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# CERCLA DERIVATIVE SUITS

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*Corporations frequently incur liability pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Pursuant to the statute, however, the officers and directors of such corporations cannot be held directly liable. Despite this statutory protection, when corporations violate CERCLA, shareholders may be able to use a derivative suit to hold officers and directors liable based on the corporate actors' fiduciary duty of care.*

## INTRODUCTION

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in the early 1980s to allow governments or private parties to recover environmental cleanup costs from those responsible for the spills or releases of hazardous substances.<sup>1</sup> Although corporations are liable under the statute, individual officers and directors, in their roles as such, have been insulated from liability under CERCLA in instances where their companies were liable.<sup>2</sup> Rather than imposing liability on such corporate actors for their positions in the management and operation of corpo-

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<sup>1</sup> See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 (1994). The term "hazardous substance" is defined within CERCLA. See *id.* § 9601(14). Virtually all pollutants are included, except petroleum products and wastes excepted by the Solid Waste Disposal Act. See *id.*; Solid Waste Disposal Act, 42 U.S.C. § 6921 (West 1999).

<sup>2</sup> See 42 U.S.C. § 9601(14); see, e.g., *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (holding that defendant's liability was based not on his status as a corporate officer and employee, but on his personally arranging for the transportation and disposal of hazardous substances on behalf of the corporation); *Massachusetts v. Blackstone Valley Elec. Co.*, 777 F. Supp. 1036, 1039-40 (D. Mass. 1991), *vacated*, 67 F.3d 981 (1st Cir. 1995) (holding defendants not liable as directors since they did not personally participate in the conduct that violated CERCLA); Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. REV. 259, 263 (1992) (noting that "[a]ctive involvement by the corporate actor in the CERCLA violation, as opposed to mere status as an owner or officer, is still a prerequisite to imposition of liability").

rations, officers and directors have only been held liable under CERCLA when they are somehow directly involved in pollution incidents.<sup>3</sup>

In order to impose liability on directors and officers *qua* directors and officers of companies that incur CERCLA liability, stockholders can use the derivative suit mechanism.<sup>4</sup> Derivative suits compel a corporate board to bring suit against an individual, typically an officer or director, who has harmed the corporation.<sup>5</sup> If the suit is successful, the liable party will be obligated to pay damages directly to the corporation itself, an arrangement which, in theory, benefits the shareholders who suffered from the original harm.<sup>6</sup>

Section I of this Comment begins with a discussion of the role of officers and directors in the modern corporation, as well as a description of their fiduciary duties. Section II outlines CERCLA's legislative history and purpose. Section II also explores the current liability for directors and officers under CERCLA. Finally, Section III of this Comment argues that current CERCLA liability is inadequate, and that derivative suits should be allowed to proceed against the individual corporate officers and directors who violate CERCLA.

## I. CORPORATE LAW PRINCIPLES

This portion of the Comment will discuss principles of corporate law that are germane to possible CERCLA derivative suits. This section begins with a discussion of the role of officers and the board of directors within a corporation. Then, a discussion of officers' and directors' fiduciary duties will follow, along with a discussion of the Business Judgment Rule (BJR), which is closely related to those duties. This section concludes with a discussion of derivative suits, which are usually brought when one of the fiduciary duties has been violated. The section concludes with a description of the requirements that shareholders must meet in order to establish a derivative claim.

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<sup>3</sup> See Oswald & Schipani, *supra* note 2, at 263.

<sup>4</sup> See Laurie Galer Ohliger, Note, *Disincentive to Holding Corporate Office—How Risky is Director and Officer Business in Corporate America Today Under CERCLA*, 7 TEMP. ENVTL. L. & TECH. J. 83, 99–100 (1988) (mentioning the possibility of such suits); cf. Maya K. van Rossum, *Corporate Noncompliance With the Clean Water and Clean Air Acts: Theories to Hold a Director Personally Liable*, 13 VA. ENVTL. L.J. 99, 105–28 (1993) (discussing derivative suits against directors for violations of other environmental laws); see generally ROBERT CHARLES CLARK, CORPORATE LAW 639–74 (1986) (providing a general discussion about shareholders' suits).

<sup>5</sup> See CLARK, *supra* note 4, at 639.

<sup>6</sup> See *id.*

## A. *The Roles of the Board of Directors and the Officers*

### 1. The Board of Directors

According to the Revised Model Business Corporation Act (RMBCA), each corporation must have a board of directors (Board).<sup>7</sup> The model statute requires that all of the corporation's affairs be exercised by or under the authority of the Board.<sup>8</sup> This generalized notion of leadership has been called the "duty of oversight."<sup>9</sup>

However, scholars of both corporate law and business have noted that contrary to the broad duties suggested by model statutes such as the RMBCA, the actual role of the Board is much more limited.<sup>10</sup> There are a number of reasons for limiting a Board member's role, most of which are practical.<sup>11</sup> According to Dean Robert Clark of Harvard Law School, the MBCA<sup>12</sup> rule on directors' duties was drafted with these limitations in mind, and was meant "to preclude any possibility . . . that the section might be interpreted to require active involvement by boards in day-to-day affairs of corporations."<sup>13</sup> Thus, modern corporate law recognizes that directors cannot take part in every aspect of the management of the corporation, but, at the same time, courts have warned that directors are not to be mere ornamental figureheads, but rather "essential component[s] of corporate governance."<sup>14</sup>

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<sup>7</sup> See REVISED MODEL BUS. CORP. ACT § 8.01 (1984). The RMBCA was created by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association. See LEWIS D. SOLOMON ET AL., *CORPORATIONS LAW AND POLICY* 35 (4th ed. 1998). It was adopted in 1984, and thirty-five states have enacted corporation statutes modeled on it, or its predecessor, the Model Business Corporation Act (MBCA). See *id.*

<sup>8</sup> See REVISED MODEL BUS. CORP. ACT § 8.01.

<sup>9</sup> See GREGORY V. VARALLO & DANIEL A. DREIBACH, *FUNDAMENTALS OF CORPORATE GOVERNANCE* 1 (1996).

<sup>10</sup> See CLARK, *supra* note 4, at 106; MYLES M. MACE, *DIRECTORS: MYTH AND REALITY* 10-42 (1986).

<sup>11</sup> See CLARK, *supra* note 4, at 109.

<sup>12</sup> The MBCA was the predecessor to the RMBCA. See SOLOMON ET AL., *supra* note 7, at 35.

<sup>13</sup> *Id.*

<sup>14</sup> *Francis v. United Jersey Bank*, 432 A.2d 814, 823 (N.J. 1981).

## 2. Officers

The officers of a corporation are basically its more important executives.<sup>15</sup> They are required to follow the duties set forth for them in the corporation's bylaws and follow the direction of the Board.<sup>16</sup>

According to the RMBCA, an officer will not be liable for any action taken in her role as such, or any failure to take any action, if she performs her duties in compliance with section 8.42 of the RMBCA.<sup>17</sup> Under section 8.42, an officer must discharge her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner that he or she reasonably believes is in the best interests of the corporation.<sup>18</sup> In discharging their duties, officers may rely on the opinions of others, as long as their reliance is warranted.<sup>19</sup> Thus, under this standard, officers are granted broad protection from personal liability.<sup>20</sup> Like directors, however, officers are also subject to the bonds of the corporate fiduciary duties.<sup>21</sup>

### B. *Fiduciary Duties*

The directors and officers of a corporation owe fiduciary duties of care and loyalty to the corporation's shareholders.<sup>22</sup> The duty of loyalty is a duty that "prohibits fiduciaries from taking advantage of their beneficiaries by means of fraudulent or unfair transactions."<sup>23</sup> The duty that is more important for purposes of this Comment is not the duty of loyalty, however, but the duty of care.<sup>24</sup> The duty of care, according to Dean Clark, is the director's or officer's duty to "exercise that degree of skill, diligence, and care that a reasonably prudent per-

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<sup>15</sup> See CLARK, *supra* note 4, at 114.

<sup>16</sup> See *id.*

<sup>17</sup> See REVISED MODEL BUS. CORP. ACT § 8.42 (1984).

<sup>18</sup> See *id.* § 8.42(a).

<sup>19</sup> See *id.* § 8.42(b)-(c).

<sup>20</sup> See *id.*

<sup>21</sup> See CLARK, *supra* note 4, at 123-36, 141-50.

<sup>22</sup> See generally *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963) (discussing the duty of care); *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997) (discussing the duty of loyalty).

<sup>23</sup> CLARK, *supra* note 4, at 141. Dean Clark illustrates four paradigms of duty of loyalty circumstances: (1) basic self-dealing; (2) executive compensation; (3) the taking of corporate or shareholder property; and (4) corporate action with mixed motives. See *id.* at 141-50.

<sup>24</sup> See *Graham*, 188 A.2d at 129-31; *In re Caremark Int'l Derivative Litig.*, 698 A.2d 967-70 (Del. Ch. 1996).

son would exercise in similar circumstances.”<sup>25</sup> Thus, even when directors or officers engage in actions for the benefit of the corporation and its shareholders, the duty of loyalty may be satisfied but the duty of care could still be violated.<sup>26</sup> As long as officers and directors satisfy their fiduciary duties when they take action on behalf of the corporation, they will virtually always be insulated from personal liability, notwithstanding the results of their actions.<sup>27</sup>

### C. *The Business Judgment Rule*

Closely related to the duty of care is the management-friendly Business Judgment Rule.<sup>28</sup> The BJR has been defined in a number of nebulous ways.<sup>29</sup> For the purposes of this discussion, however, Dean Clark’s definition of the BJR is most suitable.<sup>30</sup> According to Dean Clark, “[t]he rule is simply that business judgment of . . . directors will not be challenged or overturned by courts or shareholders, and the directors will not be held liable for the consequences of their exercise of business judgment—even for judgments that appear to have been clear mistakes—unless certain exceptions apply.”<sup>31</sup> Thus, directors and officers are generally presumed to be using the requisite due care when making business judgments.<sup>32</sup> In order to best understand the contours of the BJR and how it could possibly apply to CERCLA actions, it is helpful to analyze the more important cases and the concepts around which they were decided.

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<sup>25</sup> CLARK, *supra* note 4, at 123.

<sup>26</sup> *See id.*

<sup>27</sup> *See, e.g., Graham*, 188 A.2d at 129–31; *Caremark*, 698 A.2d at 967–70.

<sup>28</sup> *See* CLARK, *supra* note 4, at 123.

<sup>29</sup> *See, e.g., Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982) (stating that “the fact is that liability is rarely imposed upon corporate directors or officers simply because of bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labeled the business judgment rule”); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (noting that “a presumption that in making a business decision, the directors of a corporation acted on an informed basis in good faith and in the honest belief that the action was taken in the best interests of the company”).

<sup>30</sup> *See* CLARK, *supra* note 4, at 123.

<sup>31</sup> *Id.* These exceptions are for instances when the acts are illegal, are not informed, or are grossly negligent. *See Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 761–63 (3d Cir. 1974); *Joy*, 692 F.2d at 886; *Smith v. Van Gorkum*, 488 A.2d 858, 872–73 (Del. 1985).

<sup>32</sup> *See* CLARK, *supra* note 4, at 123.

## 1. The Action Requirement and the Possibility of a Duty to Monitor

In general, the BJR protects active decisions, and thus there is no protection for directors or officers who fail to act.<sup>33</sup> This notion becomes especially important in instances where subordinate employees violate laws during periods when they are under the purported supervision of the corporation's officers and directors.<sup>34</sup> In the past, it was generally thought that a director did not have a duty to take action against the illegal acts of subordinates as long as they were not on notice of suspicious acts or activities.<sup>35</sup> However, the recent Delaware Chancery Court decision in *In re Caremark International Derivative Litigation* has led some to believe that directors and officers may have an affirmative "duty to monitor" the behavior of subordinate employees.<sup>36</sup>

However, the Delaware Supreme Court case of *Graham v. Allis-Chalmers* was a seminal case regarding the possibility of a directorial duty to monitor for the illegal acts of subordinates.<sup>37</sup> In that case, the Delaware Supreme Court held that the directors of a corporation could not be held liable as a matter of law simply because their subordinates had violated anti-trust laws.<sup>38</sup>

The plaintiff shareholders argued, in part, that the directors should have implemented a system to detect such employee misconduct.<sup>39</sup> They based their suit on the United States Supreme Court's precedential decision in *Briggs v. Spaulding*<sup>40</sup> and similar cases that imposed upon corporate directors the duty to use the amount of care the "ordinarily careful and prudent" person would use in similar cir-

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<sup>33</sup> See, e.g., *Francis v. United Jersey Bank*, 432 A.2d 814, 820–24 (N.J. 1981).

<sup>34</sup> See, e.g., *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 127 (Del. 1963); *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 960–61 (Del. Ch. 1996).

<sup>35</sup> See *Graham*, 188 A.2d at 130–31.

<sup>36</sup> See 698 A.2d at 969–70.

<sup>37</sup> See 188 A.2d at 130–31.

<sup>38</sup> See *id.* at 131.

<sup>39</sup> See *id.* at 127–32. For a discussion of the importance of such monitoring systems, see, for example, *Internal Compliance Measures Needed to Stop Crimes, Attorneys, Officials Say*, 29 *Env't Rep. (BNA)* 1067, 1068 (1998) [hereinafter *Internal Compliance*]; Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 *BUS. LAW.* 617, 657–59 (1994).

<sup>40</sup> See 141 U.S. 132 (1891). In *Briggs*, the United States Supreme Court held that a bank's directors were not liable for their failure to prevent a loss to the corporation. See *id.* at 165–66. However, Chief Justice Fuller did mention that even though directors could trust their subordinates to run the business, the Board still had a duty of "reasonable supervision" over the corporation, and that the directors could be liable for losses that were the result of the Board's "gross inattention" to the activities of its employees. See *id.*

cumstances.<sup>41</sup> The plaintiffs alleged that the defendant directors, in order to satisfy that duty of care, should have implemented a "system of watchfulness" that would have brought any subordinate misconduct, including that which resulted in the *Graham* suit, to their attention, allowing the Board to stop the illegal acts before the corporation was harmed.<sup>42</sup>

The Delaware Supreme Court disagreed with the plaintiffs' reasoning and their reliance on the earlier precedents.<sup>43</sup> The court reasoned that *Briggs* stood for the proposition that directors could rely on the "honesty and integrity" of their subordinates until something happened to arouse their suspicion that an employee should not be trusted.<sup>44</sup> If there was such a tip off, and the directors failed to respond appropriately, then they could possibly be liable for any resulting losses to the corporation.<sup>45</sup> Without such notice, however, the *Graham* court said that directors had no duty to "ferret out wrongdoing which they have no reason to suspect exists."<sup>46</sup> Since the director defendants in *Graham* did take action as soon as they were aware of the subordinate misconduct, the Delaware Supreme Court held that no liability could be imposed.<sup>47</sup>

The notion of what constitutes grounds for suspicion and how prepared directors must be to counter illegal conduct within the corporation was further discussed by the New Jersey Supreme Court in *Francis v. United Jersey Bank*.<sup>48</sup> In *Francis*, the defendant was a director and the largest shareholder of an incorporated reinsurance business.<sup>49</sup> During the period that the defendant was a director, her sons, who were also officers, directors, and shareholders of the corporation, misappropriated funds from the company, causing an involuntary petition in bankruptcy to be filed on the company's behalf.<sup>50</sup> The trust-

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<sup>41</sup> See *Graham*, 188 A.2d at 130.

<sup>42</sup> See *id.* There is some disagreement about when lawbreaking actually injures the corporation. See Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729, 776-80 (1996); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1271 (1982). Some commentators believe that as long as the violations result in an economic benefit, they do not harm the corporation. See Fischel, *supra*, at 1271; see generally *infra* notes 311-329 and accompanying text.

<sup>43</sup> See *Graham*, 188 A.2d at 130.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 130-31.

<sup>48</sup> See 432 A.2d 814, 819-20 (N.J. 1981).

<sup>49</sup> See *id.* at 816.

<sup>50</sup> See *id.* at 819.



tees in bankruptcy sued, and although they were not shareholders (to whom the duty of care is generally owed), the Supreme Court of New Jersey found that the directors owed the trustees a duty similar to the duty of care pursuant to the New Jersey Business Corporation Act.<sup>51</sup> According to the Act, directors must “discharge their duties in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.”<sup>52</sup>

The defendant in *Francis* was in no way involved in the activities of the corporation.<sup>53</sup> She had only briefly visited the corporate offices on one occasion, and she had never read or even obtained the company’s annual financial statements.<sup>54</sup> She did not understand the basics of the reinsurance industry, and, perhaps most important to the court, she made no effort to assure the policies or practices of the corporation complied with the custom of the industry or the laws that regulated the industry.<sup>55</sup> According to the court, if she had any knowledge about the industry, and had taken the time to review the internal documents, she would have discovered her sons’ activities, and presumably, would have been able to take action to prevent any further damage to the corporation.<sup>56</sup>

The *Francis* court accordingly held the defendant personally liable for the company’s losses because her failure to take remedial action constituted a breach of the duty of care.<sup>57</sup> The New Jersey Supreme Court reasoned that as part of their duty of care, directors are obligated to keep personally informed about the activities of the corporation.<sup>58</sup> Since the defendant did not satisfy this obligation, which constituted a breach of her duties as a director, and losses resulted, she was held personally liable.<sup>59</sup>

Although it seemed that *Graham v. Allis Chalmers* was a strict limitation on the theory that the failure to monitor subordinate behavior could constitute a violation of the duty of care,<sup>60</sup> former Delaware

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<sup>51</sup> See *id.* at 820–24.

<sup>52</sup> *Id.* at 820 (quoting N.J. STAT. ANN. § 14A:6–14); cf. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

<sup>53</sup> See *Francis*, 432 A.2d at 819.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 826.

<sup>57</sup> See *id.*

<sup>58</sup> See *Francis*, 432 A.2d at 822.

<sup>59</sup> See *id.* at 826.

<sup>60</sup> See 188 A.2d 125, 130 (Del. 1963).

Chancellor William Allen's recent opinion in *In re Caremark International Derivative Litigation* seems to increase the chances for successful suits based on such a claim.<sup>61</sup> In *Caremark*, Chancellor Allen was asked to approve a settlement between the shareholder plaintiffs and the corporation against whom they had brought a derivative suit.<sup>62</sup> Like *Graham*, this case also involved illegal conduct by subordinate employees, specifically, violations of the Anti-Referral Payments Law, which prohibits health care providers from paying any form of remuneration for the referral of Medicare or Medicaid patients.<sup>63</sup> The plaintiffs sued on the theory that the board of directors, through its failure to proactively implement a monitoring system to notify the directors of such illegal behavior, allowed the illegal conduct to "develop and continue" to an extent that resulted in high losses to the corporation.<sup>64</sup> Since this failure to monitor was a lack of "due attention," the type required by the duty of care, the plaintiffs wanted to impose personal liability on the Board for the losses incurred by the corporation.<sup>65</sup>

In analyzing this claim, the Chancellor started by recognizing the limitations on the role of corporate Boards.<sup>66</sup> Legally, Boards are required only to authorize the corporation's most significant acts or transactions, and thus that is where most of their attention is focused.<sup>67</sup> As a result, most decisions of the corporation will not be the subject of the directors' attention.<sup>68</sup> Even though this is true, and legally acceptable, many of the business decisions made by employees and even officers far from the view of the Board can result in illegal acts and other activities that can cause losses to the corporation.<sup>69</sup>

Chancellor Allen then made an analysis of *Graham v. Allis-Chalmers Manufacturing Co.*,<sup>70</sup> and its application to the modern cor-

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<sup>61</sup> See 698 A.2d 959, 968-70 (Del. Ch. 1996).

<sup>62</sup> See *id.* at 960. For a discussion of derivative suits, see *infra* notes 114-129 and accompanying text.

<sup>63</sup> See *Caremark*, 698 A.2d at 961-62.

<sup>64</sup> See *id.* at 967.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 968; see also REVISED MODEL BUS. CORP. ACT § 8.01 (1984); AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02 (1994).

<sup>67</sup> See *Caremark*, 698 A.2d at 968.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

<sup>70</sup> See generally 188 A.2d 125 (Del. 1963); see also *supra* notes 37-47 and accompanying text.

poration.<sup>71</sup> According to his interpretation of the precedent, *Graham* did not stand for the proposition that directors had no duty to implement “information gathering and reporting systems” to monitor compliance with applicable laws.<sup>72</sup> Rather, he said that *Graham* merely held that unless there were grounds to suspect deception on the part of subordinates, corporate Boards and officers could not be charged with any wrongdoing for “assuming the integrity of employees and the honesty of their dealings on the company’s behalf.”<sup>73</sup>

Moreover, the Chancellor added that a broader interpretation of *Graham*, one that did not impose any duty to monitor, would not be accepted by the modern Delaware Supreme Court for three reasons.<sup>74</sup> The first reason is the clear message stated by the state’s highest court in a number of well-publicized opinions,<sup>75</sup> that the corporation law of Delaware takes the role of the corporate Board seriously.<sup>76</sup> Second, in order for the corporate Board to live up to its duty of care, appropriate information is necessary.<sup>77</sup> Monitoring systems, presumably, would assist the Board in gathering this information.<sup>78</sup> Finally, there is the potential impact of the federal organizational sentencing guidelines,<sup>79</sup> which could lead to potential increases in penalties for corporations that violate federal laws.<sup>80</sup>

Thus, in order to satisfy their obligation to be reasonably informed about the activities of the corporation, Boards should have monitoring systems in place in order “to provide senior management and . . . the board itself timely, accurate information sufficient to allow management and the board . . . to reach informed judgments concerning . . . the corporation’s compliance with law.”<sup>81</sup>

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<sup>71</sup> See *Caremark*, 698 A.2d at 969.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (citing *Graham*, 188 A.2d at 130–31).

<sup>74</sup> See *id.* at 969–70.

<sup>75</sup> See generally *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1994). For a discussion of *Van Gorkom*, see *infra* notes 91–105 and accompanying text.

<sup>76</sup> See *Caremark*, 698 A.2d at 970.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See generally UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1993). The guidelines generally increased penalties for corporations, but they did authorize lower penalties for corporations that took preventative measures to avoid misconduct, such as monitoring systems. See *Webb*, *supra* note 39, at 619.

<sup>80</sup> See *Caremark*, 698 A.2d at 969–70.

<sup>81</sup> *Id.* at 970.

Once such a system is implemented, the details of the system are matters of business judgment protected by the BJR.<sup>82</sup> Systems are not expected to detect every corporate violation of applicable laws and regulations.<sup>83</sup> The system, however, according to the *Caremark* court, should be “in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations.”<sup>84</sup> Thus, as a result of this analysis, the failure to have such a system in place could lead to director liability for losses caused by the violation of applicable legal standards.<sup>85</sup>

On the facts before him in the *Caremark* case, Chancellor Allen found that the Board could not be liable for a failure to monitor.<sup>86</sup> The Board had information systems in place that “represented a good faith attempt to be informed of relevant facts,” and as a result, the Board had adequately monitored the company’s activities.<sup>87</sup> Based on this finding, the Chancellor held that the Board had lived up to its duty of oversight over the corporation, and thus the directors would not be held liable for the losses incurred because of their subordinates’ activities.<sup>88</sup>

## 2. The Informed Judgment Requirement

When directors make business judgments in good faith, they are almost always protected by the BJR.<sup>89</sup> In some instances, however, directors can lose the protection of the BJR and incur personal liability for business judgments that lead to corporate losses.<sup>90</sup> One such situation is illustrated in the well-known case of *Smith v. Van Gorkom*, a Delaware Supreme Court case in which the members of the Board

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<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *Caremark*, 698 A.2d at 970.

<sup>86</sup> See *id.* at 971–72.

<sup>87</sup> *Id.*

<sup>88</sup> See *id.*

<sup>89</sup> See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. 1968) (holding that derivative suit plaintiffs did not state a cause of action because “the decision . . . [was] one properly before directors and the motives alleged in the . . . complaint showed no fraud, illegality or conflict of interest in their making of that decision”). Note that this formulation is so broad that it seems to say that shareholder claims may only be based on breach of loyalty or some fraudulent or illegal act. See *id.*

<sup>90</sup> See *Joy v. North*, 692 F.2d 880, 897 (2d Cir. 1982) (stating that “[w]hatever its merit . . . the business judgment rule extends only as far as the reasons which justify its existence”).

were liable for making a decision with insufficient information.<sup>91</sup> The plaintiff shareholders brought a derivative suit against the Board of Trans Union Corporation in the wake of a proposed merger in which Trans Union was the target.<sup>92</sup> Trans Union's CEO, Van Gorkom, had proposed the possible merger to the corporate Board, and the Board approved the merger based only on Van Gorkom's presentation, the presentations of a few other officers, and the fact that the per-share stock price being offered in the proposed transaction was higher than the market value of Trans Union's stock at the time.<sup>93</sup>

In considering the Board members' personal liability, the Delaware Supreme Court noted that the general rule was that the BJR would not protect directors who made decisions that were unintelligent or ill-advised.<sup>94</sup> This requirement of informed judgment stems from the duty of care.<sup>95</sup> Thus, when directors proceed, they must assess all information with a "critical eye."<sup>96</sup> When reviewing whether or not business judgments are adequately informed, courts apply a gross negligence standard.<sup>97</sup>

Analyzing the Trans Union merger against the gross negligence standard for informed judgment and the requirements of Delaware statutory law,<sup>98</sup> the Delaware Supreme Court held that the Board had not made an informed business judgment.<sup>99</sup> The Board made its decision based solely on Van Gorkom's presentation and another presentation by a member of senior management regarding feasibility.<sup>100</sup> Neither of the presentations provided enough information about the merger to give the Board an accurate representation of its possible implications.<sup>101</sup> Moreover, the Board meetings were called hastily and the possible acquiring party imposed urgent time constraints on the deal.<sup>102</sup> These circumstances, according to the *Van Gorkom* court, should have led the Board to make further inquiries about the deal.<sup>103</sup>

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<sup>91</sup> See 488 A.2d 858, 881 (Del. 1985).

<sup>92</sup> See *id.* at 863–70.

<sup>93</sup> See *id.* at 869.

<sup>94</sup> See *id.* at 872.

<sup>95</sup> See *id.*

<sup>96</sup> See *Van Gorkom*, 488 A.2d at 872.

<sup>97</sup> See *id.* at 873.

<sup>98</sup> See DEL. CODE ANN. tit. 8, § 251(b) (1991).

<sup>99</sup> See *Van Gorkom*, 488 A.2d at 874.

<sup>100</sup> See *id.* at 875.

<sup>101</sup> See *id.* at 874–75.

<sup>102</sup> See *id.* at 875.

<sup>103</sup> See *id.*

Even though the proposed merger would have benefited the shareholders because of the relatively high price offered, the inadequate procedures imposed personal liability on the directors.<sup>104</sup> Thus, there is a great deal of importance ascribed to the informed judgment requirement, since directors can be penalized for a failure to make informed judgments even if those judgments could result in financial benefit to shareholders.<sup>105</sup>

### 3. The Legal Activity Requirement

Directors and managers will not be protected by the BJR when their actions are illegal.<sup>106</sup> For example, in *Miller v. American Telephone & Telegraph Co.*, the shareholder plaintiffs sued the defendant directors over losses that resulted from the corporation's failure to collect on a past-due debt.<sup>107</sup> The defendant corporation, AT & T, provided communications services to the Democratic National Committee (DNC) at the 1968 Democratic National Convention.<sup>108</sup> AT & T failed to collect on the DNC's \$1.5 million bill, which, according to the plaintiffs, resulted in a violation of federal campaign spending laws.<sup>109</sup>

The Third Circuit allowed the suit to proceed, reasoning that the BJR would not apply since the Board had breached federal law.<sup>110</sup> Moreover, the court noted that not only had the corporation violated federal law, but had also contravened a "clearly enunciated" policy of Congress.<sup>111</sup> Congress had enacted the corporate campaign laws for two purposes: first, to curb the influence of corporations in the political process, and second, to stop corporations from using corporate funds to benefit political parties without the consent of the stockholders.<sup>112</sup> The fact that the shareholders were within the group for whose protection the statute was enacted gave strength to their claim,

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<sup>104</sup> See *Van Gorkom*, 488 A.2d at 875–78.

<sup>105</sup> See *id.* at 875.

<sup>106</sup> See Fischel, *supra* note 42, at 1271; see generally *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759 (3d Cir. 1974); *Abrams v. Allen*, 74 N.E.2d 305 (N.Y. 1947), *reh'g denied*, 75 N.E.2d 274 (N.Y. 1977); *Roth v. Robertson*, 118 N.Y.S. 351 (N.Y. Sup. Ct. 1909); *Beveridge*, *supra* note 42.

<sup>107</sup> See 507 F.2d at 762.

<sup>108</sup> See *id.* at 761.

<sup>109</sup> See *id.*

<sup>110</sup> See *id.* at 762.

<sup>111</sup> See *id.* at 763.

<sup>112</sup> See *Miller*, 507 F.2d at 763.

and the Third Circuit thus found that the *Miller* case presented “a particularly appropriate basis” for finding a breach of the duty of care.<sup>113</sup>

#### D. *The Derivative Suit*

One of the most important mechanisms of accountability for corporate officers and directors is the shareholder’s derivative suit.<sup>114</sup> In a derivative suit, the shareholder or shareholders sue on behalf of the corporation for any harm done to the corporation.<sup>115</sup> During this procedure, the corporation is the nominal defendant, and the shareholder compels the corporation, through its directors, to sue a third party, typically an officer or director, on behalf of the corporation itself.<sup>116</sup> Any damages are consequently paid directly to the corporation.<sup>117</sup>

##### 1. The Demand Requirement

In order to proceed with a derivative suit, the plaintiff shareholder must first satisfy what is known as the “demand requirement.”<sup>118</sup> In virtually all United States jurisdictions, before a shareholder’s suit can be brought, the shareholder must first make a demand on the corporation’s board of directors for it to remedy the situation that is the basis of the shareholder’s complaint.<sup>119</sup> If the directors take action to remedy the situation, either by bringing suit against the third parties implicated in the shareholder’s derivative claim or some other corrective act, then a shareholder suit will not be allowed to proceed.<sup>120</sup>

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<sup>113</sup> *Id.* The question of whether or not this action actually resulted in a loss is an interesting one. See *id.* at 763 n.5. Although the debt was not paid, there may have been some non-monetary gain to the corporation through increased influence. See *id.*; see also Fischel, *supra* note 42, at 1271. It seems that, according to this opinion, the value of the increased influence could not be considered since the actions leading to that increase were illegal. See *Miller*, 507 F.2d at 763; see also *infra* notes 256-263 and accompanying text.

<sup>114</sup> See CLARK, *supra* note 4, at 639; see generally *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>115</sup> See CLARK, *supra* note 4, at 639.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 639-40.

<sup>118</sup> See *id.* at 640; DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS § 5.07 (1987).

<sup>119</sup> See CLARK, *supra* note 4, at 640.

<sup>120</sup> See *id.*

If the directors refuse to sue after a shareholder demand, then a number of issues arise.<sup>121</sup> If the suit is against a third party who is not involved in any way with the management of the corporation, then the director-protective BJR most likely applies, and the directors' decision not to sue would stand, thereby barring the plaintiff's suit.<sup>122</sup> If, on the other hand, the claim involves corporate management or directors, then shareholders may be able to proceed with the suit even after a director refusal to sue if the plaintiff can show that the directors are "personally involved or interested in the alleged wrongdoing in a way calculated to impair their exercise of business judgment on behalf of the corporation, or that their refusal to sue reflects bad faith or breach of trust in some other way."<sup>123</sup>

Another option for shareholder plaintiffs in circumstances where management is implicated in the allegations is to plead the futility of any demand.<sup>124</sup> In instances when the good faith of a director or a group of directors is called into question, the courts do not expect that the defendant directors will give adequate consideration to the shareholder demand for a lawsuit.<sup>125</sup> Thus, in such instances, courts will generally excuse the demand requirement.<sup>126</sup>

## 2. CERCLA and Derivative Suits

For corporations, the costs of a CERCLA recovery due to environmental contamination by the company can be staggering.<sup>127</sup> In such instances, it is likely that corporate Boards and/or officers may have violated their duty of care through a failure to monitor the activities of their subordinates.<sup>128</sup> Thus, when a corporation is found liable, pursuant to CERCLA, for the costs of cleaning up a hazardous waste site, it would be entirely appropriate for shareholders to file derivative suits against directors and officers in order to impose personal liability upon them for any losses the corporation may suffer.<sup>129</sup>

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<sup>121</sup> See *id.* at 643-44.

<sup>122</sup> See *id.*

<sup>123</sup> *Id.* (quoting *Issner v. Aldrich*, 254 F. Supp. 696, 699 (D. Del. 1966)).

<sup>124</sup> See CLARK, *supra* note 4, at 641.

<sup>125</sup> See *id.* at 641-42.

<sup>126</sup> See *id.*

<sup>127</sup> See, e.g., George Wells, *Federal Judge Finds Hercules, Uniroyal Liable for \$102 Million Vertac Site Cleanup*, 29 Env't Rep. (BNA) 1299, 1299-1300 (1998).

<sup>128</sup> See *infra* notes 241-242 and accompanying text.

<sup>129</sup> See *id.*



## II. CERCLA

### A. Legislative History and Purpose

After the Love Canal tragedy, which left the homes and schools at Love Canal "virtually afloat on a toxic stew," the American public was concerned about the dangers posed by inactive hazardous waste sites and by improperly disposed wastes.<sup>130</sup> In response to this concern, and in recognition of the fact that existing environmental laws did not adequately protect people from the threats imposed by hazardous wastes, Congress enacted CERCLA, also known as the Superfund, in 1980.<sup>131</sup>

CERCLA was enacted hastily, and was the product of numerous compromises within Congress.<sup>132</sup> As a result, the statute's legislative history is sparse and vague.<sup>133</sup> Notwithstanding the lack of useful history, the House Committee specified that one of its overriding goals was "to provide for liability for persons responsible for releases of hazardous waste."<sup>134</sup> Moreover, one federal district court ascertained that Congress not only wanted to impose costs where they belonged, but that it also wanted to encourage care and responsibility in the handling of hazardous waste.<sup>135</sup> Thus, aside from the imposition of penalties, CERCLA also has a prophylactic objective inducing potential violators to properly dispose of their wastes.<sup>136</sup>

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<sup>130</sup> See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 803-05 (2d ed. 1998); Robert T. Lee, *Comprehensive Response, Compensation and Liability Act*, in ENVIRONMENTAL LAW HANDBOOK 225, 225 (Thomas F.P. Sullivan ed., 13th ed. 1995); see generally H.R. REP. NO. 96-1016, at pt. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 6119.

<sup>131</sup> See H.R. REP. NO. 96-1016, at 17-18, reprinted in 1980 U.S.C.C.A.N. at 6120. The term "Superfund" is derived from the statute's "Hazardous Substance Superfund," which can be used to cover response costs. See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9611 (1994).

<sup>132</sup> See *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987); see generally 1 THE ENVIRONMENTAL LAW INSTITUTE, SUPERFUND: A LEGISLATIVE HISTORY xviii-xxi (1982).

<sup>133</sup> See *Chemical Waste Management*, 669 F. Supp. at 1290 n.6.

<sup>134</sup> H.R. REP. NO. 96-1016, at 1, reprinted in 1980 U.S.C.C.A.N. at 6119.

<sup>135</sup> See *Chemical Waste Management*, 669 F. Supp. at 1290 n.6.

<sup>136</sup> See *id.*; see also H.R. REP. NO. 96-1016, at 17-18, reprinted in 1980 U.S.C.C.A.N. at 6120.

### B. Enforcement Provisions

There are two general enforcement provisions within CERCLA.<sup>137</sup> The first, and lesser known, is the abatement action.<sup>138</sup> If there is an actual or threatened release of a hazardous substance, then the federal government may seek appropriate relief in order to abate the possible resulting harms.<sup>139</sup> Moreover, CERCLA levies fines on parties who do not follow abatement orders.<sup>140</sup>

CERCLA's better-known and perhaps more powerful enforcement mechanism is its cleanup liability provision.<sup>141</sup> If there is a release, or a threatened release, of a hazardous substance from a facility, and response costs, namely the costs of cleaning up the damage from the release, are incurred, then any of the four potential parties defined by the statute can be liable under the law.<sup>142</sup>

### C. Parties

There are four possible parties who may be subject to liability under CERCLA.<sup>143</sup> The first group includes those who own or operate the vessel or facility from which the pollution emanates.<sup>144</sup> Second, any person who owned a facility at the time hazardous substances were disposed of at that facility can be liable if those substances are eventually released into the environment.<sup>145</sup> Third, any person who arranged for the transport of hazardous substances can also be liable.<sup>146</sup> Finally, any person who accepts or has accepted hazardous substances for transport to disposal or treatment facilities can be liable if those substances are ever released into the environment.<sup>147</sup> Thus, virtually all who come into contact, or can come into contact, with hazardous wastes are within the ambit of CERCLA.<sup>148</sup> This is especially true since the statute defines "person" as an "individual, firm,

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<sup>137</sup> See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9606-9607 (1994).

<sup>138</sup> See *id.* § 9606(a).

<sup>139</sup> See *id.*; see generally *Solid State Circuits, Inc. v. Unites States Evtl. Protection Agency*, 812 F.2d 383 (8th Cir. 1987).

<sup>140</sup> See 42 U.S.C. § 9606(b)(1).

<sup>141</sup> See *id.* § 9607.

<sup>142</sup> See *id.* § 9607(a)(4).

<sup>143</sup> See *id.*

<sup>144</sup> See *id.* § 9607(a)(1).

<sup>145</sup> See 42 U.S.C. § 9607(a)(2).

<sup>146</sup> See *id.* § 9607(a)(3).

<sup>147</sup> See *id.* § 9607(a)(4).

<sup>148</sup> See *id.* § 9607(a).

corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."<sup>149</sup>

#### D. Damages

In a CERCLA recovery action, the party that cleaned up hazardous wastes which were released into the environment, whether it is a governmental entity or a private party, can recover all response costs from any liable party.<sup>150</sup> In addition, the responsible parties may also be liable for damages to natural resources and certain health assessments performed after the release.<sup>151</sup> CERCLA imposes strict liability on responsible parties, and in multi-party situations, liability is also joint and several.<sup>152</sup>

As a result of the numerous party and liability options, the damage possibilities under CERCLA are quite high, particularly for industrial corporations.<sup>153</sup> For example, in October 1998, two corporations were sued for a CERCLA recovery by the United States government in an Arkansas federal court.<sup>154</sup> The defendants were liable for the cleanup of a herbicide plant, which produced, among other toxins, Agent Orange.<sup>155</sup> During the cleanup, the EPA burned barrels which were stored at the site, destroyed all of the plant equipment and buildings, incinerated contaminated top soil, and pumped wells in order to draw and dispose of contaminated ground water.<sup>156</sup> The site cleanup cost the government more than \$102 million, costs for which the defendants were jointly and severally liable.<sup>157</sup>

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<sup>149</sup> *Id.* § 9601(21).

<sup>150</sup> *See* 42 U.S.C. § 9607(a)(4)(A)-(B).

<sup>151</sup> *See id.* § 9607(a)(4)(C)-(D).

<sup>152</sup> *See* Lee, *supra* note 130, at 242 (citing Levin Meals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312 (9th Cir. 1986); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986)); *see also* H.R. REP. No. 96-1016, at 33 (1980), *reprinted in* 1980 U.S.C.A.N. 6119, 6136.

<sup>153</sup> *See* Wells, *supra* note 127, at 1299-1300.

<sup>154</sup> *See id.*

<sup>155</sup> *See id.* at 1299.

<sup>156</sup> *See id.* at 1299-1300.

<sup>157</sup> *See id.*

## E. Officers and Directors

### 1. Direct and Derivative Officer Liability

Where corporate actors have been held liable for CERCLA violations, it has been through direct, rather than derivative, liability.<sup>158</sup> This means that it is not necessary for the plaintiff, be it the government or otherwise, to impose derivative liability by "piercing the corporate veil."<sup>159</sup>

When the corporate veil is pierced, the plaintiff breaks beyond the limited liability protection of the corporate form, and reaches the personal assets of the corporate actor.<sup>160</sup> This means that the fundamental feature of the corporate form, i.e., the limited liability of those who run the corporation, is violated.<sup>161</sup> Piercing the corporate veil is a difficult process because courts will typically only pierce the veil in instances where the corporate form is used for an improper or an illegal purpose.<sup>162</sup>

Direct liability, in contrast to the derivative liability described above, is imposed when a director or officer is personally liable because of his direct personal participation in the commission of a tortious or illegal act, even if the act was committed on behalf of the corporation in good faith.<sup>163</sup> Although liability under CERCLA is usually presumed to attach directly,<sup>164</sup> there have been a few instances when courts have undertaken analyses of derivative liability.<sup>165</sup>

One such case was *Joslyn Corp. v. T.L. James & Co., Inc.*, where a Louisiana district court refused to allow CERCLA liability to be im-

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<sup>158</sup> See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052-53 (2d Cir. 1985); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420-21 (7th Cir. 1994).

<sup>159</sup> See *Shore Realty Corp.*, 759 F.2d at 1052-53; *Sidney S. Arst Co.*, 25 F.3d at 420-21; see generally CLARK, *supra* note 4, at 71-85; ELIZABETH GLASS GELTMAN, CORPORATIONS: ENVIRONMENTAL CASES AND MATERIALS 29-30 (1994).

<sup>160</sup> See CLARK, *supra* note 4, at 71; GELTMAN, *supra* note 159, at 29-30; see also *Kinney Shoe Corp. v. Polan*, 939 F.2d 209, 213 (4th Cir. 1991); *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 887 F. Supp. 1447, 1452-53 (N.D. Ala. 1995).

<sup>161</sup> See CLARK, *supra* note 4, at 2, 71-85. Limited liability provides protection for the investors in the corporation. See *id.* at 7-10. Unless the veil is pierced, corporate shareholders are not liable for any corporate loss that goes beyond the amount of their investment. See *id.* at 7.

<sup>162</sup> See *id.* at 71-85.

<sup>163</sup> See, e.g., *Shingleton v. Armor Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980).

<sup>164</sup> See GELTMAN, *supra* note 159, at 30; see also *infra* notes 186-188 and accompanying text.

<sup>165</sup> See generally *Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F. Supp. 222, 224-25 (W.D. La. 1988); *Browning-Ferris Indus. of Ill. v. Ter-Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998).

posed upon individual corporate officers.<sup>166</sup> The district court reasoned that the corporate form “is a doctrine firmly entrenched in American jurisprudence,” and that as such, it “may not be disregarded absent a specific congressional directive.”<sup>167</sup> Since, according to the court, there was nothing in the clear language or the legislative history of CERCLA that provided liability for individual corporate officers, such liability could not be imposed.<sup>168</sup> The corporate doctrines which the court discussed in support of this finding, however, all relate to the limited liability of shareholders, not that of directors and officers.<sup>169</sup> Thus, the application of *Joslyn Corp.* in the CERCLA context for officers and directors is limited, since virtually all other courts have distinguished between protection for shareholders and protection for officers and directors.<sup>170</sup>

This issue came up again in a recent decision from the Northern District of Illinois, *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*.<sup>171</sup> In that case, the court refused to impose liability on a corporate officer unless the plaintiffs could show that he was “derivatively liable under state veil-piercing law.”<sup>172</sup> Since the plaintiffs could not prove facts sufficient to justify piercing the corporate veil, the defendant officer was not held liable for the CERCLA violation.<sup>173</sup>

However, the *Browning-Ferris* decision is contrary to precedent in the higher federal appeals court and generally accepted standards of CERCLA liability for corporate officers.<sup>174</sup> In *Sidney S. Arst Co. v. Pipefitters Welfare Education Fund*, the Seventh Circuit specifically stated that “despite the . . . shield protecting corporate officers and directors from responsibility for corporate violations, corporate officers and directors may well be liable” under CERCLA.<sup>175</sup> Moreover, the Sev-

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<sup>166</sup> See 696 F. Supp. at 224–25.

<sup>167</sup> *Id.* at 226.

<sup>168</sup> See *id.*; but see *United States v. Bliss*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,879, 20,883 (E.D. Mo. Sept. 27, 1988) (holding individual officer liable for corporation's CERCLA violation in part because doing so “furthers the legislative intent to impose liability for response costs upon the parties responsible for creation of hazardous waste sites”).

<sup>169</sup> See *Joslyn Corp.*, 696 F. Supp. at 226.

<sup>170</sup> See *infra* notes 256–266 and accompanying text.

<sup>171</sup> See generally 13 F. Supp. 2d 756 (N.D. Ill. 1998); see also *Corporate Officer Has No Liability Unless Veil Can Be Pierced, Court Says*, 29 Env't Rep. (BNA) 842, 842–43 (1998) [hereinafter *Piercing Liability*]. But see *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420–21 (7th Cir. 1994).

<sup>172</sup> *Browning-Ferris*, 13 F. Supp. 2d at 765.

<sup>173</sup> See *id.* at 765–66.

<sup>174</sup> See, e.g., *Sidney S. Arst Co.*, 25 F.3d at 420–21; GELTMAN, *supra* note 159, at 29.

<sup>175</sup> 25 F.3d at 420.

enth Circuit distinguished between derivative liability and the direct liability that CERCLA provides.<sup>176</sup> While the *Browning-Ferris* court did recognize the precedent set forth by the Seventh Circuit, the opinion also considered the intervening United States Supreme Court decision in *United States v. Bestfoods* in order to reach its contrary result.<sup>177</sup>

In *Bestfoods*, the Supreme Court held that when state law allowed, a parent corporation could be liable for the CERCLA violations of its subsidiary.<sup>178</sup> Justice Souter's opinion also noted that when a plaintiff brings a CERCLA claim, that does not mean "that the entire corpus of state corporation law is to be replaced," and as a result, courts should look to state corporation laws even when dealing with federal statutes that apply to corporations.<sup>179</sup> In applying this holding, the *Browning-Ferris* court stated that the *Bestfoods* precedent "directly applie[d] to, and therefore trump[ed]" the opinion in *Sidney S. Arst* that was handed down earlier by the Seventh Circuit.<sup>180</sup> Thus, according to the *Browning-Ferris* court, the only way for the plaintiffs in that case to impose personal liability on the defendant officer would be by piercing the corporate veil.<sup>181</sup>

Assistant Attorney General Lois Schiffer of the United States Department of Justice, Environment and Natural Resources Division, who argued the *Bestfoods* case, wrote a letter urging the Illinois district court to reconsider its *Browning-Ferris* decision because, in her opinion, the court misread the Supreme Court precedent.<sup>182</sup> She said that the Supreme Court had "recognized two paths to parent liability: derivative liability through the subsidiary, and direct liability through the corporation's own actions."<sup>183</sup> Thus, in her opinion, and in that of virtually all federal courts,<sup>184</sup> a veil-piercing analysis, even after *Bestfoods*, is only necessary for derivative liability, not for direct liability under CERCLA.<sup>185</sup>

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<sup>176</sup> See *id.*

<sup>177</sup> See *Browning-Ferris*, 13 F. Supp. 2d at 765.

<sup>178</sup> See 118 S. Ct. 1876, 1885–86 (1998).

<sup>179</sup> *Id.* (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979)).

<sup>180</sup> *Browning-Ferris*, 13 F. Supp. 2d at 765; see *Sidney S. Arst Co.*, 25 F.3d at 420-21.

<sup>181</sup> See *Browning-Ferris*, 13 F. Supp. 2d at 765.

<sup>182</sup> See *Piercing Liability*, *supra* note 171, at 842.

<sup>183</sup> *Id.* at 842–43; see also *Bestfoods*, 118 S. Ct. at 1889 (stating that "a parent can be held directly liable when the parent operates the facility").

<sup>184</sup> See *infra* notes 189–227 and accompanying text.

<sup>185</sup> See *Bestfoods*, 118 S. Ct. at 1883–90; *Piercing Liability*, *supra* note 171, at 842–43.

## 2. Direct Liability Precedent

When corporate officers and directors are held personally liable under CERCLA, the liability that is imposed is direct, and thus is predicated on the actor's involvement in the pollution incident or with the particular facility.<sup>186</sup> Officers and directors have not been held liable merely because of their positions as officers and directors.<sup>187</sup> The reason for this limitation stems in part from CERCLA's definition of "covered persons" and judicial interpretations of that definition.<sup>188</sup>

One of the first cases that established direct officer liability under CERCLA was *United States v. Carolawn Co.*, a South Carolina district court case.<sup>189</sup> In *Carolawn*, the United States Environmental Protection Agency (EPA), brought a recovery action for the cleanup of a hazardous substance disposal and storage site in South Carolina.<sup>190</sup> The EPA argued that corporate officials who engaged in hazardous waste disposal activities could be subject to individual liability under CERCLA.<sup>191</sup> The court agreed with the EPA's argument, and followed the recent decision of a Missouri district court in *United States v. North Eastern Pharmaceutical & Chemical Co., Inc.*,<sup>192</sup> holding the defendants individually liable.<sup>193</sup>

The *Carolawn* court based its reasoning first on its reading of CERCLA's definition of "owner or operator."<sup>194</sup> The court noted that the text and the structure of the definition used terms which "con-

<sup>186</sup> See Oswald & Schipani, *supra* note 2, at 263; Cindy A. Schipani, *Integrating Corporate Law Principles With CERCLA Liability for Environmental Hazards*, 18 DEL. J. CORP. L. 1, 2 (1993) (noting that under CERCLA, directors and officers have only been held personally liable when they personally participated in the polluting activity).

<sup>187</sup> See Schipani, *supra* note 186, at 2.

<sup>188</sup> See 42 U.S.C. § 9607(a) (1994); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 744 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (holding officer liable because of his actual participation in pollution incidents, not because of his position within company); *Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F. Supp. 222, 224-25 (W.D. La. 1988) (holding that the court would not hold officers individually liable without specific congressional directive).

<sup>189</sup> See generally 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,699 (D.S.C. June 15, 1984). For a summary and discussion of the major precedents in this area, and how they relate to each other, see Schipani, *supra* note 186, at 5-10.

<sup>190</sup> See 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,699.

<sup>191</sup> See *id.* at 20,700.

<sup>192</sup> See 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). This case will be discussed in more detail below. See *infra* notes 211-218 and accompanying text.

<sup>193</sup> See *Carolawn*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,700.

<sup>194</sup> See *id.*

note[d], individual, personal involvement" with the activity that resulted in the CERCLA violation.<sup>195</sup> Therefore, according to the South Carolina district court, "to the extent that an individual has control or authority over 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."<sup>196</sup> Thus, the *Carolawn* case established the important principle that even though corporate officers are typically shielded from individual liability for their actions on behalf of the company,<sup>197</sup> CERCLA would impose direct costs on officers who were in charge of facilities that violated CERCLA.<sup>198</sup>

While *Carolawn's* analysis focused on the corporate actor's control over the facility,<sup>199</sup> *United States v. Mottolo*, which was handed down the same year, focused on the officer's participation in the particular pollution incident.<sup>200</sup> In *Mottolo*, a New Hampshire district court looked beyond the language of CERCLA itself to the general rule "that an officer of a corporation is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority."<sup>201</sup> In this case, since the defendant, who was the president and principal shareholder of the violating corporation, participated in arranging for the disposal of hazardous wastes, he was potentially liable under CERCLA section 9607(a)(3), and was therefore denied summary judgment.<sup>202</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See generally CLARK, *supra* note 4, at 123–40 (discussing protections for officers and directors).

<sup>198</sup> See *Carolawn*, 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* at 20,700; accord *United States v. Bliss*, 20 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,879, 20,883 (E.D. Mo. Sept. 27, 1988) (holding corporate officer liable in CERCLA action in part because he "had the authority to control the disposal of hazardous waste and to prevent the damage caused by disposal at the site"). Cf. *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 27–28 (1st Cir. 1990) (holding parent corporation liable for subsidiary's CERCLA violations since parent had control over environmental matters).

<sup>199</sup> See 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* at 20,700.

<sup>200</sup> See 629 F. Supp. 56, 59–60 (D.N.H. 1984).

<sup>201</sup> *Id.* at 60 (citing *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980)); see also *Shingleton v. Armor Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980) (stating that "[o]fficers who take part in the commission of a tort by the corporation may be held personally liable therefor").

<sup>202</sup> See *Mottolo*, 629 F. Supp. at 58–60; accord *Massachusetts v. Blackstone Valley Elec. Co.*, 777 F. Supp. 1036, 1039 (D. Mass. 1991) (holding that corporate officers can be liable for CERCLA violations if they personally participated in polluting activity).



In the 1985 case of *New York v. Shore Realty Corp.*, the Second Circuit validated the *Carolawn* decision by holding the defendant personally liable under CERCLA because of his position of authority within the corporation.<sup>203</sup> The Second Circuit agreed with the *Carolawn* court's reading of CERCLA<sup>204</sup> and the notion that CERCLA liability could be grounded in the fact that the officer was "in charge of the operation."<sup>205</sup>

During the same year, another Missouri district court considered the issue of officer/director liability in *United States v. Conservation Chemical Co.*<sup>206</sup> In that case, the district court adopted a special master's opinion which expanded on the notions set forth by previous courts.<sup>207</sup> The court held that a motion for summary judgment should be denied to a defendant on the issue of personal liability because such liability could be imposed "if it could be established that his participation was of the nature and degree which would warrant the imposition of personal liability."<sup>208</sup> Thus, this ruling reinforced the *Mottolo* result, which grounded liability in the actor's participation in the event,<sup>209</sup> and added the notion that the "nature" and "degree" of participation could also be considered in determining liability.<sup>210</sup>

In 1986, the Eighth Circuit handed down one of the most important and influential cases determining corporate officer liability under CERCLA.<sup>211</sup> In *United States v. Northeastern Pharmaceutical & Chemical Co., Inc. (NEPACCO)*, the United States brought a CERCLA action against the defendants for dumping toxic chemicals on a parcel of rural farmland.<sup>212</sup> One of the defendants was an officer of the liable corporation and had arranged for the transport of the chemicals in question.<sup>213</sup> He argued that he could not be held individually liable for the corporation's wrongful conduct because he was merely acting

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<sup>203</sup> See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); see also *Carolawn*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,700.

<sup>204</sup> See 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,700.

<sup>205</sup> *Shore Realty Corp.*, 759 F.2d at 1052.

<sup>206</sup> See generally 619 F. Supp. 162 (D. Mo. 1985).

<sup>207</sup> See *id.* at 190.

<sup>208</sup> *Id.*

<sup>209</sup> See generally 629 F. Supp. 56 (D.N.H. 1984).

<sup>210</sup> See *id.*; accord *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 190 (D. Mo. 1985) (holding that defendant could be liable "if it were established that his participation was of the nature and degree which would warrant imposition of personal liability").

<sup>211</sup> See generally *United States v. Northeastern Pharm. & Chem. Co., Inc. (NEPACCO)*, 810 F.2d 726 (8th Cir. 1986).

<sup>212</sup> See *id.* at 730.

<sup>213</sup> See *id.*

on behalf of the corporation as one of its officers or employees.<sup>214</sup> The Eighth Circuit disagreed, holding that since the officer in question “actually participated” in the company’s CERCLA violations by personally arranging for the transportation and disposal of hazardous waste, he could be held individually liable, notwithstanding the protections of the corporate form.<sup>215</sup>

Moreover, the Eighth Circuit specifically stated that the defendant’s liability was personal, and that such liability was direct and “distinct from the derivative liability that results from ‘piercing the corporate veil.’”<sup>216</sup> Thus, unlike the few courts that required piercing the corporate veil to impose liability,<sup>217</sup> the *NEPACCO* court explicitly stated that piercing the corporate veil was unnecessary due to the defendant’s personal involvement.<sup>218</sup>

One final case of note, and one that perhaps illustrates the future of CERCLA enforcement against officers and directors, is *Kelley ex rel. Michigan Natural Resources Commission v. Arco Industries Corp.*, decided in 1989 by the Western District of Michigan.<sup>219</sup> In *Kelley*, the court held that an officer could be personally liable under CERCLA.<sup>220</sup> What was innovative about this decision, which was limited to closely held corporations,<sup>221</sup> was that it considered the corporate actor’s ability to “prevent or significantly abate[]” the release, not just his personal involvement or control over the facility itself.<sup>222</sup> Thus, this extended the scope of possible liability far beyond the previous precedents,<sup>223</sup> since in this case actual participation or direct control was not necessary to impose personal liability on the officer.

The *Kelley* court reasoned that when a CERCLA action seeks to impose liability beyond the corporate form, i.e., without piercing the veil, then the officer’s or director’s power to control “the practice and policy” of the corporation, and thus prevent the resulting harm,

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<sup>214</sup> See *id.* at 744.

<sup>215</sup> See *id.*

<sup>216</sup> *NEPACCO*, 810 F.2d at 744.

<sup>217</sup> See generally *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222 (W.D. La. 1988); *Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 13 F. Supp. 2d 756 (N.D. Ill. 1998).

<sup>218</sup> See *NEPACCO*, 810 F.2d at 744.

<sup>219</sup> See generally 723 F. Supp. 1214 (W.D. Mich. 1989).

<sup>220</sup> See *id.* at 1218–20.

<sup>221</sup> Although there is no precise definition, Dean Clark defines a closely held corporation as one that has “only a small number . . . of individual shareholders and whose shares are not traded on a recognized securities exchange or an over-the-counter market.” CLARK, *supra* note 4, at 24.

<sup>222</sup> *Kelley*, 723 F. Supp. at 1220.

<sup>223</sup> See *supra* notes 189–218 and accompanying text.

should be the focus of the analysis.<sup>224</sup> This case may be the first step toward CERCLA liability for corporate officials in their roles as such, rather than based on their personal involvement in a pollution incident or their control over a facility.<sup>225</sup> Such an expansion could lead to an increased role for directors and officers in the handling of hazardous waste, since personal liability could be imposed upon them even when such activities were beyond their purview.<sup>226</sup> The *Kelley* court made sure to note, however, that even under its expanded view, CERCLA liability depends upon more than mere status as a corporate officer or director.<sup>227</sup>

### III. ANALYSIS

This portion of the Comment will begin by arguing that current CERCLA coverage is not sufficient to implement the ideals of the law. Next, it will discuss possible paradigms of liability for directors and officers through derivative suits. Finally, it will illustrate possible obstacles to such suits and how shareholder plaintiffs could overcome them.

#### A. Current CERCLA Coverage is not Sufficient

Under the current state of the law, all CERCLA liability for officers and directors is predicated on participation or control.<sup>228</sup> Although the opinion in *Kelley ex rel. Michigan Natural Resources Commission v. Arco Industries Corp.* was less predicated on participation than previous decisions were, the Michigan district court made sure to mention that mere status as an officer or director was not sufficient to impose liability.<sup>229</sup> Moreover, the opinion's analysis has not been followed by any other court.<sup>230</sup> Accordingly, corporate officers and directors who do not participate in activities that result in CERCLA violations are free from personal CERCLA liability.<sup>231</sup> There is no direct negative incentive in place for those non-participating officials to monitor the behavior of their subordinates to prevent CERCLA liabil-

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<sup>224</sup> See *Kelley*, 723 F. Supp. at 1219.

<sup>225</sup> See *id.* at 1220.

<sup>226</sup> See *id.*

<sup>227</sup> See *id.*

<sup>228</sup> See Schipani, *supra* note 186, at 6–9.

<sup>229</sup> See 723 F. Supp. at 1220.

<sup>230</sup> See *id.*; Schipani, *supra* note 186, at 9.

<sup>231</sup> See *Kelley*, 723 F. Supp. at 1221; Schipani, *supra* note 186, at 9.

ity.<sup>232</sup> Considering the high societal costs exacted by improper hazardous waste disposal,<sup>233</sup> and the costs to corporations that are liable under CERCLA,<sup>234</sup> this lack of incentive to “monitor” the environmental activities and possible liabilities of the corporation is inappropriate.<sup>235</sup>

This lack of an incentive is especially troubling in light of the importance and effectiveness of monitoring systems.<sup>236</sup> According to an attorney at 1998’s Environmental Enforcement Conference, corporations that do not have effective compliance programs “are just jeopardizing themselves.”<sup>237</sup> Such compliance and monitoring programs are invaluable tools to aid the corporation in avoiding CERCLA and other environmental liabilities.<sup>238</sup> In addition to providing notice to high-level executives and corporate Boards, monitoring systems also deter employees from violating laws.<sup>239</sup> Moreover, the benefits of such programs flow not only to the corporation, which would avoid potential liabilities, but also to society, since the environmental harms that result from CERCLA violations would be avoided.<sup>240</sup>

If officers and directors were personally liable in instances when their companies were penalized under CERCLA, then those corporate actors would be more likely to install prophylactic measures, such as monitoring systems, in order to avoid such liability.<sup>241</sup> The deriva-

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<sup>232</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4 (5th ed. 1998) (stating that “[t]he concept of man as a rational maximizer of his self-interest implies that people respond to incentives—that if a person’s surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so”).

<sup>233</sup> See generally H.R. REP. No. 96-1016, at pt. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 6119.

<sup>234</sup> See, e.g., Wells, *supra* note 127, at 1299-1300.

<sup>235</sup> Cf. *United States v. Bliss*, 20 Env’t. L. Rep. (Env’t. L. Inst.) 20,879, 20,833 (E.D. Mo. Sept. 27, 1988). In *Bliss*, the court held an individual officer liable in part because doing so furthered “the legislative intent to impose liability . . . upon the parties responsible for creation of hazardous waste sites.” See *id.*; cf. *In re Caremark Int’l Derivative Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996).

<sup>236</sup> See *Internal Compliance*, *supra* note 39, at 1068; Webb, et al., *supra* note 39, at 657-59. Cf. Janey Cohen, *Creation of Systems to Prevent Violations Still Seen as Best Defense for Companies*, 29 Env’t. Rep. (BNA) 473, 473-74 (1998) (describing a conference where one speaker reported that “a company’s best defense is to ‘set up systems to avoid anything in violation of [international] environmental laws’”).

<sup>237</sup> *Internal Compliance*, *supra* note 39, at 1068.

<sup>238</sup> See *id.*; Webb et al., *supra* note 39, at 657-59.

<sup>239</sup> See Webb et al., *supra* note 39, at 657-58.

<sup>240</sup> See *Internal Compliance*, *supra* note 39, at 473-74.

<sup>241</sup> See generally POSNER, *supra* note 232.

tive suit could be a useful mechanism for shareholders to effect such personal liability for "failure to monitor."<sup>242</sup>

Another reason that shareholders may want to use derivative suits is to impose liability on officers and directors despite court-imposed limitations on the application of CERCLA.<sup>243</sup> Although the decision in *Kelley ex rel. Michigan Natural Resources Commission v. Arco Industries Corp.* may have seemed like one district court's attempt to expand officer and director liability to include a failure to prevent harm, this decision has not yet been followed by any other court.<sup>244</sup> Accordingly, if courts follow the example set by the Northern District of Illinois in *Browning-Ferris Industries of Illinois v. Ter Maat*,<sup>245</sup> and refuse to impose CERCLA liability on officers and directors in instances when the corporate veil cannot be pierced, the liability for such corporate actors will be severely limited because of the difficulties associated with piercing the corporate veil.<sup>246</sup>

Even if the courts follow the *Browning-Ferris* example and restrict CERCLA liability for officers and directors, shareholders could account for such limitations by effecting personal liability through derivative suits.<sup>247</sup> However, in order for such suits to succeed, shareholder plaintiffs would need to cross the thresholds of the BJR and other procedural limitations.<sup>248</sup>

## B. Different Paradigms of Possible Liability Through Derivative Suits

### 1. Directors or Officers Who are Aware of CERCLA Violations

After *Browning-Ferris*, it seems likely that CERCLA liability could be imposed on corporations as entities, while officers and directors remain immune from personal liability.<sup>249</sup> As long as the corporate

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<sup>242</sup> Cf. *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996).

<sup>243</sup> See *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 224-26 (W.D. La. 1988); *Browning-Ferris Indus. of Ill. v. Ter Maat*, 13 F. Supp. 2d 756, 765-66 (N.D. Ill. 1998).

<sup>244</sup> See 723 F. Supp. 1214, 1218-20 (W.D. Mich. 1989); see also *supra* notes 189-218 and accompanying text.

<sup>245</sup> The *Browning-Ferris* decision was contrary to the great weight of federal opinion. See, e.g., *United States v. North Eastern Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 743-44 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 190 (D. Mo. 1985); *Massachusetts v. Blackstone Valley Elec. Co.*, 777 F. Supp. 1036, 1039 (D. Mass. 1991).

<sup>246</sup> See *Browning-Ferris*, 13 F. Supp. 2d at 765-66; see also CLARK, *supra* note 4, at 71-85.

<sup>247</sup> See *Browning-Ferris*, 13 F. Supp. 2d at 765-66.

<sup>248</sup> See CLARK, *supra* note 4, at 639-64; see generally DEMOTT, *supra* note 118.

<sup>249</sup> See 13 F. Supp. 2d at 765-66.

veil cannot be pierced, which is likely in most circumstances,<sup>250</sup> officers and directors will not be personally liable under *Browning-Ferris*.<sup>251</sup> Moreover, since many courts refuse to impose liability on officers and directors who have not somehow participated in the violation, officers and directors could be immune from liability even in instances where they know about the violation, but are not direct participants.<sup>252</sup>

Although directors and officers can typically rely on the protection of the BJR when they make business decisions, those who knowingly allow CERCLA violations would not be entitled to such protection because of the general notion that illegal activity is not within the BJR's scope.<sup>253</sup> Moreover, the duties set forth in the RMBCA, and the state corporation laws which are based on it, would prescribe against allowing such activity.<sup>254</sup>

As mentioned above, it is generally accepted that the BJR does not apply in instances where corporate actors violate the law.<sup>255</sup> Although directors or officers who merely condone activities that result in CERCLA violations would not themselves be violating the law, in circumstances such as those in the case of *Miller v. American Telegraph & Telephone Co.*, directors and officers should also be denied the protection of the BJR.<sup>256</sup> Recall that in *Miller*, the shareholder plaintiffs were allowed to proceed with their suit against the directors since the directors failed to take any action to collect on the debt due from the Democratic National Committee.<sup>257</sup> The directors themselves did not actively violate any law, but they neglected to take action to prevent a violation of the law which they presumably knew was taking place.<sup>258</sup>

The scenario in *Miller* is arguably similar to a situation where executives and/or Board members knowingly allowed CERCLA violations to take place, but those particular corporate actors were not di-

<sup>250</sup> See CLARK, *supra* note 4, at 71-85.

<sup>251</sup> See *Browning-Ferris*, 13 F. Supp. 2d at 765-66.

<sup>252</sup> See Schipani, *supra* note 186, at 6-9; but see *Kelley ex rel. Mich. Natural Resources Comm'n*, 723 F. Supp. 1214, 1219-20 (W.D. Mich. 1989).

<sup>253</sup> See *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 762-63 (3d Cir. 1974); but see *Beveridge*, *supra* note 42, at 776-80; *Fischel*, *supra* note 42, at 1271.

<sup>254</sup> See REVISED MODEL BUS. CORP. ACT §§ 8.01, 8.42 (1984); AMERICAN LAW INSTITUTE, *supra* note 66, at § 3.02.

<sup>255</sup> See, e.g., *Miller*, 507 F.2d at 763; *Abrams v. Allen*, 74 N.E.2d 305, 306-07 (N.Y. 1947), *reh'g denied*, 75 N.E.2d 274 (N.Y. 1974); *Roth v. Robertson*, 118 N.Y.S. 351, 352-54 (Super. Ct. 1909).

<sup>256</sup> See *Miller*, 507 F.2d at 763.

<sup>257</sup> See *id.* at 761.

<sup>258</sup> See *id.*

rectly involved in the illegal activity.<sup>259</sup> The same principles that allowed the *Miller* plaintiffs to proceed in the context of campaign finance laws should also apply to CERCLA violations, and corporate officers and directors should be held personally liable for failing to prevent CERCLA violations which they knew were occurring.<sup>260</sup>

In addition, the rationale in *Miller* was based upon more than the actual violation of the law, but also upon the fact that the corporation had contravened a clearly expressed policy of Congress.<sup>261</sup> Although CERCLA's policy goals and legislative history are not models of clarity, it is generally agreed that the statute was passed in order to respond to the threats posed by hazardous waste, to impose liability on the parties responsible for the release of hazardous substances, and to encourage maximum care and responsibility in the handling of hazardous waste.<sup>262</sup> For corporate officials to allow or approve of actions that offend these policy goals is analogous to the actions of the Board in the *Miller* case when it allowed violations of federal campaign laws.<sup>263</sup>

This analogy is particularly fitting since, like the situation in *Miller*, the shareholders in the hypothetical are within the class protected by the statute at issue, i.e., possible victims of pollution, and the statute's policies can only be effectuated if corporate actors are restrained from allowing the corporation to violate the statute since corporations are often the liable parties in CERCLA actions.<sup>264</sup> Also, since courts may require piercing the corporate veil in CERCLA actions after decisions such as *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*,<sup>265</sup> the shareholder derivative action could be an important tool to complement CERCLA actions in effecting CERCLA's policy goals, and thus courts may be more likely to allow such suits to proceed.<sup>266</sup>

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<sup>259</sup> See *id.*; cf. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(a) (1994).

<sup>260</sup> See *Miller*, 507 F.2d at 761-63.

<sup>261</sup> See *id.* at 763.

<sup>262</sup> See *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987); H.R. REP. NO. 96-1016, at 17-18 (1980), reprinted in 1980 U.S.C.A.N. 6119, 6120.

<sup>263</sup> See 507 F.2d at 763.

<sup>264</sup> See *id.* For some examples of cases in which corporations were liable for CERCLA violations, see generally *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991); *United States v. Hardage*, 761 F. Supp. 1501 (W.D. Okla. 1990); *GRM Indus., Inc. v. Wickes Mfg. Co.*, 749 F. Supp. 810 (W.D. Mich. 1990).

<sup>265</sup> See generally 13 F. Supp. 2d 756 (N.D. Ill. 1998).

<sup>266</sup> See *Miller*, 507 F.2d at 763.

## 2. Directors or Officers Who are Unaware of the CERCLA Violation

In instances when directors or officers are not aware of the CERCLA violations of lower-level employees, they would almost certainly be free from CERCLA liability.<sup>267</sup> For shareholder plaintiffs who seek to impose liability on officers or directors for such subordinate CERCLA violations, there are at least two possible avenues for them to pursue. The first avenue is through a theory that, as a result of cases such as *Francis v. United Jersey Bank*, there are certain circumstances when the Board and/or certain officers should have been aware of the activity, and thus should have taken action in order to prevent the CERCLA violation and prevent losses to the corporation.<sup>268</sup> The second, and perhaps more difficult theory, is that the Board and/or officers should have implemented adequate monitoring systems that would have brought the illegal activities of lower-level employees to their attention and would have assisted the officers and directors in preventing the CERCLA violations.<sup>269</sup>

### a. Directors and Officers Who Should Have Known About the CERCLA Violations

Any officer or Board member of a corporation who deals with industrial wastes should be on notice that CERCLA liability could possibly result from the corporation's activities.<sup>270</sup> This is true because the materials that are subject to CERCLA regulations are listed in the statute,<sup>271</sup> and also because CERCLA is such a well-known aspect of industrial regulation that any properly informed corporate official would be apprised of the law's requirements and how they could impact the operations of the business.<sup>272</sup>

Thus, if corporations incur CERCLA liability, their Boards and/or officers could be like the defendant in *Francis*, whose lack of

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<sup>267</sup> See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(a) (1994); see also Schipani, *supra* note 186, at 6–9.

<sup>268</sup> See 432 A.2d 814, 822–23 (N.J. 1981).

<sup>269</sup> See *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996).

<sup>270</sup> See 42 U.S.C. § 9607(a).

<sup>271</sup> See *id.* § 9601(14).

<sup>272</sup> See *id.* § 9607(a); *Francis*, 432 A.2d at 822–23. It is generally agreed that CERCLA is one of the best-known and perhaps most-feared environmental regulations due to its high liability possibilities and its use of strict liability in imposing fault. See generally Percy L. Angelo & Lynn L. Bergeson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. REV. 101 (1985). An article about the statute, intended for corporate lawyers, warned that it was “a problem that [would] be with [them] for some years to come.” *Id.* at 121.



knowledge about the customs and laws of her corporation's industry permitted illegal acts which caused losses to the corporation.<sup>273</sup> In that case, the New Jersey Supreme Court held the defendant liable because, had she been knowledgeable about proper industry standards as she should have been, she would have been able to prevent the losses that resulted from the illegal actions.<sup>274</sup> Similarly, directors and officers who are knowledgeable about CERCLA could perhaps use that information to prevent the imposition of liability on the corporation.<sup>275</sup> On the other hand, if directors and officers do not have such knowledge, and it would have assisted them in preventing the losses, then they could be liable for breach of their duty of care under the same rationale as the *Francis* defendant if CERCLA liabilities are imposed on the corporation.<sup>276</sup>

b. *Failure to Monitor*

Cases such as *Francis* and *Smith v. Van Gorkom* make it clear that adequate information is of the utmost importance for directors and officers in their satisfaction of the duty of care.<sup>277</sup> Since monitoring is such an effective tool in information-gathering,<sup>278</sup> the premium placed on information has led to the possible "duty to monitor" that Chancellor Allen discussed in *In re Caremark International Derivative Litigation*.<sup>279</sup> In that case, the Chancellor specifically stated that the failure to implement an adequate monitoring system could be a violation of the duty of care.<sup>280</sup>

This should be especially true in the context of CERCLA and other environmental laws.<sup>281</sup> When corporations deal with the substances that are covered under CERCLA, they should have monitoring systems in place so that the Board and senior management can preclude the heavy losses that follow recovery actions.<sup>282</sup> If a corporation does not have a monitoring system in place, and because of that failure to implement such a system, CERCLA violations occur without the

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<sup>273</sup> See 432 A.2d at 819.

<sup>274</sup> See *id.* at 825–26, 829.

<sup>275</sup> See *id.*; see also *Smith v. Van Gorkom*, 488 A.2d 858, 877–78 (Del. 1985).

<sup>276</sup> See *Francis*, 432 A.2d at 825–26.

<sup>277</sup> See *id.*; 488 A.2d at 875–78.

<sup>278</sup> See Cohen, *supra* note 236, at 473–74; *Internal Compliance*, *supra* note 39, at 1067–68; Webb, *supra* note 39, at 657–63.

<sup>279</sup> See 698 A.2d 959, 968–70 (Del. Ch. 1996).

<sup>280</sup> See *id.* at 970.

<sup>281</sup> See *id.* at 968–70; see generally Wells, *supra* note 127, at 1299–1300.

<sup>282</sup> See *Caremark*, 698 A.2d at 968–70.

Board's knowledge, those violations would be the result of the Board's and senior management's failure to satisfy their duty of care.<sup>283</sup>

This is not only a result of the *Caremark* analysis,<sup>284</sup> but it also follows directly from *Francis v. United Jersey Bank*.<sup>285</sup> In that case, part of the court's rationale for imposing personal liability was that the defendant did not follow the custom and practice of her industry, which led to her failure to notice and stop the illegal activities which caused damage to the corporation.<sup>286</sup> It is now customary in most industries to have some sort of monitoring system to prevent violations of law.<sup>287</sup> Since such systems are the norm due to their effectiveness, a reasonable officer or director would implement such systems in order to prevent losses to the corporation.<sup>288</sup> If a director's or officer's failure to comply with this industry custom led to a situation where losses were incurred by the corporation, then that director or officer would be analogous to the defendant in *Francis*.<sup>289</sup> Thus, shareholder plaintiffs could claim that the Board's or the officers' failure to follow common practice was a violation of their duty of care.<sup>290</sup>

Also, even though the Chancellor did say that once a system is established, the design of that system is a question of business judgment and is left to the discretion of the Board, there would still be instances in which the failure of the system itself could be due to duty of care violations.<sup>291</sup> All business judgments must be made with sufficient information, and the implementation of a monitoring system should be no different.<sup>292</sup> Thus, if a corporation's system failed to detect illegal activities by lower-level employees because the Board and/or senior management created or accepted a system without adequate information, then that failure could be considered a duty of care violation.<sup>293</sup>

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<sup>283</sup> See *id.*

<sup>284</sup> See *id.*

<sup>285</sup> See 432 A.2d 814, 825-26 (N.J. 1981).

<sup>286</sup> See *id.*

<sup>287</sup> See Webb et al., *supra* note 39, at 656. A 1990 study found that of 711 corporations surveyed, eighty-five percent had some sort of monitoring system. See *id.*

<sup>288</sup> See *Francis*, 432 A.2d at 825-26.

<sup>289</sup> See *id.*

<sup>290</sup> See *id.*

<sup>291</sup> See *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996); see also *Francis*, 432 A.2d at 825-26; *Smith v. Van Gorkom*, 488 A.2d 858, 877-78 (Del. 1985).

<sup>292</sup> See *Francis*, 432 A.2d at 825-26; *Van Gorkom*, 488 A.2d at 877-78; *Caremark*, 698 A.2d at 70.

<sup>293</sup> See *Van Gorkom*, 488 A.2d at 877-78.

### C. Possible Obstacles

#### 1. The Demand Requirement

The demand requirement would almost certainly be excused in any shareholder action for a company that had violated CERCLA.<sup>294</sup> It should not be difficult for a plaintiff to plead that the demand would be futile, since it would call into question the interests of the directors or officers themselves.<sup>295</sup> This would be true even for officials who were not personally implicated in the suit.<sup>296</sup> Even though their interests would not be called into question in the action itself, their relationship with those who were named in the suit could cloud their judgment on behalf of the corporation.<sup>297</sup> Thus, the demand requirement would probably be excused.<sup>298</sup>

If, on the other hand, the plaintiffs did make a demand on the directors, and the directors refused to take action, the plaintiffs could show the conflict of interest involved and still proceed notwithstanding the refusal.<sup>299</sup> This is due to the presumed nature of the claim that would be made against the corporation in the suit.<sup>300</sup> It is presumed that the claim would be directly contrary to the personal interests of the Board.<sup>301</sup> Thus, it seems that the demand requirement for derivative actions would not be a difficult hurdle for a plaintiff to cross.<sup>302</sup>

#### 2. Damage to the Corporation

There is some disagreement as to whether or not violations of law, *per se*, are the cause of damage to a corporation.<sup>303</sup> For example, according to Professor Daniel Fischel of the University of Chicago, corporate governance mechanisms such as shareholder suits are not appropriate in every instance where the law is violated.<sup>304</sup> Rather, Professor Fischel argues that if the gains from a violation of law exceed the social costs, i.e., the costs of the penalty, then for the corporation

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<sup>294</sup> See CLARK, *supra* note 4, at 640–44.

<sup>295</sup> See *id.* at 641–42.

<sup>296</sup> See *id.*

<sup>297</sup> See *id.*; DEMOTT, *supra* note 118, at § 5:07.

<sup>298</sup> See CLARK, *supra* note 4, at 641–42; DEMOTT, *supra* note 118, at § 5:07.

<sup>299</sup> See CLARK, *supra* note 4, at 643–44; DEMOTT, *supra* note 118, at § 5:07.

<sup>300</sup> See CLARK, *supra* note 4, at 643–44.

<sup>301</sup> See *id.*

<sup>302</sup> See *id.* at 640–44.

<sup>303</sup> See, e.g., Beveridge, *supra* note 42, at 776–80; Fischel, *supra* note 42, at 1271.

<sup>304</sup> See Fischel, *supra* note 42, at 1271.

to comply with that statute is undesirable since there is a net loss to the corporation.<sup>305</sup> If society wants to curb corporate behavior, then voters should elect people who will increase the applicable penalties to change the compliance mechanisms so that undesirable behavior would result in a net loss to the corporation, and thus any director and/or officer who ordered the activity would be violating their duty of care.<sup>306</sup>

Professor Norwood Beveridge of the Oklahoma City University School of Law has made a similar argument based not on net loss but on the degree of wrong associated with the activity.<sup>307</sup> He notes that although some commentators reject any cost-benefit justifications for illegal acts, the Board of Directors of United Parcel Service of America, Inc. (UPS) allowed its drivers to accrue more than \$1.5 million in parking tickets in New York City during 1994.<sup>308</sup> Although these tickets do represent violations of law, the directors have not been liable for the technically illegal conduct.<sup>309</sup> Thus, according to Beveridge's argument, there must be something about the relative triviality of these offenses that insulates the UPS Board from liability.<sup>310</sup>

It seems that both of these rationales would fail in the context of CERCLA violations.<sup>311</sup> Generally, the damages that are incurred in CERCLA actions are so high that it would be difficult to imagine an instance when the net-loss rule would not be satisfied.<sup>312</sup> The only manner in which any cost-benefit analysis would be satisfied is if the corporation made its calculations based on eluding the law and escaping liability.<sup>313</sup> However, even Professor Fischel's argument is based on obeying the laws or, presumably, making cost-benefit decisions based on paying any applicable fines or liabilities.<sup>314</sup>

Moreover, using mere financial calculations in order to decide when to act illegally may seem appropriate in certain contexts, such as

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<sup>305</sup> See *id.*; see also *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 763 n.5 (3d Cir. 1974) (holding that corporate defendants could be liable in shareholder suit only if their violations of law resulted in a net loss to the corporation).

<sup>306</sup> See Fischel, *supra* note 42, at 1271.

<sup>307</sup> See Beveridge, *supra* note 42, at 730-31.

<sup>308</sup> See *id.* at 731.

<sup>309</sup> See *id.*

<sup>310</sup> See *id.*

<sup>311</sup> See *id.* at 730-31; Fischel, *supra* note 42, at 1271.

<sup>312</sup> See *Miller v. American Tel. & Tel. Co.*, 507 F.2d 759, 763 n.5 (3d Cir. 1974); Wells, *supra* note 127, at 1299-1300.

<sup>313</sup> See *Miller*, 507 F.2d at 763 n.5; Fischel, *supra* note 42, at 1271.

<sup>314</sup> See Fischel, *supra* note 42, at 1271 (noting that "[p]erhaps all that can be said is that when a restriction on corporate conduct is embodied in a statute, it should be obeyed").

UPS's parking tickets,<sup>315</sup> but CERCLA seems quite different since often, activities that result in CERCLA liabilities carry with them a high probability of endangering human life and natural resources.<sup>316</sup> Thus, these activities are not de minimis violations of law, but rather, the type of serious violations which result not only in financial costs to society, but also costs that cannot be enumerated in mere financial terms.<sup>317</sup> Financial considerations, therefore, are not an appropriate form of measurement for these decisions, and the corporate law mechanism should recognize that fact, as it did with the illegal acts in *Miller v. American Telegraph & Telephone Co.*<sup>318</sup>

In *Miller*, the Third Circuit specifically stated that even if the illegal contribution was a sound business judgment, i.e., for the benefit of the corporation, the directors would not be insulated from liability.<sup>319</sup> This was true even though the contribution would have brought a great benefit to the corporation, namely the favor of the Democratic National Committee.<sup>320</sup> Similarly, even though violations of CERCLA could be an economic benefit to corporations, courts should, as the court in *Miller* did, consider such violations breaches of the duty of care.<sup>321</sup>

### 3. The Shareholder Power Argument

Some commentators believe that the derivative suit is an inefficient mechanism of corporate governance, and that it interferes with the ability of management and Boards to run the corporation as they see fit.<sup>322</sup> This argument is based on the assumption that since they are involved with the day-to-day operations of the enterprise, corporate officials are in a better position than shareholders or courts to make decisions for the corporation.<sup>323</sup> This argument further assumes that the market is the fundamental mechanism of corporate governance, since any inefficient or improper decisions will be curbed

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<sup>315</sup> See Beveridge, *supra* note 42, at 731.

<sup>316</sup> See *id.*; see also H.R. REP. NO. 96-1016, at 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120.

<sup>317</sup> See H.R. REP. NO. 96-1016, at 17-18, reprinted in 1980 U.S.C.C.A.N. at 6120.

<sup>318</sup> See 507 F.2d 759, 763 & n.5 (3d Cir. 1974).

<sup>319</sup> See *id.* at 763.

<sup>320</sup> See *id.*

<sup>321</sup> See *id.*

<sup>322</sup> See, e.g., Fischel, *supra* note 42, at 1290-91.

<sup>323</sup> See *id.* at 1288.

by decreased profits, lower stock prices, and eventually, a change in leadership.<sup>324</sup>

In the CERCLA context, however, fears that shareholders would interfere with the efficient management of the corporation are illogical and unfounded.<sup>325</sup> CERCLA suit plaintiffs would not be attempting to make the corporation do anything extraordinary, only comply with applicable law.<sup>326</sup> This is not an imposition on a corporation's daily operations, but merely a corrective measure to ensure that the Board and officers satisfy their duty of care by remaining within the bounds of the law.<sup>327</sup> As *Miller* has shown, such a suit is entirely appropriate and feasible.<sup>328</sup> Moreover, even a suit for failure to monitor would not be outside tinkering with the day-to-day operations of the corporations, but rather is an attempt by shareholders to compel the Board and management to take extra measures, designed by those inside the corporation itself, to ensure compliance.<sup>329</sup>

#### CONCLUSION

CERCLA liability alone may not be sufficient to encourage the proper disposal of hazardous waste. Since CERCLA only covers those who participate in the violating activities, and even this coverage may be limited if piercing the corporate veil is required to impose liability on officers and directors, the derivative suit could be a useful mechanism to compel officers and directors to install monitoring systems that prevent CERCLA violations.

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<sup>324</sup> See *id.*

<sup>325</sup> See *Miller*, 507 F.2d at 763.

<sup>326</sup> See *id.*

<sup>327</sup> See *id.*

<sup>328</sup> See *id.*

<sup>329</sup> See *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 969-70 (Del. Ch. 1996).

