the company and was involved in the construction of the Missouri plant at issue in the case. After a year of operation, Michaels returned to his permanent home in Connecticut and left John Lee, the vice-president and shareholder, to run the company. Lee contracted with an employee to dispose of the dioxin waste by way of depositing it in a trench located on James Denney's farm. The trial court found Lee was liable for cleanup costs due to his direct participation in the hazardous release and his capacity to control hazardous substances at the plant, *id.* at 732. On appeal, the court affirmed only on the direct participation standard, *id.* at 749.

[73] *Id.* at 744.

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

[75] Kelley v. Tiscornia, 827 F. Supp. 1315, 1324 (W.D. Mich. 1993).

[76] *Id.*

[77] *Id.*

1. Legal Basis of the Direct Participation Standard

There is significant disagreement concerning whether the direct participation standard truly reflects corporate individual tort liability. Some commentators agree wholeheartedly with the *Tiscornia* analysis that the standard exemplifies traditional corporate law,[78] while others believe the direct participation test is an expansion of liability for corporate officers which is without foundation.[79] This perceived expansion is often justified by references to CERCLA's primary goal of ensuring that those benefiting from improper waste disposal pay to clean up the resulting hazardous waste problems.[80]

Commentator Michael P. Healy, taking a purely statutory approach, skips the entire question of whether the direct participation test is grounded in traditional corporate law, reasoning that CERCLA provides a wholly sufficient foundation for imposing liability without the need to consider CERCLA's effect on traditional corporate doctrine.[81] He concludes that the direct participation test is not a fault-based standard but a strict liability

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[78] Oswald & Schipani, *supra* note 61, at 275. It is commonly accepted that traditional corporate law doctrine allows officers to be individually liable for direct tortious acts while acting for the corporation without requiring a piercing of the corporate veil, *id.*

In cases determining officer liability by the personal participation test, regardless of whether the courts claim to be using traditional corporate law principles of attaching individual liability to officers for their tortious actions or whether the courts claim to be directly applying the statutory language of CERCLA,

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

Id. at 282.

[79] John J. Little, *Towards Respect for Corporate Separateness in Defining the Reach of CERCLA Liability*, 44 Sw. L.J. 1499, 1514, 1516 (1991). "Such an expansion is unsupported by the language of CERCLA, its scant legislative history and traditional notions of statutory interpretation." *Id.* at 1516. Little further states that "nothing in the statute or its legislative history suggests that Congress intended to subvert or substantially alter well-settled common law principles of corporation law . . . ." *Id.* at 1514.

[80] CERCLA GOALS ARE REMEDIAL: TO CLEAN UP HAZARDOUS WASTE SITES AT THE COST OF THOSE WHO BENEFITED FROM THE POLLUTING ACTIONS. S. REP. NO. 848, 96th Cong., 2d Sess. 12-15, 31-34 (1980); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985).

[81] Healy, *supra* note 16, at 146.

standard in which an individual and a corporation stand side by side.[82] Attachment of liability is, thus, determined by whether the individual's personal actions violated CERCLA's plain statutory language in exactly the same way that a corporation's collective actions are examined to determine a violation of the Act.[83] Healy surmises that this is what was intended by the plain meaning of the statute, and CERCLA is a heightened standard of liability to which all other tests and factors do not apply.[84]

Another commentator, Linda J. Oswald, finds flaws in the abandonment of corporate law doctrine in the CERCLA context.[85] Oswald states that this statutory basis is problematic because it sets up a two-tiered test not envisioned by CERCLA: (1) applying a fault based analysis to whether an individual "person-

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[82] *Id.* at 72, 109.

[83] *Id.* at 109.

[84] *Id.* at 108. In addressing the several courts' applications of the differing standards of the prevention test, the capacity to control test, piercing of the corporate veil test and direct participation test, Healy states that none of the factors in these tests provide a material or proper basis for individual liability under CERCLA. *Id.* This inadequacy results in "confounding the future imposition of individual liability under section [96]07." *Id.* Healy attempts to clear up the confusion by advocating a plain reading of the Act, implying that individual corporate officers are included within the definition of a CERCLA operator as a matter of law, just as the attorneys for MDNR (the state agency plaintiffs seeking recoup of cleanup costs) claimed in *Tiscornia*:

> A possible explanation of courts' failure to present fully coherent rationales for individual liability lies in the courts' failure to rely on the heightened standard of care for waste disposal activities intended by Congress. If there had been proper recognition of this central purpose of CERCLA, the courts and the parties would have focused more intently on the actual activities of the individuals alleged to be liable for response costs, and they would have distinguished more carefully between managing a facility through involvement in broad financial decision making and operating a facility through involvement in disposal activities.
>
> Notwithstanding the limitations of the analysis in these decisions, the result in each case may be reconciled with the CERCLA liability scheme. As long as these cases are understood to assign direct liability for CERCLA response costs to an individual or corporation based on the "person['s]" direct participation in the hazardous substance disposal activities identified in the statute, the decisions are fully consistent with the statutory language and intent.

Id. at 109 (footnote omitted); *see* Riverside Market Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327, 330 (5th Cir. 1991). The court embraced the approach above by holding that to determine an individual's liability for CERCLA response costs, they must look at "the extent of the defendant's personal participation in the alleged wrongful conduct." *Riverside Market Dev.*, 931 F.2d at 330.

[85] *See generally* Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579 (1993); Oswald & Schipani, *supra* note 61.

ally participated" in the negligent activity and is therefore, a PRP; and (2) if found to be a PRP, holding him or her strictly liable for cleanup costs under the CERCLA scheme.[86] Given this divergence from the statutory scheme, Oswald suggests that the most consistent method of attaching liability would be to simply rely on the theory of traditional tort and agency law doctrine directly, "without attempting to frame it in CERCLA's statutory language."[87]

2. The Effect of Direct Participation as a Strict Liability Standard

Regardless of the basis for the direct participation test, there is much speculation on its impact. Since the test does not consider fault as a balancing factor, many commentators consider its net effect to be an imposition of strict liability on corporate officers for the environmental actions of the corporation.[88]

Commentators have opined that using this quasi-strict liability standard encourages corporate entities to take a "hands-off approach to operations connected to hazardous sites in order to distance themselves from potentially catastrophic liability under the Act."[89] Strict statutory liability under CERCLA works well with corporations that can spread the costs of paying for the hazardous releases among its customers and that are able to pay for these costs with profits which were gained as a result of the polluting activities.[90] But for individuals who cannot spread risks and costs, fairness becomes a major concern, and a standard of liability based on fault is necessary.[91] Further, corporations benefit from their polluting actions, but officers receive only salaries which do not necessarily mirror an increase in corporate profits.[92] In this

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[86] Oswald, *supra* note 85, at 615-16.

[87] *Id.* at 616. "There is nothing fundamentally inconsistent with holding the corporation strictly liable under CERCLA and simultaneously holding the officer liable under a common law fault-based standard where the facts support such individual liability, nor can such a result be said to be inconsistent with the goals and objectives of CERCLA." *Id.* (footnote omitted.)

[88] *See generally* Newton, *supra* note 25.

[89] *Id.* at 338.

[90] *Id.*

[91] *Oswald, supra* note 85, at 584. "Essentially applying the strict liability standard to an officer simply sticks some other hapless individual, as opposed to the victim, with the costs of the injury that the corporation's CERCLA violation caused." *Id.* (footnote omitted).

[92] *Id.*

sense, strict liability may be too harsh, providing negative incentive for environmentally-safe conduct by officers.[93] In sum, the direct participation test probably best embodies the statutory language of CERCLA, although efforts to base it in corporate law by the *Tiscornia* court and others are probably wishful thinking.

C. *The Prevention Test*

The prevention test, pioneered by *Kelley v. ARCO Industries Corp.*[94] and *Kelley v. Thomas Solvent*,[95] determines whether liability attaches based on the officer's ability to prevent the environmental harm from occurring.[96] It focuses on two factors: (1) the individual's position and degree of authority within the company and with respect to health and safety factors; and (2) positive and negative actions concerning hazardous waste disposal.[97] The inquiry is whether the individual "could have prevented or significantly abated the hazardous waste discharge that is the basis of the claim."[98] It takes into account genuine efforts to prevent hazardous substance release as an affirmative defense to attachment of CERCLA liability to individual corporate officers.[99]

It is important to note that the *Tiscornia* court, under Judge McKeague, dismissed consideration of the prevention test with less than adequate explanation.[100] Yet this is the same court, the

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[93] *Id.*

[94] 723 F. Supp. 1214 (W.D. Mich. 1989).

[95] 727 F. Supp. 1532 (W.D. Mich. 1989).

[96] Kelley v. ARCO Indus. Corp., 723 F. Supp. 1214, 1219 (W.D. Mich. 1989).

[97] *Id.*

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

Kelley v. Thomas Solvent, 727 F. Supp. 1532, 1543-44 (W.D. Mich. 1989).

[98] *Thomas Solvent*, 727 F. Supp. at 1543.

[99] *Id.* at 1544.

[100] Kelley v. Tiscornia, 827 F. Supp. 1315, 1323 (W.D. Mich. 1993). In stressing corporate law and ignoring strong persuasive-value case law from the Sixth Circuit in *Donahey* and the Western District of Michigan in *Thomas Solvent*, Judge McKeague gave his succinct rationale for quickly dismissing the prevention test:

Western District of Michigan, which first developed the prevention test in *Thomas Solvent* in 1989 under Judge Enslen.[101] The court's speedy refusal to consider the prevention test stemmed from the court's belief that the test had no basis in corporate law doctrine.[102] Another criticism not mentioned by the *Tiscornia*

> In the opinion of this Court, this test results in expanded liability based on a corporate officer's position, a formulation which ignores basic principles of corporate law. Power or authority is not a relevant factor in determining liability of a corporate officer for tortious conduct. For this reason the Court declines to adopt this test.

Id. at 1324.

[101] *See Thomas Solvent*, 727 F. Supp. 1532.

[102] *Tiscornia*, 827 F. Supp. at 1324. Judge McKeague had three major obstacles in his path in ruling out the prevention test in *Tiscornia* and favoring corporate law principles. First, the Western District of Michigan, under Judge Enslen, had originally developed and adopted the prevention test in several cases. *See Thomas Solvent*, 727 F. Supp. at 1532; Kelly v. Arco Industries Corp., 723 F. Supp. 214 (W.D. Mich. 1989). Although this was not controlling precedent for Judge McKeague, it must have held some persuasive value.

Second, the Sixth Circuit had just set binding precedent for the prevention test under the "owner" half of the "owner or operator" prong of CERCLA liability in *Donahey v. Bogle*. Similarly, since *Donahey* did not directly address "operator" liability, Judge McKeague was not bound by precedent to use the prevention test if this case was characterized as concerning only operators.

However, he most certainly would have been bound by *Donahey* to use the prevention test had the *Tiscornia* court considered this case a question of owner liability under CERCLA. Owner liability was McKeague's most severe obstacle and appropriately, he gave his most illogical rationale. McKeague stated in *Tiscornia* that since there had been only one Sixth Circuit case which had addressed owner and operator liability under CERCLA and that it had only directly addressed a sole proprietorship under CERCLA owner status , the *Tiscornia* court was forced to conclude that owner status only applied to sole proprietorships under CERCLA. *Tiscornia*, 827 F. Supp. at 1321. "To find *Donahey* controlling in this case, the Court would have to merge the three Tiscornia defendants into a single person and ignore the existence of other shareholders." *Id.*, 827 F. Supp. at 321. If the *Tiscornia* court can infer that corporate officers were meant to be included in the definition of liable persons under CERCLA because general definitions of "corporations" usually include corporate officers, then they can much more easily infer that when the *Donahey* court classifies a sole proprietorship as an owner under CERCLA, it would include corporations, partnerships and individuals as well.

In sum, McKeague ignored persuasive on-point case law from his own federal district court, ignored a persuasive associated-point case from the Sixth Circuit in *Donahey*, and wrongly characterized the facts of the case to involve only officer liability instead of properly examining liability under both officer and owner status. All of this side-stepping was necessary to dismiss consideration of the prevention test in *Tiscornia*.

In a case subsequent to *Tiscornia* involving CERCLA officer status liability, Judge Enslen criticized the *Tiscornia* holding and Judge McKeague, specifically, for his use of the direct participation test instead of the prevention test. *See* United States v. Taylor, No. 90-CV851, 1993 U.S. Dist. LEXIS 19082, at *19-23 (W.D. Mich. Dec. 9, 1993). Judge Enslen, addressing the incongruity of McKeague's rulings with his own on this subject, stated:

Court was that the test fails to implement the general strict liability standard of CERCLA due to the availability of the affirmative defense that the officer made efforts to avoid or abate the harm.[103]

These criticisms were recognized by the *Thomas Solvent* court, but that court found the test justified due to the "harsh and broad-sweeping" liability under a strict liability scheme.[104] The prevention test was designed as a compromise or middle-ground position between the strict liability present in a plain reading of CERCLA and the often too-protective traditional corporate limited liability.[105] Rather than attempting to ground the test in CERCLA's statutory language, these cases have unabashedly constructed a progressive test based on fairness principles, economics, and the goals of CERCLA in promoting prevention and remedying existing releases.[106] This middle-ground position encourages corporate officers to accept responsibility in the environmental management process.[107]

1. Prevention Versus Direct Participation

The benefits of the prevention test become clear when compared with other tests, specifically the direct participation test. With strict statutory liability under the direct participation test, a corporate official involved in waste disposal decision making may do everything possible to dispose of hazardous waste in an environmentally-safe manner. However, after contracting for the removal of the substance, the transporter may accidentally spill while loading a truck. Under the direct participation test, the officer would be personally liable because of his direct participation in the disposal.[108] Thus, the direct participation test does not take into account any positive efforts made by that officer in the dispo-

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> The Court recognizes that, as with a split in the circuits, a split in this district causes unfortunate confusion and ambiguity in the law. The Court welcomes the day when the Sixth Circuit may render a decision that settles the matter not only for sole shareholders of corporations as in Donahey, but also for officers and employees who may also be individually liable as operators.

Taylor, 1993 U.S. Dist. LEXIS 19082, at *23.

[103] *See* Newton, supra note 25, at 334.

[104] *Thomas Solvent*, 727 F. Supp. 1532, 1543 (W.D. Mich. 1989).

[105] *Id.* at 1543-44; *see also* Newton, *supra* note 25, at 334.

[106] *See* Newton, *supra* note 25, at 334.

[107] *Thomas Solvent*, 727 F. Supp. at 1544.

[108] *See* Oswald, *supra* note 85, at 590.

sal of the waste, while the prevention test would allow this to be an affirmative defense to the attachment of liability.

Further, aside from a lack of fairness in the direct participation test, a statutory strict liability standard may also frustrate one long-term goal of creating incentives for safe behavior by those in the best position to control such disposal methods.[109] Those who are potentially encouraged to help in improving disposal techniques might simply avoid becoming involved at all, fearing attachment of the full joint and several weight of the corporation's liability without regard to individual fault.[110]

2. Commentary on the Prevention Test

One criticism of the prevention test is that it has no strong foundation in case law or statutory law upon which to stand.[111] As such, it appears to be a form of judicial legislation. However, CERCLA's legislative history indicates that federal common law may be developed by courts to fill any gaps.[112] The prevention test, therefore, becomes more justified under CERCLA with every new case opinion that adopts it.

Another criticism focuses on the fact that since the prevention test allows a PRP to provide an affirmative defense to liability, it does not follow the general policy of CERCLA in imposing strict liability and, as such, is an inappropriate method of determining whether CERCLA liability attaches.[113] However, the prevention test can be viewed as determining only which parties are responsible parties, after which the strict liability of CERCLA settles on their shoulders.[114]

The prevention test is not a bright-line test and requires a fact determination considering the totality of the circumstances involved.[115] Strict liability is more predictable, easier to implement and saves judicial resources. However, courts that decline to

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[109] *Thomas Solvent*, 727 F. Supp. at 1544-45.

[110] *Id.*

[111] *See* Kelley v. Tiscornia, 827 F. Supp. 1315 (W.D. Mich. 1993).

[112] The House sponsor of CERCLA, Congressmen Florio, stated: "To insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in [this] area and law." 126 CONG. REC. 31,965 (1980).

[113] Newton, *supra* at note 25, at 335-36.

[114] *Id.*

[115] Kelley v. Thomas Solvent, 727 F. Supp. 1532, 1544 (W.D. Mich. 1989).

use the prevention test on this basis alone ignore the fact that it may provide the most equitable standard for attachment of CERCLA liability to corporate officers. Moreover, the prevention test could foster progressive environmental policies and practices by corporate individuals and could create incentives for safe behavior.[116] The prevention test would not allow corporate individuals to avoid liability by divorcing themselves from waste disposal practices in a "see no evil, hear no evil" mentality,[117] whereas the direct participation test would allow just this situation, thus promoting irresponsibility and frozen indecision in corporate waste disposal. Finally, the prevention test provides an economic benefit. Since all such CERCLA cleanup costs are distributed among taxpayers and consumers, economic savings would be realized since prevention is cheaper than cleaning up a site. Although the *Tiscornia* court dismissed the prevention test because it was viewed as a judicially-created solution, it remains a viable and equitable option for Congress in considering amendments for CERCLA's potential reauthorization.

D. The Capacity to Control Test

In *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO I)*,[118] the court stated that direct participation might not be necessary. A "capacity to control" hazardous waste activities was enough to impose CERCLA liability on officers, even if the capacity was not utilized.[119] This standard is similar to the direct participation test. However, the focus of the control test is on the degree or type of control the corporate officer exercises over the activities leading to the CERCLA violation.[120]

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[116] *See generally* Newton, *supra* note 25.

[117] *Thomas Solvent*, 727 F. Supp. at 1544-45.

[118] 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, NEPACCO II, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In *NEPACCO I*, the court applied a personal participation test in holding Lee and Michaels individually liable. Part of the court's analysis indicated more of a control test. *NEPACCO I*, 579 F. Supp. at 823. The control part of this standard was ignored when *NEPACCO II* overruled the lower court on the finding of operator liability under § 9607(a)(2) and instead imposed transporter liability under § 9607(a)(3) using only the personal participation portion of the standard applied in *NEPACCO I*. *NEPACCO II*, 810 F.2d at 726.

[119] *NEPACCO II*, 810 F.2d at 726. Although *NEPACCO II* reversed the finding of *NEPACCO I* for liability as an "operator," this reversal was due to a finding that NEPACCO was not a "facility" under § 9607(a)(2), *id.*

[120] *See, e.g.*, United States v. Carolawn Co., 14 ENVTL. L. REP. 20,699, 20,700 (D.S.C. 1984) (stating that "to the extent that an individual has control or authority over

This approach has only been adopted by a few courts in assessing corporate officer liability.[121]

The *Tiscornia* Court ruled out the control test for consideration because the available jurisdictional case law had not applied it to owner or operator actions,[122] but only to cases involving arranger liability.[123] In summarily declining both the prevention and control tests, the court evidenced its disdain for either progressive approach to the policy problems involved in following either the statutory or a true corporate individual tort test.

1. Commentary on the Control Test

Commentators state that the capacity to control and prevention tests are two attempts to create new standards for determining liability under CERCLA by expanding officer liability beyond traditional corporate law notions in order to effectuate the Act's goals.[124] The capacity to control standard has been criticized because: (1) taken to its logical extreme, every CERCLA violation could be traced back to an officer whose exercise of or failure to exercise decision-making control resulted in the hazardous release; and (2) "responsible" officers would have to be held individually strictly liable, even if morally and legally blameless.[125]

However, courts that have implemented the control test have not relied upon mere officer status to impose liability in CERCLA actions.[126] Supporters of the control test further claim that it does

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the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs incurred at the facility notwithstanding the corporate character of the business").

[121] *See, e.g.*, United States v. Mexico Feed & Seed Co., 764 F. Supp. 565, 571 (E.D. Mo. 1991) (holding the president was individually liable due to his authority to control the disposal of hazardous waste).

[122] CERCLA § 101, 42 U.S.C. § 9607(a)(2) (1988).

[123] 42 U.S.C. § 9607(a)(3).

[124] Oswald, *supra* note 85, at 616-17. Oswald states, on the other hand, that the direct participation test is based in traditional corporate law doctrine, piercing the corporate veil, *id.*

[125] *Id.* at 614-15.

[126] Oswald & Schipani, *supra* note 61.

> [Although] the control test may appear to relax traditional liability standards somewhat by suggesting that something less than actual participation or involvement in the wrongdoing will impose personal liability on officer, courts have applied the test in a manner which focuses on operational control, i.e., control over actual hazardous waste disposal practices, not general managerial control over the corporation. The control test does not, therefore, rely upon mere officer status in imposing liability."

not deviate from traditional corporate liability for direct tortious injury because *specific* control over hazardous waste disposal is required.[127] This result is true even though the control test can impose liability regardless of whether the control was exercised or not, since just like a tort standard, it covers both malfeasance and nonfeasance.[128]

One of the biggest problems with the control test is that it further blurs the distinction between the direct participation test and the prevention test, being similar in some ways to each of those tests. Control over waste disposal practices may allow a certain amount of implied fault into the analysis, since failing to exercise proper control could be construed as fault.[129] In this way, the control test may be similar to the prevention test. On the other hand, the ability to control could involve many persons who are completely removed from the decision-making process, amounting to attachment of bona fide strict liability. The true persona of the control test may swing either way, depending on the view of the court that implements it. It may be this lack of definition that has caused some courts to shun the control test in favor of the direct participation and prevention tests. While the control test arguably is based in corporate law through corporate individual tort, the direct participation test holds more solid ground.

IV. OBSERVATIONS ON THE 1994 CERCLA REAUTHORIZATION

One of the greatest concerns regarding CERCLA liability as imposed on corporate individuals is the strict liability standard. "Imposition of strict liability is guided by a number of policies and objectives such as the promotion of fairness, economic efficiency, risk-spreading, [internalization costs,] and deterrence."[130]

Id. at 290-91.

[127] *Id.* (emphasis added).

[128] *Id.*

> "Breach of a legal duty, through nonfeasance, as well as misfeasance or malfeasance, can give rise to liability under traditional doctrine. Thus, to the extent that an officer has exercised control over hazardous waste disposal practices in a wrongful manner, or has failed to exercise authority delegated to him or her so that a harm results, imposition of liability on that officer is in keeping with traditional doctrine."

Id.

[129] *See generally* Oswald & Schipani, *supra* note 61.

[130] Oswald, *supra* note 85, at 592. *See* Greenman v. Yuba Power Prod., Inc., 377 P.2d 897 (Cal. 1963); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

While these policies are effectively achieved when applied to large corporations,[131] they fail when applied to individual officers.[132] Courts have recognized this ineffectiveness and have responded with the several approaches examined in *Tiscornia* as a way of adding a layer of culpability or fault, while still fitting into the statutory rubric of CERCLA strict liability.[133] With this result in mind, two groups, a fairness faction and a corporate law faction, have emerged as challengers to the current CERCLA imposition of strict liability derived from the plain-meaning of the statute.

A. The Fairness Faction

The fairness faction centers their solution on the prevention test. They have suggested CERCLA must address the inherent differences between individual and corporate violators of the Act.[134] This difference, they argue, is taken into account by the prevention test, an unabashed judicial reworking of CERCLA's imposition of liability.

In addressing individuals, CERCLA should shift away from purely remedial goals and toward promoting incentives for new ideas and trends in safe disposal.[135] Lauri Newton claims the prevention test best performs that task.[136] The prevention test would alleviate some of the imbalance of corporate law and economics

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[131] Oswald, *supra* note 85, at 611. The policy objective of fairness, risk-spreading, economic efficiency and deterrence are achieved when applied to corporations: (1) X corporation received economic gain from the production activities creating the hazardous wastes, thus fairness dictates that it pay for the harm created (fairness); (2) X corporation can raise the price of widgets to cover any additional liability (risk-spreading); (3) increased liability creates incentives for reducing production of hazardous waste (deterrence); and (4) strict liability saves costs of litigating (economic efficiency), *id.*

[132] *Id.* at 612. If a spill occurs and an officer is found liable even though the officer is not at fault and has made genuine efforts to avoid hazardous releases, it does not fulfill policy goals to find him or her strictly liable: (1) an individual officer gains no economic benefit from the hazardous waste production or disposal; (2) an individual cannot spread risk and internalize costs of cleanup because an individual cannot pass along these costs to the consumer; (3) although, the risk may create incentive for the officer to take measures to minimize risk of environmental harm at the facility, the ability to do so will be constrained by the officer's position and authority within the corporation; and (4) since there can be no internalization, there can be no economic efficiency gained, *id.*

[133] *Id.*

[134] *See* Newton, *supra* note 25, at 340-43.

[135] *Id.* at 344.

[136] *Id.*

caused by fear of the severe consequences of liability attaching to corporate officers.[137]

One commentator, William Biel, feels the prevention test could be added to current corporate law doctrine.[138] He characterizes the prevention test as being an "environmental" business judgment rule.[139] Just as the business judgment rule allows corporate officers a shield from liability under certain circumstances, so would the prevention test.[140] It has been suggested that CERCLA's expansion of corporate officer liability has upset the balance that corporate law achieves between law and economics.[141] Biel states that the prevention rule would work to restore this bal-

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[137] William S. Biel, Comment, *Whistling Past the Waste Site: Directors' and Officers' Personal Liability for Environmental Decisions and the Role of Liability Insurance Coverage*, 140 U. PA. L. REV. 241(1991). Although heavily fact-specific, the prevention test [at] the very least, . . .

> allows corporate D&Os [directors and officers] to prove that the practices used and individual precautions taken to prevent the release of hazardous substances meet a threshold standard of care. By meeting such a standard, individual D&Os would avoid joint and several liability with other PRPs for accidental releases of hazardous substances. Such a standard reflects the traditional common law notions underlying the business judgment rule. The prevention test, therefore, reflects the uncertainty involved in many corporate decisions that have potential environmental effects and promotes responsible decision- making.

Id. at *253.*

[138] *Id.* at 252-53.

[139] *Id.* An example of the business judgment rule is when "courts will not hold officers and directors liable for decisions made if there is no bad faith, negligence, gross abuse of discretion or self dealing." HENN & ALEXANDER, *supra* note 12, at 661-63. The business judgment rule is used in cases involving fiduciary duties where a business decision is involved. *Id.*

Biel supposes that an "environmental" business judgment rule, probably embodied in the prevention test, would give officers the same type of protection from attacks of the government for cleanup costs that the traditional business judgment rule provides from attacks of the shareholders. Biel, *supra* note 137, at 253. The basic idea behind both concepts is that businesses cannot function at all if every decision that the officer makes may be challenged and second-guessed at a cost of full liability for that decision. Biel, *supra* note 137, at 247.

> Such a rule should not protect D&Os who personally participate in environmental contamination by making reckless or grossly negligent environmental decisions, but should protect decisions to use the most environmentally safe means available at the time the decision is made. Such a common law rule, similar to the business judgment rule, may counteract the legal environment of increased personal exposure to environmental liability.

Biel, *supra* note 137, at 247.

[140] Biel, *supra* note 137, at 253.

[141] *Id.*

ance, making the market and environment work efficiently.[142] Without some protection from strict liability, the increase of corporate individual risk may cause managers to fail by acting conservatively in an attempt to avoid liability by distancing themselves from the disposal or by refusing to take risks.[143] This reaction may be detrimental to safe environmental practices as well as affect corporate profitability and success.[144]

B. The Corporate Law Faction

The corporate law faction believes that use of traditional forms of corporate liability can best prevent upsetting the delicate balance of corporate law and the marketplace.[145] Any more expansion of a model opens the door for courts to allow strict liability to attach to corporate officers in a regular fashion, destroying the basis of corporate law doctrine.[146] This move away from strict liability is advocated by way of existing corporate law only, instead of a progressive approach of the prevention test ilk.[147]

Oswald questions the application of CERCLA's strict liability standard as applied to corporate officer liability:

> It is not at all clear that Congress intended such an expansion in liability when it enacted CERCLA, nor is it clear that such an expansion is consistent with the rationale of CERCLA's statu-

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[142] *Id.* Biel gives an example of how this environmental business judgment rule would work:

> [C]onsider the normal situation of a director who has made a good faith environmental decision, such as deciding to use the best available means for containing and disposing of hazardous wastes. Under the business judgment rule, the director would expect that if the best available means accord with industry standards and CERCLA liability results regardless of those best available means, he will still be protected from shareholder suits.

Id. at 255.

[143] Biel, *supra* note 137, at 257.

[144] *Id.*

> Corporate managers must continue to operate their corporations as best as they can—charged with fiduciary duties toward the shareholders on the one hand, but vulnerable to individual liability on the other hand. No legal standard of protection exists for those directors and officers who by act or by chance find themselves personally associated with a Superfund site. The concept of fiduciary duty of director and officers to shareholders can be broadened to apply to decisions affecting the environment as well.

Id. at 282. (footnotes omitted.)

[145] Oswald & Schipani, *supra* note 61, at 262.

[146] *Id.*

[147] Oswald, *supra* note 85, at 582-85.

> tory goals of cleaning up contaminated sites and ensuring that, to the extent feasible, those responsible for the contamination bear the costs of that cleanup.[148]

Oswald maintains that judicially-crafted tests created to remedy the inadequacies of CERCLA's strict liability are not superior to traditional corporate law tests as applied to corporate individuals.[149]

C. *Coexistence of the Two Factions*

Both factions suggest solutions to CERCLA's strict liability for corporate individuals which have merit. Most commentators agree that any solution is better than the statutory one of strict liability.

But the *Tiscornia* decision best illustrates the problems involved with these competing factions. As mentioned *supra*, *Tiscornia* was decided in the Western District of Michigan where the prevention test was developed and applied by Judge Enslen. Within this district, Judge Enslen has recently ruled that corporate officer liability is determined by the prevention test,[150] following his prior decisions in *Thomas Solvent*.[151] Since Judge McKeague in *Tiscornia* ruled that his standard for officer liability was the direct participation test,[152] the law is left in a state of

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[148] *Id.* (citing H.R. Rep. No. 253 (III), 99th Cong., 1st Sess. 15, *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 (noting that Congress' goals in enacting CERCLA were "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups"). Oswald goes on to observe:

> Imposition of personal liability upon individuals, whether officers or shareholders, has typically been regarded as the exception, not the norm, in corporate law. Before the courts abandon well-established legal principles in favor of a statutory extension of liability, they should be certain that the legislature intended such an extension; likewise, before the legislature mandates such an expansion of liability, it should be certain that expanded liability furthers, rather than hinders, its legislative goals and objectives.

Id. at 583.

[149] *Id.* The time is right to step back and recognize that "the traditional principles of law already provide adequate mechanisms for holding these parties personally liable in appropriate circumstances." *Id.* at 636.

[150] United States v. Taylor, No. 90-CV851, 1993 U.S. Dist. LEXIS 19082, at *23 (W.D. Mich. Dec. 9, 1993). Enslen openly criticized McKeague for his ruling in *Tiscornia* and his finding that the prevention test is appropriate for corporate officer liability. *Id; see also supra* note 102 (discussing the prevention test).

[151] 727 F. Supp. 1532 (W.D. Mich. 1989).

[152] Kelley v. Tiscornia, 827 F. Supp. 1315, 1324 (W.D. Mich. 1993).

ambiguity. Certainly a decision of the Sixth Circuit on this issue would resolve the inconsistency, but the better solution is for Congress to clarify the proper standard under the upcoming reauthorization. Such a clarification would allow a uniform solution, saving judicial resources which have been expended in grappling with this issue. The need for such a solution is clearly established and illustrated by the subject of this comment, *Kelley v. Tiscornia.*

CONCLUSION

The *Tiscornia* court exemplifies the corporate law faction by supporting corporate individual liability as operators under CERCLA. However, these courts may be too preoccupied with trying to fit square pegs into round holes. That is, these courts are trying to reconcile CERCLA liability with traditional corporate law approaches, while being too unconcerned about the most proper and equitable solution for CERCLA liability for operators.

In exploring the current range of officer liability standards, the *Tiscornia* court correctly rules out piercing the corporate veil as an applicable standard since it applies mostly to owner liability. It further identifies the prevention and control tests as judicially-crafted with no true statutory or common law basis. However, the court does stretch to reach its conclusion that the direct participation test is fully within traditional tort law as an implementation of corporate individual tortious liability.

The biggest flaw with this reasoning is that the direct participation test lacks a causation element. At best, causation is presumed because of the corporate individual's involvement with waste disposal. Since this test is interpreted by many to be pseudo-strict liability, the test diverges from standard corporate individual tort. This result effectively places the direct participation test on the same ground as other judicially-created remedies under CERCLA as applied to corporate individuals. It has little direct basis for its existence as well. However, its similarity to strict liability means that it best follows a statutory interpretation of CERCLA.

The control test suffers from the biggest flaws found in both the direct participation standard and the prevention test. It can be construed to be unlimited liability for officers based on their status alone, an even higher standard than the near-strict liability standard of the direct participation test. It can also be viewed as con-

taining a fault element since a determination of whether the defendant could have controlled toxic waste disposal really amounts to implied fault in that he had capacity to avoid the harm. This combination of flaws may have caused most courts to avoid it.

The prevention test, although perhaps the most equitable, is very progressive and far-reaching. It effectuates both short- and long-term goals of CERCLA. But, the fact that it is judicially-crafted tends to prejudice courts against using it. However, this may not clash with the long-range intent of the statute, since the legislative history supports the development of federal common law in this area.

Therefore, the direct participation test and the prevention test are the most viable alternatives. The direct participation test has the strongest basis for existence in current law. Healy claims it follows CERCLA, and the *Tiscornia* court claimed it embodied traditional corporate law doctrine. The prevention test recognizes the dilemma that officer liability represents and presents the most economic and fair approach. Courts and commentators alike agree, however, that a strict liability standard is too oppressive to apply to corporate officers, especially in the absence of specific Congressional intent.[153] The mere existence of these varying tests reveal the court's recognition of this near consensus and signal the gradual move away from strict liability for officers under CERCLA.

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[153] *Oswald, supra* note 85, at 635-37.

> When the benefits are so small, and the risks so great, expansion of liability should be undertaken cautiously. Traditional corporate and agency law doctrines provide certainty and ensure that most, if not all, of the corporate actors who engage in culpable and egregious behavior are held liable. Application of CERCLA to corporate individuals, because of its strict liability scheme, vague statutory language, and confused legislative history, creates uncertainty; CERCLA is thus an inappropriate vehicle for the expansion of individual liability."

Id. at 637.