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LENDER LIABILITY AND THE CORPORATE VEIL: AN ANALYSIS OF LENDERS AS SHAREHOLDERS UNDER CERCLA

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I. Introduction

On September 30, 1996, President Clinton signed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (ALDA).[1] Prior to the passage of ALDA, lenders who had security interests in property operated as a hazardous waste site were trapped in a Catch-22.[2] Case law suggested that if the lender merely participated in the management of the company running the site, it faced potential liability as a waste site operator under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[3] However, if the lender did nothing, but was later forced to foreclose on the property, thus gaining full title to the waste site, it also faced potential liability as an owner under CERCLA.[4] ALDA limits a lender's liability for costs associated with environmental cleanup, holding lenders responsible for cleaning up property only if they are involved in the management of the business which operates the premises.[5] The passage of ALDA resolves the inconsistency between lender liability and shareholder/owner liability under CERCLA, and provides a more predictable course for future case law.[6]

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[1] Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (ALDA), Pub. L. No. 104–208, 110 Stat. 3009 (1996).

[2] *See infra* Part VI.

[3] *See* 42 U.S.C. §§ 9601–9675 (1994).

[4] *See* Guidice v. BFG Electroplating & Mfg. Co., Inc., 732 F. Supp. 556, 562 (W.D. Pa. 1989); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986); United States v. Mirabile, 15 Envtl. L. Rep. 20,994, 20,997 (E.D. Pa. 1985).

[5] *See* ALDA § 2502(b).

[6] *See infra* Part VI.

This comment analyzes lenders as stakeholders in a corporation, and different from a shareholder only in that a lender's interest is tied to a specific piece of corporate property, whereas a shareholder has a general interest in all matters of the corporation.[7] Furthermore, since shareholders and lenders both contribute greatly to the capitalization of the company, both should incur similar risks if the company is sued or is unprofitable. This comment will show that imposing lender liability under an "owner" theory of liability is similar to piercing the corporate veil, and is precisely what courts have attempted to avoid with respect to corporate parents and shareholders.[8]

Part II of this Comment will discuss CERCLA and provide some basic background material on its origins and purpose. Part III will address some aspects of corporate law which provide important background to the cases that will be discussed. Part IV will move on to the liability of corporations, both in the context of parent/subsidiary liability and shareholder liability under CERCLA. Part V will deal with the liability of lenders before the passage of ALDA. Lastly, Part VI will discuss the inconsistencies between pre-ALDA lender liability and judicial interpretations of corporate parent and shareholder liability, and how ALDA reconciles these differences.

II. The Comprehensive Environmental Response, Compensation and Liability Act

CERCLA was passed in December, 1980 "[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."[9] By passing CERCLA, Congress attempted to achieve two goals: first, CERCLA would allow the government to promptly and effectively respond to problems of hazardous wastes and their disposal, and second, the costs of cleanup would be imposed on those responsible for the contamination.[10] To accomplish these goals, Congress created the Hazardous Substances

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[7] *See* 19 William Meade Fletcher et al., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 3:42, 3:43 (perm. ed. rev. vol. 1990) [hereinafter FLETCHER CYC CORP].

[8] *See infra* Part VI.

[9] *See, e.g.*, United States v. Hughes, 68 F.3d 811, 821 n.19 (3d Cir. 1995); United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1984); *see also* Brent Nicholson & Todd Zuiderhoek, *The Lender Liability Dilemma: Fleet Factors History and Aftermath*, 38 S.D. L. REV. 22, 24 (1993).

[10] *See* Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923, 925 (1990).

Response Trust Fund, more commonly known as the "Superfund," to finance the costs of cleaning sites by levying excise taxes on the chemical and petroleum industries.[11] Understanding that the problem of hazardous wastes is not insular, CERCLA does not hold just these industries liable for waste cleanup.[12] In 1986, the Superfund Amendments and Reauthorization Act (SARA) increased the initial Superfund balance of $1.6 billion to $8.5 billion to allow for a more agressive attack on hazardous waste sites.[13]

Four groups of contributors to a hazardous waste site can be held liable under CERCLA.[14] They are 1) owners of waste sites; 2) operators of waste sites; 3) arrangers of hazardous materials; and 4) transporters of hazardous materials.[15] When the Environmental Protection Agency (EPA) targets a potential hazardous waste site, the owners and operators become known as potentially responsible parties, or PRPs.[16] CERCLA then enables EPA to do one of three things: 1) order the responsible party to remediate the site, and impose fines of up to $25,000 per day of non-compliance; 2) seek an injunction to compel a responsible party to clean up the site; or 3) clean up the waste itself using Superfund money, and then seek recompense from a responsible party.[17] Once cleanup by the government begins with money from the Superfund, a PRP may not seek any court relief until all the work has been completed.[18] Further, when the PRP does get to court, it is not entitled to a jury trial and is allowed to present very

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[11] *See* Roger J. Marzulla and Brett G. Kappel, *Lender Liability Under the Comprehensive Environmental Response, Compensation and Liability Act*, 41 S.C. L. REV. 705, 708 (1990); Nicholson & Zuiderhoek, *supra* note 9, at 26.

[12] CERCLA defines a person to be "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) (1994).

[13] *See* Nicholson & Zuiderhoek, *supra* note 9, at 26.

[14] *See* 42 U.S.C. § 9607(a) (1994).

[15] *See id.*

[16] There are four general categories of potentially responsible parties: 1) the owner and operator of a vessel or facility; 2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substanes were disposed of; 3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, . . . of hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party or entity and containing such hazardous substances; and, 4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilties, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. 42 U.S.C. §§ 9607(a)(1)–(4).

[17] *See* 42 U.S.C. §§ 9604, 9606, 9607(a) (1994); *see also* Nicholson & Zuiderhoek, *supra* note 9, at 26.

[18] *See* Marzulla & Kappel, *supra* note 11, at 707.

little, if any, of its own evidence.[19] In deciding the case, the court is limited to the administrative record prepared by the government, "whose judgments are entitled to deference by the court unless they are found to be arbitrary and capricious."[20] A PRP can be held both strictly liable for its disposal of the waste, and jointly and severally liable for the costs of the cleanup, regardless of the extent of its contribution of wastes.[21]

CERCLA provides three defenses for PRPs that enable them to escape liability.[22] A PRP will not be held liable if it can prove that the damage was caused by:

> 1) an act of God;
> 2) an act of war;
> 3) an act or omission of a third party other than an employee or agent of the defendant, or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant, . . . if the defendant establishes . . . that
> (a) he exercised due care with respect to the hazardous substance[s] [and] . . .
> (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[23]

Although the first two defenses have been practically non-existent in subsequent litigation, the third exception permits the PRP to escape liability if it proves the two elements by a preponderance of the evidence.[24] In the earlier years of CERCLA litigation, PRPs exerted much effort trying to create new defenses, exemptions, limitations, and procedural and jurisdictional hurdles to avoid liability.[25] These attempts were largely unsuccessful.[26]

CERCLA, however, does provide an exemption for secured creditors.[27] Specifically, the statute states that an "owner or operator" does not include persons who do not participate in the management of a

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[19] *See id.*

[20] *See id.*

[21] *See* Nicholson & Zuiderhoek, *supra* note 9, at 27.

[22] *See* 42 U.S.C. § 9607(b) (1994).

[23] *Id.*

[24] *See* Marzulla & Kappel, *supra* note 11, at 710. What has become known as the "innocent landowner" defense added a third element to the other two, and requires that the landowner "purchased the property without knowing or having reason to know that the property was contaminated by hazardous substances." *See id.*

[25] *See* Barr, *supra* note 10, at 924.

[26] *See id.*

[27] *See* 42 U.S.C. § 9601(20)(A) (1994).

facility but do hold an "indicia of ownership" in order to protect a security interest.[28] Because CERCLA was not intended to target lenders, but instead "hazardous waste generators and transporters," it was unclear whether Congress intended an "owner" to include a lender who foreclosed on property and took title.[29] It was also unclear whether a lender was deemed an "operator" when it enforced certain terms of the loan.[30] As will be discussed below in Part V, courts have struggled with CERCLA's provisions because of the vague language of the statute and the relative lack of legislative history.[31] Congress made clear its goals for the statute, but intended that the courts fill the gaps with the development of an evolving federal common law.[32] In doing so, Congress sought to create uniformity in CERCLA liability in the national goal of environmental protection.[33] However, courts have had problems with consistency in establishing liability when applying the "owner" and "operator" theories of liability.[34]

III. The Corporation

A. *The Corporation and Limited Liability*

A corporation is a legal "person" created by a group of incorporators, generally to facilitate dealings in business transactions that would be much more complicated to achieve otherwise.[35] The classical theory of the corporation included two basic truths: first, that a corporation was merely one way of creating a business entity, and second, that the corporation was the best way to amass a large amount of capital from numerous investors.[36] These individual investors then became known as shareholders, and held an ownership interest in the company.[37] In addition to shareholders, another common source of capital to finance asset requirements comes from financial institutions such as banks.[38] Banks provide funds to businesses on both short and

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[28] *See id.*
[29] *See* Nicholson & Zuiderhoek, *supra* note 9, at 28.
[30] *See id.*
[31] *See* Barr, *supra* note 10, at 923.
[32] *See id.* at 925.
[33] *See id.* at 925–26.
[34] *See* Nicholson & Zuiderhoek, *supra* note 9, at 28.
[35] *See* Herbert Hovenkamp, Enterprise and American Law 1836–1937, 42–44 (1991).
[36] *See id.* at 13.
[37] *See* James C. Dockeray & William H. Husband, Modern Corporation Finance 225–27 (3d ed. 1952); *see also In re Hoskins*, 102 F.3d 311, 318 (7th Cir. 1996).
[38] *See* 19 Fletcher Cyc Corp §§ 3:40, 3:41.

long-term loans which may be secured or unsecured by company property.[39]

The characteristics of today's corporations and their legal relationships with the state developed from these two basic truths described above.[40] One such trait, and arguably the most important, is limited liability.[41] Limited liability ensures that corporate officers, directors, and the shareholder/owners are shielded from liability for tortious or illegal corporate actions to the extent of their investment in the company.[42] In the modern day, courts understand that limited liability is one of the principal objectives of incorporation, and are willing to respect that purpose so long as the corporation was formed and operated consistent with legitimate business purposes.[43]

B. *Piercing the Corporate Veil*

The mere fact that a business entity has been incorporated (thus providing limited liability protection) does not completely preclude the courts from holding the individual directors, officers, or shareholders personally liable in all cases.[44] Courts typically "pierce the corporate veil"[45] when the officers and directors have not followed the proper formalities of operating a corporation.[46] In other words, individual officers, directors, or shareholders may be found personally liable if two conditions are apparent: 1) the separate personalities of the corporation and the shareholders/owners are unified; and 2) to respect the corporate form and limit the liability of shareholders and owners would sanction a fraud or promote an injustice.[47]

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[39] *See id.* § 3:41.

[40] *See* HOVENKAMP, *supra* note 35, at 13–14.

[41] *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS § 73 (3d ed. 1983). Other important attributes would include (1) the power to contract and to take, hold, and convey property in the corporate name; (2) the power to sue and to be sued in the corporate name; (3) centralization of management in the board of directors; (4) ready transferability of shares; and (5) perpetual succession. *See id.* § 79.

[42] *See id.* § 73.

[43] *See id.* § 146.

[44] *See id.*

[45] When a court "pierces the corporate veil," the directors, officers, and/or shareholders no longer have the protection of limited liability. Each and every person can then be held personally liable for the torts of the company. *See* HENN & ALEXANDER, *supra* note 41, § 146.

[46] *See id.*

[47] *See* Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 569–70 (7th Cir. 1985); *see also* 1 FLETCHER CYC CORP § 41.10.

The first element in justifying a piercing of the corporate veil can be satisfied by a balancing of four factors: 1) failure to maintain adequate corporate formalities; 2) the commingling of funds between the shareholders and the corporation; 3) undercapitalization of the corporation; 4) and a corporation treating the assets of another as its own.[48] An inquiry into the existence of these four elements is based on the rationale that if officers and directors are not performing the tasks essential to the proper functioning of a corporation, then those running such a company should not get the benefit of limited liability.[49]

The second element of the test is satisfied if respecting the corporate form by not piercing the veil would sanction a fraud or promote an injustice.[50] In demonstrating that to respect the corporate form would sanction a fraud, the plaintiff must show that there was "intentional wrongdoing" by those running the corporation.[51] In the alternative, a plaintiff can prove that a failure to pierce the corporate veil would promote an injustice, a lesser standard than proving fraud because intent is not an element.[52] This can be accomplished by demonstrating the existence of a compelling public interest[53] such that the court must disregard the corporate form.[54]

For example, in *Sea-Land Services v. Pepper Source*, the plaintiff brought an action against Pepper Source to pierce its corporate veil and hold the owner, Gerald J. Marchese, personally liable for debts owed to Sea-Land.[55] The plaintiff also sought to "reverse-pierce" Marchese's other corporations and hold them liable for the

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[48] *See Van Dorn*, 753 F.2d at 570; *see generally* HENN & ALEXANDER, *supra* note 41, § 146.

[49] *See Van Dorn*, 753 F.2d at 569–70; *see also* Victoria Elevator Co. v. Meriden Grain Co., Inc., 283 N.W.2d 509, 513 (Minn. 1979); Kinney Shoe Corp. v. Polan, 939 F.2d 209, 212 (4th Cir. 1991).

[50] *See Van Dorn*, 753 F.2d at 570; *see also* Sea-Land Servs., Inc. v. Pepper Source, 941 F.2d 519, 520–21 (7th Cir. 1991).

[51] *See* Torco Oil Co. v. Innovative Thermal Co., 763 F. Supp. 1445, 1451 (N.D. Ill. 1991) (citing *Van Dorn*, 753 F.2d at 570).

[52] *See Van Dorn*, 753 F.2d at 569–70; *see also Sea-Land*, 941 F.2d at 522–24.

[53] A compelling public interest may include "any wrong beyond a creditor's inability to collect," or for example:

> the common sense rules of adverse possession would be undermined; former partners would be permitted to skirt the legal rules concerning monetary obligations; a party would be unjustly enriched; a parent corporation that caused a sub's liabilities and its inability to pay for them would escape those liabilities; or an intentional scheme to squirrel assets into a liability-free corporation while heaping liabilities upon an asset-free corporation would be successful.

Sea-Land, 941 F.2d at 524.

[54] *See id.*

[55] *See id.* at 520.

debts owed as well.[56] The United States Court of Appeals for the Seventh Circuit relied on a test it previously established in *Van Dorn v. Future Chemical and Oil*,[57] which set forth the two requirements needed to justify piercing the corporate veil, as described above.[58] Finding that Marchese ran all four of his corporations "out of the same, single office, with the same phone line, the same expense accounts" and often "used the bank accounts of these corporations to pay all kinds of personal expenses, including alimony and child support payments to his ex-wife, education expenses for his children, maintenance of his personal automobiles, [and] health care for his pet," the court held that the shared control/unity of interest and ownership element of the *Van Dorn* test was satisfied.[59] The court noted that Marchese had clearly created these four "shell" corporations for his own personal use while enjoying the freedom from liability provided by their existence.[60]

On remand, the Seventh Circuit held that further evidence submitted by Sea-Land Services clearly proved that failure to pierce the corporate veil of Pepper Source would both sanction a fraud and promote an injustice.[61] The court relied on clear evidence that Marchese had engaged in tax fraud by treating his personal expenses as deductible corporate business expenses.[62] Thus, the court found that "since Marchese was enriched unjustly by his intentional manipulation and diversion of funds from his corporate entities, to allow him to use these same entities to avoid liability 'would be to sanction an injustice.'"[63]

Therefore, the incorporation of a business does not guarantee immunity from personal liability for the torts of the company.[64] Courts are generally unwilling to pierce the corporate veil, especially when the corporation is managed and operated properly.[65] However, when

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[56] *Id.*

[57] *Van Dorn*, 753 F.2d at 569–70 (citing Macaluso v. Jenkins, 420 N.E.2d 251, 255 (Ill. App. Ct. 1981)) (other citations omitted).

[58] *See Sea-Land*, 941 F.2d at 520 (citing *Van Dorn*, 753 F.2d 569–70).

[59] *Id.* at 521–22.

[60] *Id.* at 520–21.

[61] *See* Sea-Land Servs., Inc. v. Pepper Source, 993 F.2d 1309, 1313 (7th Cir. 1993).

[62] *See id.* at 1312.

[63] *See id.* (citing Gromer, Wittenstrom & Meyer, P.C. v. Strom, 489 N.E.2d 370, 374 (Ill. App. Ct. 1986)).

[64] *See, e.g.*, Kinney Shoe Corp. v. Polan, 939 F.2d 209, 211 (4th Cir. 1991); Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509, 512 (Minn. 1979).

[65] *See* HENN & ALEXANDER, *supra* note 41, § 146.

it is clear that the corporation was created merely to avoid personal liability or to perpetrate a fraud, courts will not hesitate to hold the responsible individuals personally liable.[66]

IV. The Liability of Corporations Under CERCLA

A. *Parent Company Liability Under CERCLA*

The language of CERCLA expressly includes, among other "persons," corporations and other commercial entities as potentially responsible parties for liability.[67] A number of cases have even held that a corporation which may be "dead," but whose assets have not yet been divided and distributed to shareholders can still be held liable under CERCLA.[68] Unsurprisingly, resulting lawsuits against corporations have inquired as to the possibility of piercing the corporate veil in order to find liability on the part of the corporation's owners, shareholders, or parent company.[69] The U.S. government has urged the adoption of a uniform federal rule on parent corporation liability.[70] The suggested rule differs substantially from the federal common law, and would hold a parent corporation liable either if the parent directly participated in the management of the subsidiary, or if the subsidiary were substantially integrated in some way into the business of the parent.[71] In virtually all cases, courts have not found parent corporations liable for the contamination caused by their subsidiaries merely because of their ownership of the stock.[72] However, in those cases where the parent corporations were held liable, the court found the

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[66] *See Sea-Land*, 993 F.2d at 1313.

[67] 42 U.S.C § 9601(21) (1994).

[68] *See* Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1152 (N.D. Fl. 1994); United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1498 (D. Utah 1987).

[69] *See, e.g.*, United States v. Kayser-Roth Corp., 910 F.2d 24, 25 (1st Cir. 1990); United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1200 (E.D. Pa. 1989); Joslyn Mfg. Co. v. T.L. James & Co., 696 F. Supp. 222, 224 (D. La. 1988), *aff'd*, 893 F.2d. 80 (5th Cir. 1990); *In re* Acushnet River & New Bedford Harbor, 675 F. Supp. 22, 30 (D. Mass. 1987).

[70] *See* Marzulla & Kappel, *supra* note 11, at 719.

[71] *Id.*

[72] Ownership of stock has not been equated with the notion of "ownership" when determining "owner" liability under CERCLA. *See, e.g.*, *Joslyn*, 893 F.2d at 82–83; *In re Acushnet River*, 675 F. Supp. at 32.

[73] *See Kayser-Roth*, 910 F.2d at 27 (holding parent liable for its activities as an operator); *Nicolet*, 712 F. Supp. at 1205 (denying motion to dismiss and holding that "case law suggests

parent to be actively involved in the subsidiary's violation, and thus directly liable under CERCLA using an "operator" theory of liability.[73]

Therefore, two theories of parent corporation liability were created.[74] The first is where the parent corporation can only be held liable if the facts support a piercing of the corporate veil.[75] The second theory states that the parent can be held directly liable if it exercises control over the subsidiary beyond a certain threshold.[76] However, an examination of the cases will demonstrate that the two theories are essentially different paths to the same result.

B. *Degree of Control Necessary to Pierce the Corporate Veil*

The standard of veil piercing applied by courts under CERCLA is the same as the *Van Dorn* two pronged test, namely that the government must show that: 1) there is such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and 2) to respect the corporate form would be to sanction a fraud or promote an injustice.[77] CERCLA case law has established a number of facts which may satisfy the first element of unity of interest.[78] The "laundry list" that courts have used in determining whether to pierce the corporate veil consists of the following elements (in descending order of importance):

> 1) inadequate capitalization in light of the purposes for which the corporation was organized;
> 2) extensive or pervasive control by the shareholder or shareholders;
> 3) intermingling of the corporation's properties or accounts with those of its owner;
> 4) failure to observe corporate formalities and separateness;
> 5) siphoning of funds from the corporation;
> 6) absence of corporate records; or
> 7) nonfunctioning officers or directors.[79]

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that a mortgagee can be held liable under CERCLA only if the mortgagee participated in the managerial and operational aspects of the facility in question").

[74] *See* Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 301 (1992).

[75] *See id.*

[76] *See id.*

[77] *See Joslyn*, 893 F.2d at 83; *In re Acushnet River*, 675 F. Supp. at 33.

[78] *See id.* (citations omitted).

[79] *See id.*

The degree of control in the second of the seven considerations was further broken down into twelve important factors by the United States Court of Appeals for the Fifth Circuit in *United States v. Jon-T Chemicals*,[80] Each of these elements is very fact specific and the ultimate decision to pierce requires a totality test.[81]

The creation of the balancing test began when the United States District Court for the District of Massachusetts in *In re Acushnet River and New Bedford Harbor* dealt with the issue of whether the court should pierce the corporate veil of Aerovox, Inc., a subsidiary wholly owned by RTE Corporation (RTE).[82] Aerovox was one of six defendants charged with contamination of the New Bedford Harbor and the Acushnet River.[83] The court explicitly rejected the government's argument that 100 percent ownership of the subsidiary should in and of itself be enough to hold the parent corporation liable for the violations of its subsidiary.[84] Believing it was the duty of Congress and not the courts to establish the boundaries of CERCLA liability, the court stated that it would not disregard the corporate form and impose liability on the parent "under the guise of furthering some unspoken congressional intent," especially when it was not clear that the parent did anything illegal.[85]

In *United States v. Nicolet*, the United States District Court for the Eastern District of Pennsylvania also rejected the contention that mere ownership of stock in the subsidiary should subject the parent corporation to liability.[86] Instead, the court followed the theory of "operator" liability adopted by the *Acushnet* court, which requires some degree of parent involvement in the management and operations of the subsidiary in order to hold the parent liable.[87] The court

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[80] *See* United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691–92 (5th Cir. 1985) (citations omitted). The test is a balancing of whether: 1) the parent and the subsidiary have common stock ownership; 2) the parent and the subsidiary have common directors or officers; 3) the parent and the subsidiary have common business departments; 4) the parent and the subsidiary file consolidated financial statements and tax returns; 5) the parent finances the subsidiary; 6) the parent caused the incorporation of the subsidiary; 7) the subsidiary operates with grossly inadequate capital; 8) the parent pays the salaries and other expenses of the subsidiary; 9) the subsidiary receives no business except that given to it by the parent; 10) the parent uses the subsidiary's property as its own; 11) the daily operations of the two corporations are not kept separate; and 12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings. *See id.*

[81] *See id.* at 694.

[82] *See In re Acushnet River*, 675 F. Supp. at 30.

[83] *See id.* at 25.

[84] *See id.* at 34.

[85] *See id.* at 32.

[86] *See* United States v. Nicolet, Inc., 712 F. Supp. 1193, 1202 (E.D. Pa. 1989).

[87] *See id.*

further explained the rule for when the corporate veil should be pierced in a CERCLA case, stating:

> where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.[88]

The first appellate court to address the issue of parent corporation liability was the United Staets Court of Appeals for the Fifth Circuit.[89] In *Joslyn Manufacturing v. T.L. James & Co.*, the Fifth Cicuit rejected the analysis of other cases that held officers liable for the costs of cleanup without first piercing the corporate veil.[90] Following the lead of *In re Acushnet River and New Bedford Harbor*, the *Joslyn* court refused to pierce the corporate veil, holding that CERCLA does not include parent corporations in the definition of owner or operator.[91] The court reasoned that if Congress had intended to extend liability to parent corporations, the legislative history would have so indicated.[92]

Instead, the court used a narrow standard of veil piercing, holding that "[v]eil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate a fraud or avoid personal liability."[93] This holding was a reversion to the traditional doctrine of veil piercing, in which courts disregard the corporate form only when the facts clearly support the conclusion that the subsidiary is a "bogus shell" of the parent corporation.[94]

C. *Direct Statutory Liability of Parent Corporations*

The majority of courts[95] in other circuits have rejected the *Joslyn* approach, imposing direct statutory liability on a parent corporation when the parent has exercised a certain degree of control over the

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[88] *Id.*
[89] *See generally* Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990).
[90] *See id.* at 82.
[91] *See id.* at 82–83.
[92] *See id.* at 83.
[93] *See id.*
[94] *See Joslyn*, 893 F.2d at 84.
[95] *See generally* Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996); United States v. TIC Inv.

subsidiary. This approach can be classified as "operator" liability.[96] Although that amount of control has been a very vague threshold, these courts have still been relatively unwilling to apply the traditional standards of piercing the corporate veil to find liability.[97]

For example, in *United States v. Kayser-Roth*, the United States Court of Appeals for the First Circuit distinguished *Joslyn* on the basis that the issue framed in that case was simply to "impose direct liability on parent corporations for the violations of their wholly owned subsidiaries."[98] The First Circuit stated that in this case, the question was whether Kayser-Roth was to be held directly liable for its activities as an operator, versus liability as an owner for the activities of its subsidiary, Stamina Mills.[99] Although the evidence demonstrated Kayser-Roth's active involvement in the activities of its subsidiary, and that this involvement was clearly sufficient to have pierced the corporate veil even under the narrow *Joslyn* test, the First Circuit explicitly declined to use this method of establishing liability.[100] Instead, the First Circuit held that Kayser-Roth's pervasive control over the activities of Stamina Mills was sufficient in and of itself to hold Kayser-Roth directly liable as an operator under CERCLA.[101]

In *Shiavone v. Pearce*, the United States Court of Appeals for the Second Circuit specifically rejected the *Joslyn* court's unwillingness to perceive CERCLA as "authorizing a departure from longstanding principles of corporate law."[102] Instead, the *Schiavone* court reasoned that the ability to hold a parent company liable stems from the parent's control over the subsidiary, which in turn necessarily must fall

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Corp., 68 F.3d 1082 (8th Cir. 1995); Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993); United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990).

[96] *See generally Schiavone*, 79 F.3d at 248; *TIC Inv. Corp.*, 68 F.3d at 1082; *Sidney S. Arst*, 25 F.3d at 417; *Lansford-Coaldale*, 4 F.3d at 1209; *Jacksonville Elec.*, 996 F.2d at 1107; *Carolina Transformer*, 978 F.2d at 832; *Kayser-Roth Corp.*, 910 F.2d at 24.

[97] *See Schiavone*, 79 F.3d at 255; United States v. Cordova Chem. Co., 59 F.3d 584, 594–96 (6th Cir.) (Ryan, J., dissenting), *vacated* 67 F.3d 586 (1995).

[98] *See Kayser-Roth*, 910 F.2d at 27 (quoting *Joslyn*, 893 F.2d at 81).

[99] *See id.*

[100] *See id.* at 27–28.

[101] *See id.*

[102] *See Schiavone*, 79 F.3d at 255.

under an "operator" theory of liability.[103] The court further reasoned that "unlike owner liability, the basis for such operator liability is wholly independent of any liability on the part of" the subsidiary.[104] Thus, when evidence establishes that the parent corporation can be deemed an operator of the subsidiary (at which point, the Fifth Circuit would apparently look to piercing the corporate veil), the Second Circuit court instead looks to holding the parent directly liable under an "operator" theory of liability.[105] In adopting this approach, the Second Circuit has aligned itself with the majority of circuits in deciding this issue.[106]

D. *Shareholder Liability Under CERCLA*

Although the requirements for piercing the corporate veil to impose liability on the shareholders of a corporation are the same as they are for a parent company, the analysis differs slightly when dealing with shareholders. Case law shows that different results occur when the shareholder is 1) a corporate officer (but not a director); 2) a simple shareholder in a large public corporation; and 3) a shareholder in a closely held company.[107] Relatively few courts have pierced the corporate veil to hold a shareholder liable under CERCLA.[108] Even those courts that have held a shareholder liable, did so only when the shareholders involved were also corporate officers who directly controlled the facility.[109] This is the same standard of liability applied in determining corporate parent liability.

For example, in *United States v. Mottolo*, the defendant was the sole shareholder of the corporation.[110] The United States District Court for the District of New Hampshire stated that this fact alone may have been sufficient to hold him liable, even given the fact that

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[103] *See id.* at 254–55.

[104] *Id.* Remember, a court would not be able to find the parent company liable for its subsidiary's actions under an owner liability theory. It has been established that mere ownership of stock in a company is not sufficient to warrant liability. *See supra* note 72 and accompanying text.

[105] *See Schiavone*, 79 F.3d at 255.

[106] *See supra* note 95 and accompanying text.

[107] *See* Oswald & Schipani, *supra* note 74, at 298–99.

[108] *See id.* at 297.

[109] *See id.; see also* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (holding stockholder liable under CERCLA); United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988) (holding defendant liable under CERCLA since he was sole shareholder of corporation and operator of the facility).

[110] *See Mottolo*, 695 F. Supp. at 624.

he admitted to "incorporat[ing] Service [Pumping and Drain Co., Inc.] to escape potential personal liability by using the corporate entity as a shield."[111] The court noted that Mottolo could have been found liable either by examining his operation of his company, Service Pumping and Drain Co., Inc. (Service), or through his admission to forming the company for an improper purpose.[112]

The court stated that Mottolo, as the sole shareholder of Service, "is personally liable for tort liabilities incurred by the proprietorship" and "is also liable as a site operator in his capacity as owner of Service."[113] The evidence in the case showed that Mottolo had "transported and arranged for the transportation of numerous containers and at least two tank trucks of hazardous waste materials . . . on behalf of Service, either driving the truck himself or having a Service employee drive."[114] The court also held that this evidence clearly made Mottolo liable as a transporter of hazardous materials under 42 U.S.C. § 9607(a)(3).[115]

Mottolo's admission to creating Service merely to avoid personal liability would have itself been sufficient to hold him liable under CERCLA.[116] The court stated: "[a]lthough the corporate entity is generally recognized for most purposes, it may not be employed to avoid overriding federal legislative policies, and federal courts will disregard it if the interests of public convenience, fairness, and equity so demand."[117]

In *New York v. Shore Realty*, the United States Court of Appeals for the Second Circuit concluded that the stockholder, Donald LeoGrande, was an "owner or operator" of the facility because his stock holdings could be seen as an indicia of ownership.[118] LeoGrande incorporated the Shore Realty Corporation for the purpose of purchasing the property on Shore Road, which contained hazardous materials.[119] LeoGrande was fully aware that the current tenants, Applied Environmental Services, Inc. and Hazardous Waste Disposal, Inc. were operating an illegal hazardous waste storage facility on the prop-

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[111] *See id.*
[112] *See id.* at 623–24.
[113] *Id.* at 623 (citing HENN & ALEXANDER, *supra* note 41, § 18).
[114] *Id.* at 623 n.4.
[115] *See Mottolo*, 695 F. Supp. at 623 n.4.
[116] *See id.* at 624.
[117] *Id.* (citing Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986)).
[118] *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985).
[119] *See id.* at 1038.

erty.[120] A number of tanks located above and below ground that contained hazardous materials, clearly covered by CERCLA, were leaking into the ground and contaminating both the groundwater and Hempstead Harbor.[121] Shore employees brought the situation to the attention of the State, asking it "to enter the site, inspect it, and take steps to mitigate the 'life-threatening crisis situation.'"[122] Thereafter, the state of New York sued Shore Realty Corp. to recover costs incurred in the inspection of the site and in supervising the disposal of the hazardous wastes.[123]

The Second Circuit found Shore liable for the costs incurred by the State, and held LeoGrande jointly and severally liable under CERCLA and New York state law.[124] Further, the court held that the security interest exemption did not apply to LeoGrande because he had participated actively in the management of the corporation, and thus was liable as an "operator" under CERCLA.[125] The court imposed liability on LeoGrande without piercing the corporate veil by relying on a New York law allowing "a corporate officer who controls corporate conduct and [who] thus is an active individual participant in that conduct" to be held liable "for the torts of the corporation."[126]

Thus, case law indicates that courts reject the use of an "owner" theory of liability and instead apply an "operator" theory when determining liability of corporate parents and shareholders.

V. The Liability of Lenders

A. *The Growth of Lender Liability Under CERCLA*

Because CERCLA was primarily intended to target hazardous waste generators and transporters, the already-sparse legislative history fails miserably to provide direction on the issue of lender liability.[127] Because section 107 of CERCLA holds the current owner or operator of the waste site responsible, a problem arises when a lender forecloses on property which contains hazardous wastes.[128] However,

[120] *Id.*
[121] *Id.*
[122] *Id.* at n.3.
[123] *Shore Realty*, 759 F.2d at 1037.
[124] *See id.* at 1037.
[125] *See id.* at 1052.
[126] *Id.* at 1052.
[127] *See* Marzulla & Kappel, *supra* note 11, at 710; Nicholson & Zuiderhoek, *supra* note 9, at 28.
[128] *See* 42 U.S.C. § 9607(a)(1) (1994).

liability is unclear under the statute for a lender who forecloses on the property and becomes the "owner" by taking legal title.[129] The definition of "operator" under CERCLA is also vague in describing what actions are considered to rise to the level of "participation in the management of."[130] An exemption for secured creditors allows them to escape liability if they can prove that "without participating in the management of a vessel or facility, [they] hold an indicia of ownership primarily to protect [their] security interest in the vessel or facility."[131]

In *United States v. Mirabile*, the United States District Court for the Eastern District of Pennsylvania was the first to attempt to define what actions by a lender constitute participation in the management of a facility.[132] In *Mirabile*, EPA brought suit against the owners of the property to recover the costs of cleaning the waste created by the prior original owner, Turco Coatings (Turco).[133] The plaintiffs then impleaded a number of third party defendants, including American Bank and Trust Company (American Bank), who had foreclosed on the property after Turco had ceased operations on the site.[134] American Bank held title to the property for four months before assigning title to the Mirabiles at a sheriff's sale.[135] American Bank argued that this did not qualify it as an "owner" under CERCLA.[136] The court agreed, holding that because American Bank acquired only equitable title pursuant to the foreclosure, and not legal title, and that American Bank merely foreclosed on the property and took "prudent and routine steps to secure the property against further depreciation," American Bank did not participate in the day-to-day management of the facility.[137] Therefore, the court held, American Bank was not liable under CERCLA.[138]

However, the court in *Mirabile* also stated that actions a lender normally would take to assist a troubled borrower may be construed as participating in the management of the borrower's business, thus subjecting the lender to CERCLA liability.[139] These actions fell under

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[129] *See* Nicholson & Zuiderhoek, *supra* note 9, at 28.

[130] *See id.*

[131] *Id.* § 9601(20)(A).

[132] *See* United States v. Mirabile, 15 Envtl. L. Rep. 20,994, 20,995 (E.D. Pa. 1985); *see also* Marzulla & Kappel, *supra* note 11, at 714–15.

[133] *See Mirabile*, 15 Envtl. L. Rep. at 20,994–95.

[134] *See id.* at 20,995.

[135] *See id.* at 20,996.

[136] *See id.*

[137] *See id.*

[138] *See Mirabile*, 15 Envtl. L Rep. at 20,996.

[139] See *id.* at 20995–96; *see also* Marzulla & Kappel, *supra* note 11, at 724.

the "operator" liability theory of CERCLA.[140] Another third party defendant in *Mirabile*, Mellon Bank National Association (Mellon) became concerned about its financial interest in Turco, and as a result, became more vocal with the management as the company began to falter.[141] The court denied Mellon's motion for summary judgment, holding that Mellon's actions might trigger CERCLA liability.[142]

In *United States v. Maryland Bank & Trust*, the United States District Court for the District of Maryland distinguished *Mirabile* on the basis of the difference in the lenders' time of possession before resale.[143] In this case, Maryland Bank & Trust (Maryland Bank) attempted to rely on the secured creditor exemption.[144] However, the court found this exemption inapplicable, holding that Maryland Bank was unlike American Bank in *Mirabile* because American Bank had assigned its interest in the property after the foreclosure.[145] Here, the court noted, Maryland Bank still owned the property (possessed legal title) at the time EPA filed suit against them.[146] In finding CERCLA liability, the court noted that Maryland Bank purchased the property at the foreclosure sale to protect its investment, not its security interest, and that "only during the life of the mortgage did Maryland Bank hold indicia of ownership primarily to protect its security interest in the land."[147] *Maryland Bank & Trust* thus set precedent for the distinct possibility that lenders would not be able to foreclose and hold property without incurring CERCLA liablity under an "ownership" theory.[148]

In *Guidice v. BFG Electroplating and Manufacturing*, the residents of the Borough of Punxsutawney, Pennsylvania, brought suit against the defendant, alleging that BFG Electroplating and Manufacturing Co. (BFG) had contaminated the environment.[149] BFG, in turn, filed third party complaints against the current and past owners of the adjacent property, known as the Berlin Property.[150] BFG sought

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[140] *See* Nicholson & Zuiderhoek, *supra* note 9, at 30.

[141] *See Mirabile*, 15 Envtl. L. Rep. at 20,997.

[142] *See id.*

[143] *See* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 n.5 (D. Md. 1986); Marzulla & Kappel, *supra* note 11, at 714–15.

[144] *See Maryland Bank & Trust*, 632 F. Supp. at 579.

[145] *See id.* at 579 n.5.

[146] *See id.* at 576.

[147] *See id.* at 579.

[148] *See* Nicholson & Zuiderhoek, *supra* note 9, at 31.

[149] *See* Guidice v. BFG Electroplating & Mfg. Co., Inc., 732 F. Supp. 556, 557 (W.D. Pa. 1989).

[150] *See id.*

indemnification against those owners and from the National Bank of the Commonwealth (National Bank), which had been a record title owner of the Berlin Property for eight months.[151] When Berlin defaulted on its obligations to the bank, National Bank conducted several meetings with the officials of Berlin Metal Polishers (Berlin) in an attempt to help the company avoid further defaults.[152] Just over one year later, National Bank foreclosed on the Berlin Property, and subsequently purchased it at the foreclosure sale.[153] The deed was delivered to the bank, and during its eight month period of ownership, National Bank paid the insurance premiums and property taxes on the Berlin property.[154] The *Guidice* court looked to the different time periods in which National Bank was involved with Berlin to determine whether CERCLA liability existed at any time under either an "owner" theory of liability or under an "operator" theory of liability.[155]

The court held that prior to National Bank's purchase of the property at the foreclosure sale, National Bank took steps only to protect its security interest when it conducted meetings with Berlin officials.[156] The court further concluded that under the existing case law, a mortgagee is exempt from CERCLA liability so long as there was no "participat[ion] in the managerial or operational aspects of the facility."[157] The *Guidice* court followed the district court opinion in *United States v. Fleet Factors*,[158] which interpreted "participating in the management" and "primarily to protect its security interest" to permit a secured creditor "to provide financial assistance and general, and even isolated instances of specific management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation."[159] The *Guidice* court held that National Bank's actions prior to the foreclosure were insufficient to render the secured creditor exemption void.[160]

[151] *See id.*
[152] *See id.* at 558.
[153] *See id.* at 559.
[154] *See Guidice*, 732 F. Supp. at 559.
[155] *See id.* at 561.
[156] *See id.* at 562.
[157] *Id.* at 561.
[158] See *infra* notes 163–72 and accompanying text.
[159] United States v. Fleet Factors Corp., 724 F. Supp. 955, 960 (S.D. Ga. 1988), *aff'd*, 901 F.2d 1550 (11th Cir. 1990).
[160] *See* Guidice, 732 F. Supp. at 562.

However, the court in *Guidice* then looked to National Bank's actions after the purchase of the property at the foreclosure sale.[161] Relying primarily on *Maryland Bank & Trust*, the court held that the secured creditor exemption did not apply when National Bank became the owner of the property, and thus National Bank was a PRP under CERCLA.[162] In doing so, the court explicitly rejected the holding in *Mirabile*.[163] The court rationalized this by stating that "[w]hen a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been."[164]

B. *United States v. Fleet Factors*

In a decision that caused widespread panic among lenders, the United Stated Court of Appeals for the Eleventh Circuit explicitly rejected *Mirabile* in *United States v. Fleet Factors*.[165] *Fleet Factors* involved an attempt by EPA to expand the definition of "owner or operator".[166] The Eleventh Circuit held the lower court's construction of the secured creditor exemption "too permissive towards secured creditors who are involved with toxic waste facilities."[167] The Eleventh Circuit further stated that to achieve the statutory goal of CERCLA, "ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities."[168] Although the court affirmed the finding of a lack of CERCLA liability under § 9607(a)(1) for owning, operating, or controlling activities at the facility immediately before the tax foreclosure, the court looked to whether the lender was an operator of the facility at the time of disposal of the hazardous wastes.[169]

The Eleventh Circuit held that the phrase "participating in the management" and the term "operator" were similar but not analogous.[170] The court set a new standard, stating that a secured creditor may be liable under § 9607(a)(2) without being an operator, merely by

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[161] *See id.*

[162] *See id.* at 563.

[163] *See id.*

[164] *Id.*

[165] *See Guidice*, F. Supp. at 561 (citing United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990)); *see also* Marzulla & Kappel, *supra* note 11, at 717.

[166] *See Fleet Factors*, 901 F.2d at 1557.

[167] *Id.*

[168] *See id.*

[169] *See id.* at 1554–55.

[170] *See id.* at 1557.

participating in the financial management of a facility "to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[171] This analysis thus implicitly rejected Fleet's argument that it was merely protecting its security interest in the facility by foreclosing on its interests in the equipment, inventory, and fixtures.[172] The court held that this argument was entirely immaterial to the test for whether the secured creditor exemption applied, as only "the nature and extent of the creditor's involvement with the facility, not its motive" is relevant.[173] The rationale behind this holding was that Congress did not intend CERCLA to allow "secured creditors to take indifferent and irresponsible actions toward their debtors' hazardous wastes with impunity by incanting that they were protecting their security interests."[174]

Because the *Fleet Factors* decision had the unforgiving ability to impose liability on lenders without their being an owner or operator, the nation's lenders and federal agencies became extremely concerned with the potential for disaster when lenders needed to take steps to protect their secured property during the term of the mortgage.[175] Before the *Fleet Factors* decision, lenders had the absolute ability to provide financial assistance or limited management advice without having to worry about CERCLA liability, so long as the lender did not cross the threshold into day-to-day management of the company.[176] Undoubtedly, lending practices became much more restricted and complicated after *Fleet Factors*.[177] However, because *Fleet Factors* rests on the belief that financial institutions have had the power to protect themselves from CERCLA liability by making prudent loans, lending practices should not be adversely affected by the *Fleet Factors* decision.[178]

In light of *Fleet Factors*, EPA promulgated a regulation in April, 1992 to clarify the meaning of "participation in management."[179] The rule allowed lenders to 1) investigate the site or facility before taking a security interest in the property; 2) continue to monitor the opera-

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[171] *See Fleet Factors*, 901 F.2d at 1557.

[172] *See id.* at 1560.

[173] *Id.*

[174] *Id.*

[175] *See* John W. Ames et al., *104th Congress Builds New Safe Harbor*, 15 AM. BANKR. INST. J., 8, 8 (1987); Nicholson & Zuiderhoek, *supra* note 9, at 38.

[176] *See* Nicholson & Zuiderhoek, *supra* note 9, at 38.

[177] *See id.*

[178] *See* Joel R. Burcat, *Environmental Liability of Creditors: Open Season on Banks, Creditors, and Other Deep Pockets*, 103 BANKING L.J. 509, 539–41 (1986).

[179] *See* 40 C.F.R. § 300.1100 (1992).

tions of the facility; and 3) require further that the borrower comply with all environmental laws.[180] Lenders are also permitted to conduct negotiations with management when loans are in danger of default.[181] Most importantly, the rule permitted lenders to foreclose on property without incurring any liability, so long as: 1) the lender did not participate in the management of the facility prior to the foreclosure; and 2) the lender made diligent attempts to resell or reassign the land after foreclosure.[182]

However, this affirmative step taken by EPA was abrogated by the decision in *Kelley v. EPA*.[183] In *Kelly*, the United States District Court for the District of Columbia held that EPA exceeded its statutory authority under CERCLA to pass such a measure as a substantive rule, though the court admitted that EPA would not have exceeded its authority had the measure been drafted as an interpretive rule.[184] Looking to the language of CERCLA, the court rejected EPA's argument that the power to pass such a regulation stemmed from sections 105(a)(3) and 105(a)(4).[185] EPA's premise was that these two sections granted them the authority to promulgate a national contigency plan in response to a contamination.[186] The court conceded this position but emphasized that this power did not translate into the authority to determine liability under section 107.[187] In vacating the rule, the court further held that the EPA rule does not have deference in court because Congress intended the courts, and not EPA, to determine issues of liability.[188]

[180] *See id.* § 300.1100(c)(2).

[181] *See id.* § 300.1100(c)(2)(ii)(B).

[182] *See id.* § 300.1100(d).

[183] *See* Kelley v. Environmental Protection Agency, 15 F.3d 1100, 1109 (D.C. Cir. 1994).

[184] *See id.* at 1108.

[185] *See id.* at 1106.

[186] *See id.* at 1105. These sections apply to EPA through the agency authority granted to the President in section 115 to delegate and assign any duties, including the power to promulgate regulations necessary to carry out the provisions of CERCLA. *See* 42 U.S.C. §§ 9605(a)(3)–(4), 9615 (1994). However, this agency authority was limited by *Wagner Seed v. Bush* to allow the EPA *only* to interpret certain language in section 106 that applied to EPA's administrative responsibilities *only*. *See* Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 920 (D.C. Cir. 1991).

[187] *See Kelley*, 15 F.3d at 1105 n.3.

[188] *See id.* at 1108–09.

C. *The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996*

The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (ALDA) was enacted on September 30, 1996. ALDA amends CERCLA by adding new subsections E, F, and G to the definitions provided in section 101(20).[189] ALDA also explicitly reinstates the EPA rule vacated by *Kelley v. EPA* stating that it was "validly issued under authority of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980."[190]

The term "participate in management" is amended to "mean[] actually participating in the management or operational affairs of a vessel or facility; and . . . does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations."[191] Furthermore, the law explicitly excludes from the CERCLA definition of "owner or operator" a lender who forecloses on the property, subject to any participation in the management of that facility.[192] Thus, a lender may foreclose on property without threat of incurring liability so long as it did not participate in the management of the vessel or facility before the foreclosure, and actively seeks to sell, release, or liquidate the facility after the foreclosure.[193] ALDA also permits a lender to meet with management to renegotiate the terms of the loan or to provide financial advice if the company is in danger of defaulting.[194]

Prior to the passage of ALDA, courts had been slowly expanding the extent of lender liability.[195] Lenders were soon finding themselves incurring liability for actions they believed were taken to protect their investments and not for the sake of participating in the management of the facility.[196] The *Fleet Factors* decision was the climax in this expansion, sending lenders scrambling to rethink their lending practices, and to ensure that they were not already subject to liability.[197]

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[189] *See* ALDA § 2502(b).
[190] *See id.* § 2504(a).
[191] *Id.* § 2502(b).
[192] *See id.*
[193] *See id.*
[194] *See* ALDA § 2502(b).
[195] *See* Nicholson & Zuiderhoek, *supra* note 9, at 38.
[196] *See id.*
[197] *See* Ames, *supra* note 175, at 8.

VI. Analysis

A. *Inconsistencies of Pre-ALDA Lender Liability Case Law with Traditional Notions of Corporate Law*

1. Lenders as stakeholders

Much like shareholders, lenders contribute capital to corporations who wish to expand into a larger, more profitable firm by providing them with the means to pursue various ventures that may not be otherwise feasible.[198] Similarly, shareholders are, in most cases, a chief source of capital for both initial startup companies and longstanding giants.[199] Although these two groups differ in that one is a debt holder and the other an equity holder, both interests are still considered to be forms of ownership interests in a corporation.[200] A lender's interest is specifically tied to a particular piece of corporate property, while a shareholder has a general interest in the affairs of the corporation.[201] Nonetheless, lenders and shareholders both hold a stake in the matters of the corporation.[202]

2. The Inconsistency between Lender Liability Cases and Shareholder Liability Cases under CERCLA

The cases under CERCLA before the passage of ALDA failed to realize the similarities between lenders and shareholders.[203] In terms of imposing CERCLA liability on lenders and shareholders when their participation in the management of the facility is evident, the case law is consistent when applying an "operator" theory of liability.[204] The statutory language of CERCLA is clear that the operators of a hazardous waste facility are to be held liable.[205]

In cases involving lenders, courts have imposed liability on those who have involved themselves in the day-to-day management of the company or facility.[206] Further, the courts have been consistent in

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[198] *See* 19 Fletcher Cyc Corp §§ 3:40, 3:41.
[199] *See id.* § 3:43.
[200] *See In re* Hoskins, 102 F.3d 311, 318 (7th Cir. 1996).
[201] *See* 19 Fletcher Cyc Corp §§ 3:41, 3:42.
[202] *See id.*; *In re Hoskins*, 102 F.2d at 318.
[203] *See supra* Parts IV and V.
[204] *See supra* Parts IV and V.
[205] *See* 42 U.S.C. §§ 9607(a)(1)–(2) (1994).
[206] *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557–60 (11th Cir. 1990) (creating

finding that the "secured creditor" exemption does not apply when lenders participate in the management of a facility.[207] Such a degree of involvement clearly extends beyond merely "hold[ing] indicia of ownership primarily to protect [their] security interest in the vessel or facility."[208]

Similarly, in the cases dealing with shareholders and corporate parents, courts have consistently imposed liability on these two groups when the facts clearly indicated that they were active in the day-to-day operations of the facility.[209] It is clear under the case law that when the courts attempted to pierce the corporate veil, shareholders were almost never held liable.[210] Shareholder liability only resulted when the shareholder was also a corporate officer, or a shareholder in a closely held company, or more simply stated, when the shareholder was in a position to "participate in the management" of the company.[211] Furthermore, closer examination of the cases clearly indicates that it was not necessary to hold these shareholders individually liable in their capacities as owners, in order to find liability.[212] Instead, the courts needed only to look to the extent of the individuals' participa-

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harsher standard holding that "participating in the management" and "operator liability" were similar but not analogous and thus a secured creditor can be held liable under § 9607(a)(2) without even being an operator); United States v. Mirabile, 15 Envtl. L. Rep. 20,994, 20,997 (E.D. Pa. 1985) (denying motion for summary judgment brought by third party plaintiff, Mellon Bank, stating that its actions in helping faltering company may have triggered CERCLA liability).

[207] *See Fleet Factors*, 901 F.2d at 1559; United States v. Maryland Bank & Trust, Co., 632 F. Supp. 573, 579 (D. Md. 1986); *Mirabile*, 15 Envtl. L. Rep. at 20,995.

[208] *See* 42 U.S.C. § 9601(20)(A) (1994); *see also Fleet Factors*, 901 F.2d at 1555–56; *Maryland Bank & Trust*, 632 F. Supp. at 579; *Mirabile*, 15 Envtl. L. Rep. at 20,995.

[209] Liability has been found with and without piercing the corporate veil. *See Schiavone*, 79 F.3d at 254–55 (stating that operator liability is really independent of the actions of the subsidiary, and thus the controlling parent must be held liable directly, without piercing the corporate veil); United States v. Kayser-Roth Corp., 910 F.2d 24, 26–27 (1st Cir. 1990) (holding that although facility was run by subsidiary, parent corporation was liable as an operator of facility, without piercing the corporate veil, for parent's control over subsidiary); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (holding stockholder/officer personally liable under "operator" theory of liability because he managed the corporation, and was thus covered by CERCLA under § 9601(20)(A)); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1202 (E.D. Pa. 1989) (adopting an "operator" theory of liability used by court in *In re Acushnet River*, stating that the corporate veil should be pierced to hold the parent company liable only if the parent controls or controlled the subsidiary at the "relevant time"); United States v. Mottolo, 695 F. Supp. 615, 623 (D.N.H. 1988) (holding sole shareholder of corporation personally liable "as a site operator in his capacity as owner").

[210] *See supra* Part IV.D.

[211] *See Shore Realty*, 759 F.2d at 1052; *Mottolo*, 695 F. Supp. at 623.

[212] *See id.*

tion in the day-to-day management of the company, and impose liability based on an "operator" theory.[213] Thus, courts have shied away from piercing the corporate veil and imposing "owner" liability on shareholders.[214]

With respect to the cases dealing with lender liability prior to the passage of ALDA, however, courts had increasingly found "owner" liability.[215] Beginning with *Mirabile*, and culminating in *Fleet Factors*, lenders were subjected to growing limitations on their ability to ensure the security of their lien via the expanding threat of CERCLA liability.[216] This trend, however, is inconsistent when considering lenders as stakeholders in a corporation.

When a lender has clearly not "participated in the management" of the facility, then rationally, the majority of circuits should only look to "owner" liability and not "operator" liability.[217] This theory survives even the *Fleet Factors* standard, which separates "participation in the management" as its own theory of liability from the statutory theories of owner, operator, arranger, and transporter liability.[218] Furthermore, an investigation into "owner" liability for lenders is similar to conducting the test for piercing the corporate veil with respect to shareholders and parent companies. Lenders, shareholders, and parent companies all hold some form of an ownership interest in the company operating the site.[219] Thus, imposing liability on lenders under an "owner" theory is necessarily similar to piercing the corporate veil based on mere ownership of an interest in the corporation. However, courts will only pierce the corporate veil to hold shareholders and parent companies liable if the facts demonstrate that the corporation

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[213] *See id.*

[214] *See supra* Part IV.D.

[215] *See supra* Part V.A.

[216] *See supra* Part V.A.

[217] With the exception of the Eleventh Circuit (the *Fleet Factors* court), the other circuits that have dealt with this issue have held that "operator" liability excludes those situations where the lender has not "participated in the management" of the company. This, of course, also assumes that the lender was not directly operating any part of the facility in any way. *See supra* Part V.A.

[218] Arguably, if the possibility of holding the lender liable under arranger or transporter theories of liability exists, its activities as such may be sufficient to cause the lender to be found also as an operator, and thus held liable as one. *See* 42 U.S.C. §§ 9607(a)(1)–(4) (1994); United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (stating "individuals and entities involved in the operations of a facility are already liable as operators under the express language of section 9607(a)(2)").

[219] *See* Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 83 (5th Cir. 1990); *In re* Acushnet River, 675 F. Supp. 22, 33 (D. Mass. 1987).

was formed to perpetrate a fraud or avoid personal liability.[220] Courts have further held that the mere ownership of stock does not fall under the definition of "ownership" when determining "owner" liability.[221] With respect to lenders, however, the *Fleet Factors* decision made it clear that lenders may be held liable as an owner of the waste site upon foreclosure, despite the lender's lack of participation in the management of that site.[222] Although it failed to elaborate any further, the United States District Court for the Eastern District of Pennsylvania in *Mirabile* recognized an inconsistency, stating "that 'site control is an important consideration in determining who qualifies as an "owner" under Section 107(a)' . . . simply does not apply with the same force to secured creditors as it does to corporate officers and/or shareholders."[223]

Herein lies the problem. If a lender possesses a debt interest in a piece of property, but is not permitted to intervene in the activities of the operating corporation to ensure that hazardous wastes are not being stored or transported to or from the site,[224] yet, at the same time will inevitably incur CERCLA liability under an "owner" theory if forced to foreclose on the property,[225] what incentives remain for a lender to continue to make loans to small or large businesses? We may impose a burden on lenders to make prudent loans; however, even due diligence by a lender does not guarantee the compliance of the borrower after the signing of the loan papers. By imposing "owner" liability on lenders in such a situation, courts have effectively pierced the corporate veil to hold the lender liable. The case law is unclear as to why the corporate veil was not pierced to hold the officers and/or directors of the company operating the site individually liable for managing the business in such a way.[226] Again, to pierce the corporate

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220 *See supra* Part IV.B. The *Joslyn* court even so far as to say that parent companies are not included in the definition of owners or operators under CERCLA, and that the legislative history would have done so had Congress intended to extend liability to the parents. *See Joslyn*, 893 F.2d at 82–83.

221 *See id.* at 82–83; *In re Acushnet River*, 675 F. Supp. at 32.

222 *See Fleet Factors*, 901 F.2d at 1560.

223 United States v. Mirabile, 15 Envtl. L. Rep. 20,994, 20,995 (E.D. Pa. 1985).

224 Such actions would fall under "participation in the management" and void the secured creditor exemption. *See* 42 U.S.C. § 9601(20)(A) (1994); *Fleet Factors*, 901 F.2d at 1559; United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986); *Mirabile*, 15 Envtl. L. Rep. at 20,995.

225 *See Fleet Factors*, 901 F.2d at 1557.

226 *See generally Fleet Factors*, 901 F.2d 1150; Guidice v. BFG Electroplating & Mfg. Co., 732 F. Supp. 556 (W.D. Pa. 1989); *Maryland Bank & Trust*, 632 F. Supp. 573; *Mirabile*, 15 Envtl. L. Rep. 20,994.

veil, courts must look to see if: 1) the separate personalities of the corporation and the shareholders/owners are unified; and 2) to respect the corporate form would sanction a fraud or promote an injustice.[227]

A number of considerations factor into satisfying the first element of unity of interest, one of which is an inquiry into the amount of control exercised by the shareholders.[228] If that control is extensive or pervasive, the first element of veil piercing is satisfied.[229] Arguably, the second element of the two prong test used to determine if veil piercing is justified can be met relatively easily. In application, this has been a subjective test to determine whether an injustice will result if the corporate veil is not pierced.[230] Thus, a piercing seems justified when failure to do so would result in holding an innocent or powerless party responsible, in this case, the lender.

In the alternative, because case law indicates a strong aversion of courts to pierce the corporate veil, why not hold the owners and operators responsible for the presence of hazardous wastes at the site liable under an "operator" theory of liability? CERCLA clearly defines operator liability as including those operators "who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of."[231] The language "at the time of disposal" already provides a retroactive ability for courts to hold the prior owners individually liable, even after the foreclosure by the lender.[232] More importantly, the problem of holding unresponsible parties liable does not arise.

B. *How ALDA Solves the Problem*

ALDA resolves this inconsistency by reinstating the 1992 EPA Final Rule on Lender Liability that had been vacated by *Kelley*.[233] ALDA clearly limits the term "participate in the management" to only those actions taken by the lender that are "actually participating in the management . . . and does not include merely having the capacity to influence, or the unexercised right to control."[234] This phrase

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[227] *See* Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 570 (7th Cir. 1985).

[228] *See In re* Acushnet River & New Bedford Harbor, 675 F. Supp. 22, 33 (D. Mass. 1987).

[229] *See* United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691–92 (5th Cir. 1985); *In re Acushnet River*, 675 F. Supp. at 33.

[230] *See Van Dorn*, 753 F.2d at 570; Sea-Land Servs., Inc. v. Pepper Source, 941 F.2d 209, 522–24 (4th Cir. 1991).

[231] 42 U.S.C. § 9607(a)(2) (1994).

[232] *See id.*

[233] *See* ALDA § 2504(a).

[234] *See id.* § 2502(b).

had been the main source of trouble for courts in deciding lender liability.[235]

Furthermore, ALDA excludes lenders who have foreclosed on property from the CERCLA definition of "owner," thus correctly subjecting lenders to liability only when their participation in the management of the facility is truly an active role in the day-to-day decision-making.[236] Finally, ALDA allows for lenders to investigate the site and the company during the course of the loan term, and even to build covenants into the loan agreement relating to environmental compliance by the borrower.[237] These provisions enable a lender to take affirmative steps to protect its security interest in the property, without the fear of incurring liability.[238] Because the boundaries of lender action have now been clearly stated in ALDA, the liability of lenders under CERCLA will follow a more consistent and predictable course.

VII. Conclusion

Arguably, the future of the lending business had been in serious jeopardy because of the ever-increasing threat of CERCLA liability for cleanup costs. The passage of ALDA solves the courts' confusion about lender liability under CERCLA, providing clarity and direction for future cases. It sets clear terms for lenders to abide by in their effort to protect the value of their security interest. Furthermore, ALDA resolves the inconsistency in holding lenders liable under an "owner" theory of CERCLA liability which did not exist for shareholders and parent companies. This problem had also arisen, though unnoticed, as a result of the confusion surrounding lender liability. Thankfully, Congress's moves toward filling some of the gaps resulting from the haste in putting CERCLA into action in 1980.

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[235] *See* Nicholson & Zuiderhoek, *supra* note 9, at 28.
[236] *See* ALDA § 2502(b).
[237] *See id.*
[238] *See id.*