

# Seeing the Forest for the Trees in CERCLA Liability

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*The determination of CERCLA liability for corporate subsidiaries, individual corporate actors, lenders, and others who do not actually own or operate a hazardous waste site has proven to be a particularly vexing problem. Cases dealing with these categories of individuals or companies present different fact patterns and have, for the most part, each been subject to a separate analysis for liability. Thus, for example, one finds that cases involving corporate actor liability are based on the case law concerning corporate actors, and cases involving lender liability are based on the case law for this category of individual or institution. The result is a confusing array of separate liability rules for corporate subsidiaries, individual corporate actors, lenders, and other involved parties. By surveying all these categories of liability cases, the authors demonstrate that the confusion is replaced by the revelation that general liability principles, do, in fact, exist. First, CERCLA liability extends to those who directly manage the general business operations. Second, liability will reach all those who assume and exercise responsibility for handling hazardous substances. Analyzing the case law from the standpoint of these two principles will demystify the subject of CERCLA liability and provide greater certainty for all parties who face the potential risk of liability under the statute.*

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## Introduction

Liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)<sup>1</sup> is widely thought to be inexplicable, random, and often disastrous in consequence. This is particularly true with respect to the liability of parties who are not now involved in the storage or disposal of the hazardous substances at issue, but who have had a tie to those hazardous substances. Many perceive Superfund liability to constitute a mindless search for deep pockets, instead of a body of general principles that provides predictability. We will argue that this perception arises from a tendency by courts and counsel to separate cases into rigid, poorly chosen categories, and that this perception is incorrect upon a studied examination of the case law.

The familiar forest and trees problem exists in the area of CERCLA liability because Superfund cases have been classified too crudely and rigidly. The case law in this area has been categorized by the types of entities that are potentially subject to CERCLA liability: corporate subsidiaries, lenders, dissolved corporations, and bankruptcy trustees, for example. While these categories have their uses, they have been too confining, and restrict the ability of counsel and judges to see the forest of general principles from the trees of specific fact patterns. This Article examines the specific trees, but its primary goal is to describe the forest.

This forest is made up of two general principles of Superfund liability. First, liability extends to all those who have assumed and exercised responsibility for handling hazardous substances, including handling related to environmental compliance. Second, liability extends to parties with supervisory authority over general business operations that included, or should have included, waste handling and environmental compliance responsibilities. However, as a corollary, parties far removed from the day-to-day management of the business and its wastes will typically not be held liable as either operators of waste disposal facilities or arrangers for waste disposal just because they had an unexercised "capacity to control" the business. Our conclusions are based on an analysis of the results and differing rationales of many CERCLA liability cases. These principles, this vision of the forest, are particularly significant because they are drawn from a factually diverse group of cases. Courts have followed these principles, for the most part, without either articulating them or cross-referencing to cases in other fact pattern categories.

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1. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1988).

Originally conceived as a type of insurance fund that would spread the cost of toxic waste cleanup, Superfund emphasized the principle that quick cleanup was essential. However, the policy of quick cleanup now seems a naive aspiration. The "polluter pays" principle, also part of the original statutory intention, has now become the primary force driving CERCLA. Superfund has become a liability-driven regulatory scheme, and the assignment of liability reportedly consumes as much, if not more, time and resources as the actual cleanups themselves.<sup>2</sup>

Liability is primarily based on three concepts in the statutory scheme: owners, operators, and waste treatment arrangers. The first two, "owners" and "operators," are linked together in the statutory formulation.<sup>3</sup> Liable owners include present owners of the waste disposal facility, as well as past owners who owned the facility when the wastes in question were stored at the facility. Where a person or business is an owner of a facility, except for a very limited number of defenses, the inquiry need go no farther in order for liability to attach.<sup>4</sup> Courts, for the most part, have taken a straightforward approach in

2. William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,413, 10,423 (July 1991) (citing OFFICE OF TECHNOLOGY ASSESSMENT, *COMING CLEAN, SUPERFUND PROBLEMS CAN BE SOLVED* 29, n.13 (Oct. 1989) (estimates by the Office of Technology Assessment that "20 to 40 percent of total spending for the Superfund program is inefficient because of prolonged negotiations and litigation between EPA and PRPs [Potentially Responsible Parties]")); Sargeant, *Superfund Contractors Clean Up Few Waste Dumps But Management Costs Rise*, 27 *TRIAL* 93(2) (Oct. 1991); Michael Weisskopf, *Superfund Spending Inquiries Set*, *WASH. POST*, June 20, 1991, at A4 (reporting that one-third of Superfund spending since 1988 was used for administrative "program management" and not for actual cleanup); Michael Weisskopf, *Administrative Costs Drain Superfund, Few Toxic Waste Sites Actually Cleaned Up*, *WASH. POST*, June 19, 1991, at A1. See, e.g., William W. Balcke, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 *V.A. L. REV.* 123, 131 n.46 (1988) (noting that in one case involving the Conservation Chemical Co. the cost of cleanup was estimated to be between \$10 and \$18 million dollars while pretrial costs totalled \$2 million for the government and \$5 to \$12 million for the defendants contesting liability.)

3. 42 U.S.C. § 9607(a)(1), (2) (1988) provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable . . .

Defendants have unsuccessfully argued that the conjunctive use of "owner and operator" in § 9607(a)(1) requires the current owner also to be an operator in order for liability to attach. See, e.g., *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1280-81 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

Transporter liability is also provided by the statute, CERCLA § 107(a)(4), but has not been proven to be particularly contentious as courts have generally agreed that Congress did not intend to hold transporters liable where they did not choose the site for waste disposal or treatment. See *United States v. Western Processing Co.* 756 F. Supp. 1416 (W.D. Wa. 1991); *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987); cf. *Ronald M. Eddy & Diana Terry Reindl, Transporter Liability Under CERCLA*, 16 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,244 (Sept. 1986) (describing problems facing transporters of hazardous waste under CERCLA and potential strategies to minimize liability).

4. In the following cases, each owner was seemingly without knowledge that the acquired land was contaminated and without fault in creating the hazard, but each was nevertheless held liable as an "owner:" *NL Indus. v. Kaplan*, 792 F.2d 896, 897 (9th Cir. 1986); *T&E Indus. v. Safety Light Corp.*, 680 F. Supp. 696, 698-99 (D.N.J. 1988); *Jersey City Redev. Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1259 (D.N.J. 1987); *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1137 (E.D. Pa. 1982).

deciding whether a party is a liable owner. Problems have nevertheless arisen in determining the liability of parties who hold less than complete title, such as trust beneficiaries and secured lenders.<sup>5</sup> Nevertheless, determining who is liable as an "owner" has proven to be a simpler task than determining who is liable as an "operator."

Determining operator liability has proven much more troublesome, in part, because of the numerous scenarios which can confer operator status upon an entity. As with owners, the statute reaches operators who ran the facility at the time of waste disposal, as well as those who run it now.<sup>6</sup> Interpreting and applying the statute to identify these parties, however, is not the main source of trouble. Problems arise when one considers whether parties that have had some, but not complete, influence or control over the operation of the facility should be liable as operators. Extending CERCLA liability to parent companies and other members of the corporate enterprise presents a complex set of questions. Corporate officers, directors, and shareholders directly involved in managing a facility and its hazardous substances may also be held individually liable. The status of successor companies, previously dissolved companies, trustees, receivers, executors, and administrators, in a given case, may also force the drawing of a fine line to determine the type and extent of involvement necessary for operator liability to attach. Creditors of the primary operator can become potentially liable as operators when they offer management advice and exercise some supervision, as they frequently do, to protect their security. Similarly, difficult issues exist at the outermost boundary of Superfund liability concerning parties who contract to design and build facilities, to obtain manufacturing services, or to enter a franchise relationship.

The third statutory group upon which liability is imposed are waste treatment arrangers—those who arranged for the disposal, treatment, or transport of hazardous substances.<sup>7</sup> The imposition of generator liability implements the principle that the "polluter pays." In effect, the liability for hazardous waste creation exists as long as the waste remains hazardous. Liability is typically clear under the statute for a company whose manufacturing operations created the waste. Moving beyond this straightforward case, once again, the many different fact patterns illustrated in the cases demonstrate the existence of numerous potential arrangers. Possibilities include: parent and sibling corporations, officers and directors, trustees, executors, supervising

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5. See *infra* Parts III and VIII for a fuller discussion on the potential CERCLA liability of trust beneficiaries and secured lenders.

6. 42 U.S.C. § 9607(a)(1), (2) (1988).

7. 42 U.S.C. § 9607(a)(3), (4) (1988). This subsection provides that: "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . shall be liable . . ."

lenders, and contracting parties whose jobs involved in any way the arranging for hazardous substances handling. Determining who in the arrangement is liable under CERCLA presents many of the same questions as those posed by operator liability, and the answers frequently overlap.

With all three statutory groups of liable parties, the courts have given a most expansive interpretation to CERCLA. Emphasizing the remedial nature of the statutory cleanup scheme, courts have willingly extended liability well into the periphery of debatable statutory coverage, leaving individuals and businesses with wholly unanticipated liability. In addition, the statute has been interpreted to have retroactive impact which means that liability today can be based on conduct undertaken years ago, even if it was in compliance with the applicable environmental regulations governing at the time.<sup>8</sup>

Furthermore, strict liability is the rule. No proof that the defendant's waste or conduct caused the present harm or threat of harm is needed. Liability among all of the "potentially responsible parties" is typically joint and several, a provision with particular bite now that today's cleanups are reported to average \$25 million.<sup>9</sup> Strict joint and several liability can leave a party with a much greater share of the cleanup bill than its contribution to the problem. Contribution among liable parties is provided for,<sup>10</sup> but solvent contributors may be difficult to find.

Parts I through V of this Article will look at cases with fact patterns that demonstrate the two liability principles under CERCLA. CERCLA liability will be shown to extend, first, to all those who directly manage the general business operations of the entity involved and, second, to those who manage its hazardous substances and wastes. Parts I and II discuss two groups of corporate liability cases, parent company liability for subsidiary activities, and individual—officer, director, and shareholder—liability for corporate activities. The existence of the same two principles find strong support in the cases

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8. See Note, *Development in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1539-42, 1555-63 (1986); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (hazardous waste disposal occurred in the early 1970s prior to enactment of CERCLA but retroactive liability under CERCLA applies and does not violate due process or the takings clause); *United States v. Conservation Chem. Co.*, 589 F. Supp. 59 (W.D. Mo. 1984) (waste disposal liability incurred for disposal activity in 1960).

Of note also is the frequency with which the potentially liable party is one engaged in the recycling business—a business that has developed in response to the need for environmental protection. See, e.g., *In re Bergsoe Metal Corp. v. East Asiatic Co.*, 910 F.2d 668 (9th Cir. 1990) (lead recycling); *In re T.P. Long Chem. Inc.*, 45 B.R. 278 (N.D. Ohio 1985) (rubber recycling).

9. Keith Schneider, *EPA Announces New Steps to Prod Cleanup of Wastes*, N.Y. TIMES, Oct. 3, 1991, at A1 ("on average, cleanup projects take 7 to 10 years to complete at a cost of more than [\$]25 million"); Robert Bell & John Machir, *Hazardous Waste Cleanup Structured Settlements Help Reduce the Cost*, BUSINESS INSURANCE, Oct. 22, 1990, at 51 (noting that cleanup costs average 25 million and more than 50% of the cleanups then underway were paid by PRPs); R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99, 101 n.14 (1986) (contending that most cleanups cost \$8 to \$10 million.).

10. 42 U.S.C. § 9613(f) (1988).

dealing with lending arrangements, leases, and other contracts and government activities, discussed in Parts III, IV, and V, respectively.

While the last three groups of cases we discuss also lend support to our hypothesis, the support is weaker and indirect. Two involve corporate cases of successor liability and dissolved corporations, Parts VI and VII respectively, and are primarily concerned with the proximity of the defendants to the primary owner, operator, or generator. The last group of cases, Part VIII, focuses on beneficiaries, executors, and trustees. The case law that exists within this group, is limited; however, what does exist supports our hypothesis. Taken together, these cases represent a diverse array of fact patterns, and it is this diversity that provides the strongest support for our hypothesis.

### I. Parent and Sibling Corporation Liability

Parent corporations, and to a lesser extent corporate siblings, have presented one of the most attractive targets for expanding Superfund liability beyond the immediate waste disposer or generator.<sup>11</sup> In general, the results of the cases support both of our two liability principles. First, courts have generally been willing to find parent corporations liable whenever they have been actively involved in the subsidiary's operations that produce hazardous waste. Second,

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11. This section draws heavily on PHILIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATUTORY LAW OF GENERAL APPLICATION* (Little, Brown & Co., 1989) §§ 18.02.1-.02.4, and the 1992 Cumulative Supplement. There is a substantial and growing law review literature addressing the issue of parent corporate liability. See, e.g., Lynda J. Oswald & Cindy K. Schipani, *Legal Theory: CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259 (1992); Richard B. Stewart & Bradley M. Campbell, *Lessons From Parent Liability Under CERCLA*, 6 NAT. RES. & ENV'T 7 (1992) (arguing parent liability should turn on the extent of day-to-day involvement with subsidiary management); Cindy A. Wolfer, Comment, *Piercing the Corporate Veil Under CERCLA: To Control or Not to Control—Which is the Answer?*, 59 U. CIN. L. REV. 975 (1991); John J. Little, *Towards Respect for Corporate Separateness in Defining the Reach of CERCLA Liability*, 44 SW. L.J. 1499 (1991); Evelyn F. Heidelberg, Comment, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 PAC. L.J. 854 (1991); Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F.L. REV. 421 (1990) (arguing for a three part test emphasizing parent capacity to control waste practices, exercise of that capacity, and knowledge or reason to know of waste practices); Charles E. Dadswell, Jr., Comment, *The Corporate Entity: Is There Life After CERCLA?*, 7 COOLEY L. REV. 463 (1990); Note, *Environmental Law: CERCLA Liability of Corporate Parents for Their Dissolved or Undercapitalized Subsidiaries*, 44 OKLA. L. REV. 345 (1991); Grant M. Sumsion, Note, *Joslyn Manufacturing. Co. v. T.L. James & Co., Should the Sins of the Children be Answered Upon the Heads of the Parents*, 1991 B.Y.U. L. REV. 1427 (1991) (distinguishing between parent company liability and individual investor/shareholder liability); Scott Blankenship & Barry Mandel, "Unveiled": *Corporate Officer, Parent, and Successor Liability Under CERCLA*, 4 TUL. ENVTL. L.J. 213 (1990); Allen Kezsbom et al., "Successor" and "Parent" *Liability for Superfund Cleanup Costs: The Evolving State of the Law*, 10 VA. ENVTL. L.J. 45 (1990); Elizabeth A. Noonan, Note, *To Pierce or Not to Pierce: When Is the Question*, 638 WASH. U. L.Q. 733 (1990); Julie Mendel, *Interpreting "Owner" and "Operator" Liability Under CERCLA*, 38 WASH. U. J. URB. & CONTEMP. L. 229 (1990); Tom McMahon & Katie Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RES. & ENV'T 29 (1988); Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469 (1989); Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986) (arguing that the reasons for limited liability favor broad CERCLA liability for cleanups).

parents are typically found liable whenever they have been directly involved in the subsidiary's disposal of waste. However, some recent cases have articulated standards that may indicate the eroding of this distinction.

The frequency of parent-subsidiary cases is not surprising, given the usual *de facto* control of parent corporations and the artificial nature of modern large corporate structures. Indeed, the modern large business enterprise is usually made up of numerous controlled corporations, often with more than one tier of corporate ownership. The corporate structure of an enterprise is chosen primarily as part of a business strategy rather than as a reflection of any meaningful business separation of the constituent corporate parts.<sup>12</sup> Despite often being part of the same business enterprise, these separate corporations are separate legal entities with potentially separate legal liabilities. Further, parents typically offer deeper pockets, and siblings, at a minimum, offer more pockets.

Although it is not surprising that there have been frequent attempts to extend cleanup liability to corporate parents and some attempts to reach siblings, it is surprising that claimants have been successful in this pursuit. Protection of shareholders, including parent company shareholders, from liability is a fundamental principle of the legal system and, in the customary jargon of the common law, parent liability is to be imposed only in exceptional cases.<sup>13</sup> The two legal theories of statutory interpretation and "piercing the veil" have been at the center of these cases. In most of the cases applying the statutory interpretation theory, courts have been willing to interpret the statute to find parents directly liable as owners, operators, or generators<sup>14</sup> of waste. However, some of the same courts, as well as others, have emphasized the idea of limited liability and have had substantial difficulty applying the second theory, piercing the veil, to find liability of corporate parents. Corporate parents have sometimes defeated liability based upon the piercing the veil theory, but have almost always been held liable on the statutory interpretation theory.

The discussion in this Part will be organized by these two legal theories. These theories have dominated the courts' thinking in this area, and the distinction between the theories has been important in articulating the rationale for liability.

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12. PHILLIP I. BLUMBERG & KURT A. STRASSER, *THE LAW OF CORPORATE GROUPS: PROBLEMS OF PARENT AND SUBSIDIARY CORPORATIONS UNDER STATUTORY LAW SPECIFICALLY APPLYING ENTERPRISE PRINCIPLES* xliii-1 (Little, Brown & Co. 1992); BLUMBERG, *supra* note 11, at xxxix-xivi.

13. PHILLIP I. BLUMBERG, *THE LAW OF CORPORATE GROUPS: TORT, CONTRACT AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS* 137-53 (Little, Brown & Co. 1987).

14. "Generators" is used here to describe parties whose operations give rise to hazardous waste for which they "arrange for disposal" in CERCLA terms. See CERCLA § 9607(a)(3). The term "generator" comes from the Resource Conservation and Recovery Act (RCRA) regulatory scheme for hazardous waste disposal.



A. *Statutory Interpretation Cases*

As discussed above, CERCLA extends liability to owners and operators of waste disposal sites, as well as to generators of waste who arrange for disposal. All three of these statutory categories have been interpreted to hold the parent of the specific corporate actor liable for cleanup. The cases finding liability, or potential liability, typically discuss both of the common liability principles. Thus, most are concerned with both the extent of general parent company control over subsidiary business operations, as well as the specific parent company involvement in waste disposal and pollution control matters.

One of the first opinions to find parent company liability, *State of Idaho v. Bunker Hill Co.*,<sup>15</sup> emphasized both factors. In this case, parent company control over the subsidiary was substantial, going well beyond mere designation of the subsidiary's directors. Specifically, the parent required the subsidiary to receive parent approval before making any pollution control expenditures that exceeded \$500. All capital expenditures also required parent approval; the parent could overrule any management transaction or decision of the subsidiary. Further, the parent obtained weekly reports on the subsidiary's day-to-day management activities. They filed consolidated tax returns. Finally, the subsidiary's authorized capital was only \$1,100 although it had paid \$27 million in dividends to the parent between 1968 and 1974.

It is significant that, even with this highly integrated corporate group, the court also looked specifically to the parent's involvement with the subsidiary's waste operations. The court concluded that the parent could also be held as an owner or operator under CERCLA because it was "intimately familiar" with the subsidiary's hazardous waste disposal and releases and had the "capacity. . . to make decisions and implement actions and mechanisms to prevent and abate the damage."<sup>16</sup> Control over general business operations, combined with the knowledge and potential control over waste disposal operations, was sufficient to find owner or operator liability. The court did not discuss whether either aspect alone would have been sufficient.

Both aspects of parent involvement and control were also discussed in *Rockwell International Corp. v. IU International Corp.*,<sup>17</sup> although the general business control principle was more emphasized. In that case, the parent hired or approved hiring of certain subsidiary officers, some of whom were also parent company officers, and determined their responsibilities. For example, parent company executives established procedures and approved operating plans for the facility in question and monitored the facility's compliance with these

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15. 635 F. Supp. 665, 670-71 (D. Idaho 1986) (alternate holding).

16. *Id.* at 671-72.

17. 702 F. Supp. 1384 (N.D. Ill. 1988).

plans. Further, the parent publicly announced that it operated the facility. Although not emphasized in its opinion, the court also noted the substantial parent involvement with the waste generation and disposal operations. Parent company auditors and accountants suggested changes in procedures that directly affected the disposal of hazardous substances. These parent employers also reviewed subsidiary requests to purchase environmental protection equipment.

In *United States v. Kayser-Roth*,<sup>18</sup> the Court of Appeals for the First Circuit affirmed one of the first lower court opinions finding parent company liability, and adopted its distinction between owner and operator liability.<sup>19</sup> It held that while owner liability was to be determined by traditional piercing the veil standards, operator liability presented a statutory interpretation question to be answered by considering parent control over the subsidiary's waste management activities. Here the parent was liable as an operator because its "active involvement" in the affairs of the subsidiary amounted to "practical total influence and control"<sup>20</sup> over the subsidiary, including control over waste disposal activities. The court noted the parent's involvement with the subsidiary's hazardous materials, including its having made the decisions which admitted the materials to the plant. Although the opinion emphasized the parent's involvement with waste management, once again, both aspects of parental control were central to the decision.

Both the ultimate corporate parent and an intermediate sub-holding company were held liable as operators in *Colorado v. Idarado Mining Co.*<sup>21</sup> The court stated that parent liability could have been based on the fact that the parent company "knew of and participated in efforts to ameliorate environmental problems."<sup>22</sup> In addition, the court found that the parent exercised general business control over the second-tier subsidiary in its hiring, employment compensation, and contracting. The parent also supplied legal and other administrative services to the subsidiary. The intermediate subsidiary was held liable as an operator because it had effective day-to-day control over the second-tier subsidiary, exercised through the management services it provided. The court noted that permitting such an intermediate subsidiary to insulate the parent from liability would substantially frustrate CERCLA's remedial purposes.

Two other cases found parent company liability on statutory interpretation grounds, but also would have found liability on traditional piercing the veil

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18. 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

19. The lower court opinion is at 724 F. Supp. 15 (D.R.I. 1989).

20. 910 F.2d at 27 (citing *United States v. Kayser-Roth Co.*, 724 F. Supp. at 18).

21. No. 83-C-2385, 1987 U.S. Dist. LEXIS 14,254, 18 *Env't. L. Rep.* (Env't. L. Inst.) 20,578 (D. Colo. 1987). *Accord* *Mobay Corp. v. Allied-Signal, Inc.*, 753 F. Supp. 1248 (D.N.J. 1991) (denying defendant's motion for summary judgment); *United States v. Allied Chem. Corp.*, Nos. 83-5896-FMS, 1990 U.S. Dist. LEXIS 11,695 (N.D. Cal. June 27, 1990) (denying defendant's motion for summary judgment).

22. 1987 U.S. Dist. LEXIS 14,254, at \*4.

standards, as discussed in Section B *infra*. *City of New York v. Exxon*<sup>23</sup> is one of the rare cases finding a parent company liable as a generator or transporter who arranged for disposal,<sup>24</sup> rather than as an owner or operator. However, the court emphasized that similar policies applied to interpreting “arranged for disposal” as those implicated in interpreting “owner or operator” to establish parent company liability. The court focused on the parent company’s close supervision of the subsidiary’s business in general,<sup>25</sup> as well as its specific involvement with the subsidiary’s waste generating activities.<sup>26</sup> Making a strong factual conclusion, it granted summary judgment for the plaintiff, finding that reasonable jurors would conclude that liability must follow from the parent’s involvement.

In the second of these two cases, *United States v. Nicolet*,<sup>27</sup> the court found that sufficient facts had been alleged to support the plaintiff’s liability claims based on either statutory interpretation of definitions of owner and operator or by piercing the veil standards of liability. In the statutory interpretation finding of potential parent liability, the court first made an analogy to the shareholder liability cases which impose liability on a shareholder who directly participates in the management of the site at issue.<sup>28</sup> Second, the court found liability could be based on the parent’s involvement with waste disposal practices and its benefit from those practices.<sup>29</sup> Third, the court was willing to base the parent company’s liability on the fact that it held a mortgage on the subsidiary’s property and participated in the facility’s management, analogizing the situation to a lender liability case.<sup>30</sup> The first and third of these theories, in particular, have the potential to lead to quite broad parent company liability if generally adopted, for they appear to premise potential liability on parent company conduct that is typical in many integrated corporate groups.

Particularly close parent supervision and control over the subsidiary provided the basis for operator liability of two parent company defendants in *CPC International, Inc. v. Aerojet-General Corp.*<sup>31</sup> The parent companies of both the current and past owners of the site had shared officers and directors with the subsidiary and had been directly involved in both its major decision-

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23. 112 B.R. 540 (S.D.N.Y. 1990).

24. 42 U.S.C. §§ 9607(a)(3), (4) (1988).

25. 112 B.R. at 549-50.

26. *Id.* at 550-52.

27. 712 F. Supp. 1193 (E.D. Pa. 1989).

28. The court, in denying defendant’s motion for summary judgment, did not discuss the specific facts of direct parent company participation in the management. *Id.* at 1202-03. Individual shareholder liability is discussed in Part II *infra*.

29. 712 F. Supp. at 1203-04. The court did not discuss the specific facts of parent company involvement with the subsidiary’s waste disposal.

30. Lender liability is discussed in Part III *infra*.

31. 777 F. Supp. 549 (W.D. Mich. 1991).

making and its day-to-day operations. Further, parent company employees were found to have been directly involved in the subsidiary's waste handling operations by formulating the subsidiary's policy, controlling these activities, and overseeing the policy's implementation. These activities, taken together, made each parent defendant an "active operator" rather than an "interested investor,"<sup>32</sup> and thus liable under CERCLA. As discussed below, the court applied a veil-piercing analysis to determine owner liability for each of the two parent defendants.

*United States v. McGraw-Edison*<sup>33</sup> illustrates the point that it is parent company behavior, rather than mere status as a shareholder, that leads to liability. As discussed in Part II,<sup>34</sup> individual shareholder liability has typically been denied when sought on the basis of shareholding alone. Here, a 49% joint venturer was held potentially liable for the subsidiary's cleanup liability. The 51% joint venture owner had settled this CERCLA claim. The complaint alleged that the 49%-owning joint venturer had provided technical expertise and shared one officer with the joint venture. The court held these facts sufficient to defeat the 49% joint venturer's motion for summary judgment. If a 49%-owning joint venturer is potentially liable, presumably liability must be based on conduct rather than ownership alone.

One case offers a clear contrast to the statutory interpretation approach that normally supports parent company liability. *Joslyn Manufacturing Co. v. T. L. James & Co.*<sup>35</sup> emphasized the fundamental common law policy of corporate separateness in refusing to find the parent liable on either statutory interpretation grounds or by piercing the veil. On the issue of statutory interpretation, the court presumed that Congress intended to follow the fundamental common law principle of limited liability because of the statute's failure to expressly say otherwise. "Without an express Congressional directive to the contrary, common-law principles of Corporation law, such as limited liability, govern our court's analysis."<sup>36</sup> This interpretation is based on the presumed preference of Congress to apply common law principles of limited liability, rather than to interpret congressional intent from specific statutory language, legislative history, or the underlying regulatory policy of CERCLA. In contrast to the opinions discussed above, the *Joslyn Manufacturing* opinion used common law categories, rather than an interpretation of Congress's chosen

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32. *Id.* at 573, 578-79.

33. 718 F. Supp. 154 (W.D.N.Y. 1989).

34. See *infra* Part II, and *infra* note 65 for cases where shareholder liability was unsuccessfully sought, based on the fact of shareholding alone.

35. 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).

36. 893 F.2d at 83. Donald B. Mitchell, Jr., *Joslyn Manufacturing Co. v. T. L. James & Co., Inc.: Integrating CERCLA with the American Common-Law Tradition*, 17 COLUM. J. ENVTL. L. 53 (1992) argues that the opinion's common law emphasis is the proper doctrinal basis for unifying all CERCLA law. The author was lead counsel for the successful defendant, T. L. James & Co.

regulatory policy, to fill the statutory silence on parent company liability. The court also emphasized the fact that the parent did not exercise day-to-day control.<sup>37</sup> Several recent opinions have sought to limit *Joslyn Manufacturing* by confining it to claims of owner liability and then basing more expansive liability on an interpretation of "operator."<sup>38</sup>

In two cases, courts found parents not liable as operators because of their minimal involvement with the subsidiary's operations. In one, the parent corporation, Tufts College, had never participated directly in the management of a company it had acquired mostly by testamentary bequest.<sup>39</sup> In the second, the parent owned the subsidiary for only one day as part of a complex purchase of some business assets, and the parent's sole involvement was to vote to liquidate the subsidiary.<sup>40</sup> A clearer case of minimal involvement is difficult to imagine. By emphasizing the limited parent involvement in the subsidiary's operations as grounds for a finding of no liability, these two cases implicitly support the principle of liability for actively managing parents.

With the exception of *Joslyn Manufacturing*, these cases, taken together, support the general principle that liability determinations will be based on an evaluation of the parent's general business control over the subsidiary, as well as the parent's specific involvement with the subsidiary's waste and pollution control activities. In doing so, these cases do not express new or radical corporation law.<sup>41</sup> Parent company liability often turns on the extent of its involvement with the subsidiary's business. These cases present rather easy fact patterns that illustrate corporate law's adaptation to CERCLA; either there is substantial parent involvement, and hence liability, as in *Bunker Hill*, *Rockwell*, *Kayser-Roth*, *Idarado Mining*, *Exxon*, and *Nicolet*, or very little involvement and no liability, as in *Jacksonville Electric Authority* and *Boston Gas*.<sup>42</sup> A more difficult case might involve a parent that is not directly involved with and does not closely supervise a subsidiary, but does have the power to control it

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37. The facts central to conventional piercing the veil analysis were also discussed.

38. *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *Mobay Corp. v. Allied Signal, Inc.*, 753 F. Supp. 1248 (D.N.J. 1991) (denying defendant's motion for summary judgment); *United States v. Allied Chem. Corp.*, Nos. 83-5896-FMS, 83-5898-FMS, 1990 U.S. Dist. LEXIS 11,695 (N.D. Cal. June 27, 1990) (denying defendant's motion for summary judgment).

39. *Jacksonville Elec. Auth. v. Eppinger & Russell Co.*, 776 F. Supp. 1542 (M.D. Fla. 1991). The court also applied traditional piercing the veil law to find no owner liability under CERCLA.

40. *John Boyd Co. v. Boston Gas Co.*, 775 F. Supp. 435 (D. Mass. 1991).

41. Oswald & Schipani, *supra* note 11, at 263.

42. Three recent, careful studies of the cases broadly agree. Oswald & Schipani, *supra* note 11, at 302, conclude that regardless of the theory of liability, active participation of the parent in the violation is present whenever liability is found. Stewart & Campbell, *supra* note 11, at 9-10, note that rationales of cases diverge, with some basing liability on parent capacity to control and some only on the exercise of control, although all the cases finding liability, in fact, presented extensive parent control over subsidiary business operations. Kezsbom et al., *supra* note 11, at 74 conclude:

As in most cases, it should be expected that the specific conduct of the parties including, in particular, their waste disposal practices and attitude toward compliance, the extent of the parent's actual involvement in the affairs of the subsidiary, and the ability of the subsidiary to make independent decisions, will remain factors that will impact the court's actual decision.

and exercises the power loosely. Yet, even such a case likely would lead to liability. The rationales used in deciding the above cases emphasize strongly the remedial purposes of CERCLA. These purposes call for quite broad parent liability, even where a parent chooses, as a business management strategy, not to exert day-to-day control over all the subsidiaries in its enterprise.<sup>43</sup>

#### B. "Piercing the Veil" Liability Theory

In asserting liability of parent companies, plaintiff's counsel frequently raises both statutory interpretation and piercing the veil theories, and the same case must often decide the applicability of each. However, the two theories often receive different treatment; the results of CERCLA cases using a piercing the veil theory of liability have been more mixed.<sup>44</sup> While many courts, indeed a majority that have considered the issue, have been willing to find veil-piercing liability, several have declined to do so. Nevertheless, many of the cases refusing veil-piercing liability have found liability on statutory interpretation grounds, effectively undercutting parent company protection while affirming it in principle.

Unlike the statutory interpretation holdings, piercing the veil holdings requires an initial determination of whether state law principles or federal common law principles should apply. Such a decision turns on the need for national uniformity—a need which obviously exists under CERCLA:

In attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection. Congress did not intend that the ability of the executive to fund the cleanup of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.<sup>45</sup>

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43. See BLUMBERG, *supra* note 11, at ch. 18, for a general discussion of the application of enterprise principles in environmental law.

The court in *Jacksonville Elec. Auth. v. Eppinger & Russell Co.*, 776 F. Supp. 1542 (M.D. Fla. 1991), found no present liability, emphasizing that the parent and subsidiary were in totally unrelated businesses, and, as such, were not part of one integrated enterprise.

44. This is also true of the officer, director, and shareholder liability cases. See *infra* Part II.

45. *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 31 (D. Mass. 1987). Other CERCLA liability cases in accord are collected in BLUMBERG, *supra* note 11, at 615 n.12 and BLUMBERG & STRASSER, 1992 SUPPLEMENT, THE LAW OF CORPORATE GROUPS: STATUTORY LAW—GENERAL (1992).

While courts in a few shareholder liability cases have apparently applied state law on this question,<sup>46</sup> courts in the vast majority of parent liability cases have expressed a preference for a uniform federal common law.<sup>47</sup> Nevertheless, the difference may be more one of analytic rather than practical significance.

The emerging federal law draws heavily on the state law for guidance,<sup>48</sup> and, in any event, the state law is typically not sufficiently precise to mandate a particular result in any given case. Several cases have found parent company liability by applying federal common law that resembles traditional state piercing the veil law. In an alternative holding, the court in *City of New York v. Exxon*<sup>49</sup> pierced the corporate veil, emphasizing the parent's involvement in and pervasive control over the subsidiary's business activities, the lack of observance of corporate formalities, integrated financing of the parent and subsidiary, as well as the parent's awareness of the subsidiary's pollution dumping activities.

*United States v. Kayser-Roth*<sup>50</sup> held that owner liability was to be determined by piercing the veil law, although the facts it emphasized to justify liability were largely those that also justified operator liability under a statutory interpretation theory. Piercing the veil was apparently used in *Gopher Oil Co. v. Union Oil of California*<sup>51</sup> to find parent liability. Although the court did not specify the legal theory of liability, it emphasized the parent's control over the subsidiary and the fraud perpetrated on the plaintiff when the defendant parent misrepresented the contaminated property during sales negotiations.

*United States v. Nicolet*<sup>52</sup> reinterpreted the standards for veil piercing under CERCLA in the course of finding liability. The new standard comes close to merging the veil piercing and statutory interpretation theories of liability:

Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the

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46. See, e.g., *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 574 (W.D. Mich. 1991); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985); *United States v. Carolawn Co.*, 14 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,699-700 (D.S.C. 1984).

47. See authorities cited *supra* note 45.

48. *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1202 (E.D. Pa. 1989); *Acushnet River*, 675 F. Supp. at 33.

49. 112 B.R. 540 (S.D.N.Y. 1990).

50. 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991). *Accord CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549 (W.D. Mich. 1991) (apparently applying state law standards). *Jacksonville Elec. Auth. v. Eppinger & Russell Co.*, 776 F. Supp. 1542 (M.D. Fla. 1991) (applying federal veil-piercing standards to its unusual facts to find no owner liability).

51. 757 F. Supp. 988 (D. Minn. 1990).

52. 712 F. Supp. 1193 (E.D. Pa. 1989).

management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.<sup>53</sup>

Under this standard, the same facts would lead to CERCLA liability under either a statutory interpretation or a veil-piercing theory, undercutting any distinction between the two.

The court significantly modified the traditional piercing the veil analysis in this reformulation by leaving out any consideration of undercapitalization, fraud, inequitable conduct, or observance of separate corporate formalities. The widespread adoption of this new standard would result in the frequent imposition of parent company liability wherever courts find the parent controlled the subsidiary's "management and operations." This standard was the basis for an alternative holding, and the court was clearly prepared to base liability on statutory interpretation, if needed. These factors may well have influenced the court's adoption of such a substantial change in legal doctrine.

In almost direct contrast stands *Joslyn Manufacturing Co. v. T. L. James & Co.*<sup>54</sup> The court not only refused to assign liability based on the statutory interpretation theory, as discussed above, but it applied a traditional test to deny veil-piercing liability. The parent and subsidiary's separateness were established by the observance of corporate formalities, separate employees and officers, separate property ownership, tax returns, bill paying, and employee benefits payments.<sup>55</sup> "Veil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate a fraud or avoid personal liability."<sup>56</sup> This high standard was simply not met under the facts of *Joslyn Manufacturing*. Although the facts were different in the two cases, *Joslyn Manufacturing* provides a quite different legal standard from the expansive one articulated in *Nicolet*.

*Joslyn Manufacturing* aside, most courts that have not found liability under traditional veil-piercing analysis have found liability on some other grounds.<sup>57</sup> As a result, the parent company protection offered in a restrictive veil-piercing holding is more apparent than real; presumably, parents will be more concerned with being liable under CERCLA than with the particular theory upon which liability is based.

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53. *Id.* at 1202.

54. 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).

55. 893 F.2d at 83.

56. *Id.*

57. *See, e.g., In re Southern Timber Prods., Inc.*, No. 87-13-R, RCRA (3008) appeal No. 89-2, 1990 RCRA LEXIS 22 (EPA Nov. 13, 1990). There is, however, an interesting exception to this general rule. *In re Acushnet River & New Bedford Harbor Proc.*, 675 F. Supp. 22 (D. Mass. 1987), *United States v. Bliss*, 108 F.R.D. 127 (E.D. Mo. 1985), and *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27 (E.D. Mo. 1985), all refused to pierce the veil to find jurisdiction over absent parents in CERCLA litigation. *United States v. Alcan Aluminum, Inc.*, 1989 U.S. Dist. LEXIS 11,592 (E.D. Pa. 1989) denied discovery of facts needed to support a "piercing the veil" theory because that theory had not been pleaded.



Although both the legal rules and their application are less certain in piercing the veil holdings than in statutory interpretation holdings, even the former offers some support for our thesis. In deciding whether to pierce the veil, courts look to the extent of the parent company's control over and involvement with the subsidiary's business generally, and its specific involvement with the subsidiary's hazardous substance handling operations.<sup>58</sup> However, the vast common law jurisprudence that has developed around veil piercing also finds its way into some of these cases, so that the observance of corporate formalities, undercapitalization, and fraud, among others, influence the courts' analysis at times. Although these facts would not be irrelevant in the statutory interpretation opinions in certain courts, these traditional common law standards may receive greater emphasis in deciding whether to pierce the veil. Courts further complicate the situation by applying different veil-piercing tests. Application of the *Nicolet* standard makes the veil-piercing inquiry virtually indistinguishable from statutory interpretation. On the other hand, the more traditional *Joslyn Manufacturing* standard makes liability much harder to find. Of course, the ready availability of alternative theories of liability undercuts the significance of any differences between them.

## II. Individual Corporate Officers, Directors, and Shareholders

Plaintiffs often seek to extend liability to corporate officers, directors, and even shareholders.<sup>59</sup> While such claims may reflect CERCLA's endless search for more and deeper pockets, they may also rest on a stronger basis. Courts have found that individual corporate actors who had some degree of responsibility for hazardous substances which have now created environmental problems, or threaten to create them, are appropriate liability targets under CERCLA, both to fund needed cleanups, and to discourage improper behavior

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58. See discussion and authorities, *supra*, notes 40 & 41.

59. There is a large and growing law review literature on this topic. In addition to the articles cited in note 11, *supra*, see Kathryn R. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act*, 52 OHIO ST. L.J. 133 (1991); William Scott Biel, Comment, *Whistling Past the Waste Site: Directors' and Officers Personal Liability for Environmental Decisions and the Rule of Liability Insurance Coverage*, 140 U. PA. L. REV. 241 (1991); Elizabeth A. G. Geltman, *Shareholder Liability for Improper Disposal of Hazardous Waste*, 95 COM. L.J. 385 (1990); Perry E. Wallace, Jr., *Liability of Corporations and Corporate Officers, Directors, and Shareholders Under Superfund: Should Corporate and Agency Law Concepts Apply?*, 14 J. CORP. L. 839 (1989); Carroll E. Dubuc & William D. Evans, Jr., *United States v. Northeastern Pharmaceutical Chemical Co., Inc.: The Eighth Circuit Unleashes a CERCLA Dragnet on Corporate Officials*, 24 TORT & INS. L.J. 168 (1988); David A. Rich, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. ENVTL. AFF. L. REV. 643 (1986); David W. Tunderman, *Personal Liability for Corporate Directors, Officers, Employees and Controlling Shareholders Under State and Federal Environmental Laws*, 31 ROCKY MTN. MIN. L. INST. ch. 2 (1985); Andrew M. Goldberg, Comment, *Corporate Officer Liability for Federal Environmental Statute Violations*, 18 B.C. ENVTL. AFF. L. REV. 357 (1991); Thomas J. Niekamp, Note, *Individual Liability of Corporate Officers, Directors and Shareholders for Violations of Environmental Laws*, 14 OHIO N.U. L. REV. 379 (1987).

in the future. The key is to identify the degree of responsibility for business operations, and the degree of involvement in them, that can result in liability. After a brief review of the legal theories of liability, this Part will identify lessons to be learned from the results and rationales of the cases, regarding the level of personal involvement in a business that may lead to liability.

Cases can be brought against individual officers, directors, or shareholders under one or more of three legal theories. First, plaintiffs can seek a broad interpretation of CERCLA's statutory terms—"owner," "operator," or "generator"—to reach individual defendants. CERCLA's basic remedial policies and its endless search for deep pockets will support its long arm here, as shown in earlier Parts of this Article.<sup>60</sup> Second, many plaintiffs have been successful in applying traditional tort corporate law doctrines which hold individual corporate actors liable for corporate torts in which they "actively participate."<sup>61</sup> Third, plaintiffs may resort to the traditional piercing the veil theory. Attempts to impose liability on individuals by piercing the corporate veil have been generally less successful, although these cases typically do find liability on other grounds.<sup>62</sup>

Whatever the legal theory, analysis of these cases turns on the type of individual behavior that can lead to liability. Several recent cases, all concerned with individual shareholders of closely held companies, generally confirm the principle that stock ownership by an individual, without more, will not provide a basis for finding owner liability.<sup>63</sup> Similarly, no court has found director liability based solely on the performance of traditional director's duties; more personal involvement by directors in management activities has always been required.<sup>64</sup> In emphasizing that shareholder and director liability turns on individual behavior, these cases indirectly support the principle that CERCLA liability will turn on each individual's participation in managing the business

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60. See Introduction and Part I, *supra*.

61. For a discussion of these traditional tort theories, see, for example, 3A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1137 (perm. ed. 1986); H. HENN. & J. ALEXANDER, LAWS OF CORPORATIONS § 230 at 608 n.5 (3d ed. 1983); BLUMBERG, *supra* note 11, at § 18.02.2.

62. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Mottolo*, 629 F. Supp. 56 (D.N.H. 1984). In contrast, piercing the veil liability was found as an alternative holding in *United States v. Carolawn Co.*, [1984] 14 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 20,698 (D.S.C. June 15, 1984), although the court was also willing to find liability for the individual's participation in the conduct that violated the statute.

63. See *Arnotek Indus., Inc. v. Seymour Freedman*, 790 F. Supp. 383 (D. Conn. 1992) (inactive shareholder and officer defendants granted summary judgment); *CBS, Inc. v. Henkin*, 803 F. Supp. 1462 (N.D. Ind. 1992) (inactive shareholder defendant granted summary judgment); *Robertshaw Controls Co. v. Watts Regulator Co.*, 807 F. Supp. 144 (D. Me. 1992); *Riverside Mkt. Dev. Corp. v. International Bldg. Prods. Inc.*, No. 88-5317, 1990 U.S. Dist. LEXIS 6375 (E.D. La. May 22, 1990), *aff'd*, 931 F.2d 327 (5th Cir.), *cert. denied*, 112 S. Ct. 636 (1991); *Amcast Ind. Corp. v. Detrex Corp.*, No. S88-620, 1990 U.S. Dist. LEXIS 15191 (N.D. Ind. Sept. 12, 1990); *Columbia River Serv. v. Gilman*, 751 F. Supp. 1448 (W.D. Wash. 1990); *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341 (D. Idaho 1989). *Cf.* *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989), *aff'd*, 978 F.2d 832 (4th Cir. 1992). See Oswald & Schipani, *supra* note 11, at 297-99.

64. Oswald & Schipani, *supra* note 11, at 273.

and handling its wastes. Further, the cases now clearly require that an officer must have engaged in the liability-creating conduct at the time that storage or disposal took place for liability to attach under an operator theory; officers who control the company only at a later time will not be liable.<sup>65</sup>

In general, the rules and results of the cases establish three categories of individual behavior—three points of focus for the factual inquiry—that may lead to liability.<sup>66</sup> The first category looks to the authority of an individual to control the waste disposal activities of the business. Typically, this authority is inferred from the general business management and supervisory activities of the individual. The second point of focus looks to the individual's personal involvement with waste-handling and disposal management. The third category looks to an individual's ability to prevent harm from improper waste activities.

#### A. *Control of the Business and its Wastes*

Two early cases established the fundamental principle in favor of liability for the general managers and supervisors of the business. This basic principle states that those who manage the business must also take care in managing its wastes. *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*<sup>67</sup> ultimately held Michaels, the corporate president and a major stockholder, liable for cleanup costs. The federal district court in Missouri found that Michaels's direct involvement in waste disposal practices justified owner or operator liability.<sup>68</sup> Because Michaels had not actually owned the facility, the Court of Appeals reversed this determination, instead imposing liability on him because he had arranged for disposal of the wastes.<sup>69</sup> Noting that "the authority to control the handling and disposal of hazardous substances . . . is critical under the statutory scheme," the court gave what has become a widely quoted statement of basic policy favoring individual liability:

[C]onstruction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and

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65. See *Nurad v. Wm. E. Hager & Sons Co.*, 22 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,079 (D. Md. 1991), *aff'd on other grounds*, 966 F.2d 837 (4th Cir.), *cert. denied sub. nom. Mumaw v. Nurad, Inc.*, 113 S. Ct. 377 (1992); *Quadion Corp. v. Mache*, No. 89L3536, 1991 U.S. Dist. LEXIS 8222 (N.D. Ill. June 11, 1991); *Massachusetts v. Blackstone Valley Elec. Co.*, No. 871799-T, 1991 U.S. Dist. LEXIS 17,284 (D. Mass. Nov. 25, 1991).

66. This three part distinction is a modified version of the analysis of Oswald and Schipani, *supra* note 11, at 273-97.

67. 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).

68. *Id.* at 849.

69. 810 F.2d at 743. See *United States v. Ward*, 618 F. Supp. 884, 897 (E.D.N.C. 1983) (imposing liability on president/principal shareholder "regardless of the knowing involvement of the generator of hazardous wastes.").

disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme.<sup>70</sup>

Applying this basic policy, the court found individual liability, even though the defendant had no personal involvement in the decisions about hazardous substances. It was enough that, as president and a major shareholder, he generally managed the business: "Michaels was the individual in charge of and directly responsible for all of NEPACCO'S operations . . . and he had ultimate authority to control the disposal of NEPACCO'S hazardous substances."<sup>71</sup> This case strongly supports the idea that those who manage the business must also take responsibility for managing its wastes.

A previous case, *New York v. Shore Realty Corp.*<sup>72</sup> articulated this same basic policy. Here the sole shareholder and corporate officer, who effectively exercised the day-to-day management of the business, was held liable for CERCLA cleanup costs. Liability was based on his active conduct in managing the business rather than on personal involvement with the associated cleanup obligations. The court concluded that the sole shareholder/officer was an owner or operator, relying on the legislative history of CERCLA which underscored the judicial policy of broadly construing remedial environmental statutes such as CERCLA.<sup>73</sup> However, the court specifically declined to pierce the corporate veil to attach liability. The court strictly applied New York law and found that some separation between the shareholder and his corporation had been maintained.<sup>74</sup>

The difficulty with the principle that individual liability will attach to those with general supervisory responsibility for the business is that it is potentially limitless. Surely the CEO should not always have personal liability whenever the corporate entity has any CERCLA liability, although the bare statement of principle in these cases seems to permit it. *Northeastern Pharmaceutical* and *Shore Realty Corp.*, however, may provide some implicit guidance as to the limits of officer liability. In both cases, the officers held liable, while company

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70. 810 F.2d at 743.

71. *Id.* at 745. Dicta in two recent cases support a determination for individual liability on the basis of the individual's "authority to control" waste disposal, rather than requiring personal involvement in waste operations. *Quadion Corp. v. Mache*, No. 89L3536, 1991 U.S. Dist. LEXIS 8222 (N.D. Ill. June 11, 1991); *Nurad v. Wm. E. Hooper & Sons Co.*, 22 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,079 (D. Md. 1991), *aff'd*, 966 F.2d 837 (4th Cir.), *cert. denied sub. nom.* *MuMaw v. Nurad, Inc.*, 113 S. Ct. 377 (1992).

72. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

73. *Id.* at 1039-42, 1044-45, 1047, 1049. For the most part, RCRA cases have applied similarly expansive policies, although this has not been universally the rule. *Compare* *United States v. Conservation Chem. Co. of Ill.*, 733 F. Supp. 1215 (N.D. Ind. 1989) and *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956 (W.D. Mich. 1990) with *In re Southern Timber Prod., Inc.*, No. 87-13R RCRA (3008) appeal No. 892, 1990 RCRA LEXIS 22 (EPA, Nov. 13, 1990).

74. 759 F.2d at 1052. See BLUMBERG, *supra* note 11, at § 18.02.3, nn.52-54. *Shore Realty*, itself, was readily found liable as an owner of the facility. "Section 9607(a)(1) [CERCLA 107(a)(1)] unequivocally imposes strict liability on the current owner of a facility. . . ." *New York v. Shore Realty Corp.*, 759 F.2d at 1044.

presidents, had managed, at a level close to the actual supervision, the waste generation and disposal activities. These were relatively small companies in which the president might reasonably have been expected to supervise the waste disposal operations. We will see below that at least one opinion denied individual liability because the individual was not closely enough associated with waste handling and disposal.

#### B. *Individual Involvement with Waste Disposal*

The second group of cases, more common in the facts and to some degree in the courts' rationales, emphasizes the individual's specific involvement with the waste handling and disposal activities at the company in determining liability. General business supervision authority is also present in most of these cases, however, there is always personal involvement in the conduct which led to the violation.

Involvement in both the specific waste disposal activities and the general management of the business operation were important in finding the existence of potential individual liability to withstand a motion for summary judgment in *Riverside Market Development Corp. v. International Building Products Inc.*<sup>75</sup> Von Dohlen, the president and 15% shareholder, was found potentially liable as an operator under CERCLA. He spent about 40% of his time at the factory in question and was actively involved in general management, product design, and facilities acquisition, as well as in waste disposal and the sale of the asbestos products that generated the troublesome waste.<sup>76</sup> However, the court found no operator liability for another individual, Prescott, despite the fact that he owned 85% of the stock and was chairman of the board. His actual involvement in the management of the business was minimal. He spent little time at the plant, did not live in the same part of the country, and participated only by reviewing financial information and attending directors' meetings and an annual gathering which included customers.<sup>77</sup> The Court of Appeals, while

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75. *Riverside Mkt Dev. Corp. v. International Bldg. Prod. Inc.*, No. 88-5317, 1990 U.S. Dist. LEXIS 6375 (E.D. La. May 22, 1990), *aff'd*, 931 F.2d 327 (5th Cir.), *cert. denied*, 112 S. Ct. 636 (1991). See *United States v. Amtreco*, 809 F. Supp. 959 (M.D. Ga. 1992) (denying defendant's motion for summary judgment); *United States v. Princeton Gamma-Tech., Inc.*, Civ. No. 91-809 (CSF), 1992 WL 33845 (D.N.J. Feb. 18, 1992) (denying defendant's motion for summary judgment); *Construction Corp. v. Williams*, 785 F. Supp. 271 (D.N.H. 1991) (denying defendant's motion for summary judgment).

76. The District Court detailed Von Dohlen's activities in 1990 U.S. Dist. LEXIS 6375, at \*5-7.

77. The District Court's detailed statement of Preston's activities is in 1990 U.S. Dist. LEXIS 6375, at \*5.

noting his lack of managerial involvement generally, particularly emphasized that he had no personal involvement in the conduct that violated CERCLA:

The record clearly indicates that Prescott spent very little time at the asbestos plant [the facility in question], and no evidence has been presented to indicate that such visits would have provided Prescott with the opportunity to direct or personally participate in the improper disposal of asbestos or asbestos by-products.<sup>78</sup>

Based on these facts, the court granted summary judgment for Prescott.

Two cases have found CERCLA liability for individual corporate actors who actively managed the corporations' commercial waste disposal facilities. *United States v. Carolawn Co.*<sup>79</sup> upheld the potential liability of three individual controlling shareholders and officers for their participation in the misconduct, finding that "personal liability of corporate officials who are responsible for the day-to-day operations of a hazardous waste business"<sup>80</sup> was contemplated by CERCLA. The court also refused to dismiss the piercing the veil claim.<sup>81</sup>

Owner and operator liability was found, based on similar facts, in *United States v. Mexico Feed & Seed Co.*<sup>82</sup> This case concerned the liability of Pierce, the president and majority shareholder of the company that owned the storage tanks and conducted the waste storage operations at issue when hazardous substance releases occurred. The court found him liable noting:

As president of [the company] during the relevant time period, Pierce was in charge of and directly responsible for all of the [company's] operations and, hence, possessed ultimate authority to control the disposal of the hazardous substances. Therefore, as owner and operator at the time of the disposal of the hazardous waste at the Mexico site, Jack Pierce is liable under CERCLA.<sup>83</sup>

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78. 931 F.2d at 330.

79. *United States v. Carolawn Co.*, [1984], 14 *Env'tl. L. Rep.* (*Env'tl. L. Inst.*) 20,698 (D.S.C. June 15, 1984).

80. *Id.* at 20,699. See *United States v. Mirabile*, [1985] 23 *Env't Rep. Cas.* (BNA) 1511 (E.D. Pa. June 6, 1985) (upholding potential liability of the individual who was both the chairman and a major stockholder, who "directed, controlled and managed" the operations which deposited the wastes and "had the capacity and opportunity to control the disposal of the waste.") *Id.* at 1512.

81. 14 *Env'tl. L. Rep.* at 20,699.

82. 764 F. Supp. 565 (E.D. Mo. 1991); 21 *Env'tl. L. Rep.* (*Env'tl. L. Inst.*) 21,486 (E.D. Mo. May 16, 1991), *rev'd on other grounds*, 980 F.2d 478 (4th Cir. 1992).

83. *Id.* at 16. See *United States v. Fleet Factors Corp.*, 724 F. Supp. 955 (S.D. Ga. 1988), *aff'd*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) (holding sole shareholders who also managed the business liable under CERCLA, despite the claim that the lender intervened to take over the management of the hazardous waste and thus was an intervening cause). For a discussion of lender liability, see Part III *infra*.

Similarly, two opinions in *United States v. Mottolo*<sup>84</sup> support liability of corporate officials directly involved in managing waste disposal operations. The first opinion found the individuals potentially liable because of their participation in the tort, and thus denied their motion for summary judgment; interestingly, the court also applied a strict piercing the veil test that was not satisfied.<sup>85</sup> The second opinion articulated a revised piercing test that emphasized the remedial goals of CERCLA over the importance of the common law's respect for the corporate form.<sup>86</sup> Despite the merits of such an enterprise approach to liability, it has not been widely adopted in the CERCLA cases, no doubt because other theories of liability have proven so serviceable.

*United States v. Carolina Transformer Co.*<sup>87</sup> introduced a distinction between owner and operator liability for individuals who have a direct involvement in the waste operations of a company. In this case, the sole shareholder, also a former director, president, and chairman, who had actively participated in the business, was held liable as both an owner and an operator. Another defendant, also a former president and director who had been active in the business, was held liable only as an operator. Both had supervised the day-to-day operations, including operations involving toxic substances, and both had been involved in the corporation's refusal to comply with the EPA orders. The distinction between owner liability and operator liability, in this instance, can only have been based on stock ownership, although the opinion simply does not say whether owner liability could have been based on stock ownership alone. Because the case presented egregious misconduct by a closely held corporation, and this misconduct was central to the liability findings, the distinction it draws between owner and operator liability on the basis of shareholding should be used cautiously.

*Massachusetts v. Blackstone Valley Electric Co.*<sup>88</sup> demonstrates the limits of basing liability on personal involvement with waste disposal operations. It

84. 629 F. Supp. 56 (D.N.H. 1984); 695 F. Supp. 615 (D.N.H. 1988).

85. 629 F. Supp. at 59-60 (participation and direct causal relation to the injury led to potential liability).

86. 695 F. Supp. at 624. "In applying this rule [concerning separate corporate entities] with respect to federal statutes, the Court looks closely 'at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine.'" *Id.* (quoting *Alman v. Danin*, 801 F.2d 1, 3 (1st Cir. 1986)). Strict respect for the corporate form here, the court noted, would undermine the CERCLA "polluter pays" principle.

87. *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989), *aff'd*, 978 F.2d 832 (4th Cir. 1992).

88. No. 87-1799-T, 1991 U.S. Dist. LEXIS 17,284 (D. Mass. Nov. 25, 1991). *See Levin Metals Corp. v. Parr-Richmond Co.*, 781 F. Supp. 1454 (N.D. Cal. 1991).

[T]his court holds that an individual cannot be liable as an operator under CERCLA Section 107(a)(2) unless that individual actively participates in the operation of the facility at which hazardous substances are disposed of, exercises control over the company immediately responsible for the operation of the facility, or is otherwise intimately involved in that company's operations. *Id.* at 1457. Applying this standard, the court granted the summary judgment motion of the defendant who had been a minority shareholder, director, and officer of the company, but had never been involved in waste disposal operations and had had only minimal involvement with the overall operations. *Id.* at 1458.

held that the corporate officers were not liable because they did not participate in the conduct that violated CERCLA. The officers in question did not take over management of the company until four years after the production and storage of the wastes at issue had ceased. To "hold an officer liable. . . he must have personally participated in the conduct that violated CERCLA."<sup>89</sup> This rationale appears to be in direct conflict with the reasoning expressed in the cases discussed in Section A of this Part. But a close examination of the facts in each group of cases shows, as demonstrated here, that the competing rationales merely fall along different points on a continuum. While the court's focus here was on the individual's lack of involvement with waste disposal, the facts show an equal absence of involvement with general business management at the time the wastes were improperly stored.

### C. Capacity to Prevent Harm

The third group of cases, consisting mainly of three opinions from Judge Ensen of the Western District of Michigan, find individual liability under CERCLA where the individual could have prevented the hazardous waste problem, but did not. These three opinions emphasized the individual's responsibilities and actions in preventing or ameliorating the hazardous waste problem as a key to determining liability.<sup>90</sup> The first factor of Judge Ensen's two factor analysis considered the authority of an individual to control the business of the discharging company, especially the waste handling practices. As one moves up the corporate hierarchy, there is greater responsibility to insure compliance with the law although, as a practical matter, there is likely to be less direct contact with specific waste handling operations.<sup>91</sup> Second, the court considered the "responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal."<sup>92</sup> Taken together, these two factors maintain the focus on an individual's general management responsibility and her specific responsibility for hazardous waste demonstrated in previous sections.

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89. *Blackstone Valley Elec. Co.*, 1991 U.S. Dist. LEXIS 17,284.

90. *Kelley v. Arco Indus. Corp.*, 723 F. Supp. 1214, 1219-20 (W.D. Mich. 1989); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1543-44 (W.D. Mich. 1989); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1554, 1562 (W.D. Mich. 1989).

91. Dale A. Oesterl's, *Viewing CERCLA as Creating an Option on the Marginal Firm: Does it Encourage Irresponsible Environmental Behavior?* 26 WAKE FOREST L. REV. 39, 48 (1991) notes that the *Kelley* court has moved the standard from requiring direct personal participation to a standard that includes broadly defined forms of culpable nonfeasance: "Thus a corporation that does not have an established corporate policy against illegal releases, backed by proper lines of authority, communication, and monitoring, may find that its chief officers, managers, and even controlling shareholders are . . . liable."

92. *Kelley v. Arco Indus. Corp.*, 723 F. Supp. at 1219.



Judge Enslin particularly emphasized that liability is to be used to encourage prevention, distinguishing its approach from the common law:

The standard I have articulated is quite unlike the lack of corporate formalities associated with piercing the corporate veil, and is different from the issue of personal knowledge, direct supervision, or active participation found in most ordinary torts by corporate actors. Here the focus of the inquiry is whether the corporate individual could have prevented the hazardous waste discharge at issue. . . . Secondly, the Court, in determining individual liability under § 107, will look at responsibility undertaken for waste disposal practices as it relates to the prevention test. Here active, direct, knowing efforts to prevent or abate the contamination may work for—not against—a corporate defendant where the acts suggest the individual tried but was unable to prevent or abate the unlawful waste disposal.<sup>93</sup>

While generally supportive of our principles of CERCLA liability, this prevention test offers an additional lens to view the facts of a specific case. However, it goes beyond the previous cases and presents an expanded liability principle that, if generally adopted, is a substantial modification in the test, that might also change the results of some cases.

The key to appropriate use of a prevention test is to properly appreciate its limits. As with a focus on authority to control, this test can, in the abstract, result in the limitless extension of liability. However, careful reading of these opinions provides a partial response to such concerns. These were all opinions denying summary judgment motions; they offer quite limited development of the facts on which liability could be based, holding only that the complete absence of such facts had not been shown at the relatively early stage of the litigation. In addition, the opinions emphasize the need for careful, fact-sensitive decision-making in specific cases:

Imposing liability on a corporate individual is a serious matter, and because CERCLA provides no explicit way to distinguish among corporate actors, the courts should respond with proper standards. Strict liability may be too harsh and broad-sweeping a standard to apply to all corporate “owners” [and operators] in all cases. Not all employees or managers of a close corporation will necessarily, absent special factors, be liable for a § 107 claim. Consequently, a more definitive standard seems appropriate.

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93. *Id.* at 1216. *See also* Kelley v. Thomas, 727 F. Supp. at 1544.

This Court will look to evidence of an individual's authority to control, among other things, waste handling practices—evidence such as whether the individual holds the position of officer or director, especially where there is a co-existing management position; distribution of power within the corporation . . . evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal.<sup>94</sup>

In this context, the prevention principle is most usefully seen as another way to analyze the facts, rather than a novel test for liability. It offers, however, a useful perspective for evaluating specific facts in specific cases.

Grouping the cases into the three types of the three sections in this Part helps to clarify distinctions and analysis. Yet resolving new cases will always require more than simply identifying to which of these groups it belongs; a fact sensitive analysis will always be required. As the court said in *United States v. Cordova Chemical Co.*,<sup>95</sup> denying an individual corporate actor's motion for summary judgment:

A court must weigh a number of factors to determine an official's role in a corporation and its polluting activities. These factors include a corporate individual's position in the company; degree of authority; percentage of ownership; role in board decision-making and daily management; knowledge of and responsibility for waste disposal policy; and personal involvement with, neglect of and ability to control hazardous waste matters. . . . [A] combined assessment of all of these factors determines whether a corporate individual should be held personally liable under CERCLA due to involvement in hazardous waste practices or due to neglect thereof when placed in the context of the individual's pervasive control and active involvement over other aspects of the company.<sup>96</sup>

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94. *Kelley v. Arco*, 723 F. Supp. at 1219.

95. *United States v. Cordova Chem. Co.*, Nos: 1:89-CV-961, 1:89-CV-503, 1991 U.S. Dist. LEXIS 4183 (W.D. Mich. Mar. 26, 1991).

96. *Id.* at \*2, \*3. See *United States v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989) (RCRA liability); *Vermont v. Staco*, 684 F. Supp. 822 (D. Vt. 1988) (controlling shareholder of parent with "ultimate authority to control" and plant manager both potentially liable under CERCLA and RCRA). See also *Levin Metals Corp. v. Parr Richmond Terminal Co.*, 781 F. Supp. 1454 (N.D. Cal. 1991) (individual who, at various times, was a minority shareholder, director, and officer of related corporations acquiring property leased to a hazardous waste generator could not be held liable as an operator because the individual did not participate in the lessee's operation of the facility, did not exercise control over the lessee, and was not intimately involved in the lessee's operations).

#### D. Conclusion

Claims of CERCLA liability against individual corporate actors turn on the extent of the individual's involvement with the business. While precise and definitive rules have not emerged, and some conflicts exist among the cases' rationales, three points of focus for the factual inquiry can be seen. First, courts will inquire into the extent to which the individual actively managed the business and thus had general authority over the waste generating and handling operations. Some cases say that those who are running the business, typically high level corporate officers or major stockholders in closely held companies, must insure that the company complies with CERCLA as part of their business management responsibilities. By predicating liability on nonfeasance by those managing the business, the language of some cases articulates a duty to act to insure compliance. While such a rule expresses broader liability than managers and executives have traditionally faced, it can be justified by CERCLA's frequently stated remedial goals.

The greatest difficulty with this expanded scope of liability under CERCLA is defining its outer limits.<sup>97</sup> First, such a principle reaches too far; it is simply unfair to hold top corporate officials personally liable for all corporate waste handling activities far removed from their actual areas of direct, personal management, as will be particularly true in large and diverse organizations. In addition, with such liability, corporate indemnification will surely follow, at least in large organizations, and effectively undercut the incentive effects of the rule. However, the rule of liability expressed in these cases is qualified by their fact patterns. The cases that have articulated a broad liability rule involved relatively small companies managed by individuals who directly oversaw all business operations and could reasonably be charged with checking on hazardous substance management. Indeed, in no case has liability been imposed on an individual whose actual management activities or responsibilities did not have a reasonably close connection to the waste generating or disposing operations of the company, regardless of the principle of liability expressed.<sup>98</sup> While the case law has not yet specified the outer limits of liability based on general supervision, there is a basis for expecting that those with no connection to, or no responsibility for, waste generation, handling, or storage will be held liable.<sup>99</sup>

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97. See William Scott Biel, *Whistling Past the Waste Site: Directors' and Officers' Personal Liability for Environmental Decisions and the Role of Liability Insurance Coverage*, 140 U. PA. L. REV. 241 (1991).

98. See generally Oswald & Schipani, *supra* note 11, at 288, 297-99.

99. See *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327 (5th Cir. 1991); *Massachusetts v. Blackstone Valley Elec. Co.*, 77 F. Supp. 1036 (D. Mass. 1991); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454 (N.D. Cal. 1991).

The second point of focus is the extent to which an individual participated in the management of hazardous substances. Liability determined by this factor may well be found for those lower in the corporate hierarchy, those who actually made and implemented waste disposal decisions. Once again, liability of this nature cannot be considered wholly unanticipated in this day of extreme public concern with toxic chemical exposure. Corporate actors who manage waste disposal can no longer claim to be surprised that society is intensely concerned with the proper use and disposal of hazardous substances and is willing to punish misbehavior through the imposition of liability. In fact, this aspect of CERCLA liability is quite similar to the traditional tort liability of those who "actively participate" in a corporation's misconduct.

The third point of focus is the extent to which an individual could have prevented a hazardous waste problem. This inquiry is really a modification of the first point of focus, for they both emphasize the authority to control. However, the third focus also implicates aspects of the second, for those closer to actual waste handling operations will often have the best opportunity to prevent harm. Notably, these three points of focus essentially restate our two general principles of liability.

### III. Lender Liability

Commercial lenders often become involved in the management of their borrowers' activities, particularly when the borrower experiences financial difficulty. While financial difficulty can result from many causes, a large unfunded Superfund liability can certainly cause or contribute to fiscal problems. As the lender becomes more closely involved in supervising, and perhaps managing the borrower's operations, claims of Superfund lender liability have followed.<sup>100</sup>

The Superfund Amendments provide a specific exemption for lenders. Section 9607(2)(A) excludes from "owner or operator" liability one who holds only a security interest in a facility. This so-called "secured creditor exemption" provides that "[the term 'owner or operator'] does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or

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100. See, e.g., James B. Lowery, Comment, *Don't Get Involved!—How Unsuspecting Secured Creditors May Incur Liability Under CERCLA by "Participating in the Management" of a Debtor's "Facility,"* 56 MO. L. REV. 295 (1991); T. Allen McConnell, *Wanted! Comprehensive Ruling on Lender Liability for Borrowers' Hazardous Waste: A Survey of the "Secured Creditor" Exception to Liability Under CERCLA,* 22 TEX. TECH L. REV. 1181 (1991); Michelle B. Corash & Lawrence Behrendet, *Lender Liability Under CERCLA: Search for Safe Harbor,* 43 SW. L.J. 863 (1990); Martin R. Jelliffe, *Lender Liability Under CERCLA: A Game of Chance or a Game of Skill?* 11 MISS. C. L. REV. 39 (1990).

facility.”<sup>101</sup> Thus the questions of, “When do lenders become ‘owners or operators’?”, and “What constitutes ‘without participating in the management’ of the facility?”, become very important. The courts that have grappled with these questions have reached varied and inconsistent results. In response, the EPA has recently attempted to achieve specificity and certainty by promulgating a rule.<sup>102</sup>

The court in *United States v. Mirabile*<sup>103</sup> addressed both of the above questions. In ruling on a motion for partial summary judgment, a Pennsylvania District Court held that the secured creditors<sup>104</sup> of a hazardous waste site could be deemed owners or operators and, therefore, held liable for cleanup costs under CERCLA.<sup>105</sup> The determinative factor for assessing liability was whether the individual creditors had exercised control over the nuts-and-bolts operation of the site.<sup>106</sup>

In *Mirabile*, the court evaluated the involvement of three financial institutions at the waste site to determine whether they were “owners” or “operators” under CERCLA, or whether they fell within the secured creditor exemption of the statute. The American Bank and Trust Company (ABT) loaned money to Mangels Industries, Inc., the owner of the Turco site, and secured its loan with a mortgage on its facility. Mellon Bank provided financing to Turco, a paint manufacturer, secured by its inventory and assets, and the Small Business Administration (SBA) loaned money to Turco for specific debts and secured its loan by a second lien security interest in machinery and equipment, a second lien on inventory and accounts receivable, a second mortgage on real estate, and a pledge of stock.<sup>107</sup>

The court determined that ABT could not be held liable for cleanup costs as it clearly held only a security interest in the facility, even though it did hold formal title as a result of its foreclosure.<sup>108</sup>

[ABT’s] actions with respect to the foreclosure were plainly undertaken in an effort to protect its security interest in the property. ABT made no effort to continue . . . operations on the property, and indeed

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101. 42 U.S.C. § 9601(20)(A) (1988). “Person means any individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body,” 42 U.S.C. § 9601(21) (1988), and is therefore broad enough to encompass lending institutions.

102. 7 Fed. Reg. 18,344. See *infra* text accompanying notes 144-48.

103. 15 Env’t. L. Rep. (Env’t. L. Inst.) 20,994 (E.D. Pa. 1985).

104. *Id.* at 20,995.

105. Two of the three secured creditors involved were granted summary judgments.

106. *Id.*

107. The procedural posture of this case is somewhat unusual. The United States filed an action against the present owners of the Turco site, the Mirabiles. They, in turn, joined ABT and Mellon Bank as third party defendants. ABT and Mellon Bank counterclaimed against the SBA. *Id.*

108. *Id.* at 20,996. The court did not determine whether ABT owned both legal and equitable title to the property, finding such a determination unnecessary for the disposition of the case relative to ABT.

foreclosed some eight months after all operations had ceased. . . . The actions undertaken by ABT with respect to the site cannot be deemed to constitute participation in the management of the site.<sup>109</sup>

The court went on to note that before a secured creditor may be held liable, "it must, at a minimum, participate in the day-to-day operational aspects of the site."<sup>110</sup> Finding no participation beyond foreclosure, the court was unwilling to extend liability to ABT, despite ABT's ownership of the site, and despite the court's recognition that the government would be more likely to recoup its cleanup costs if ABT could be held accountable.<sup>111</sup> Further, unlike the court in *Kelly v. Arco Industries*,<sup>112</sup> the *Mirabile* court refused to base its decision on policy grounds. "It may well be that the imposition of [liability on secured creditors or lending institutions] would help to ensure more responsible management of such sites. The consideration of such policy matters, and the decision as to the imposition of such liability, however, lies with Congress."<sup>113</sup>

SBA's financing agreement with Turco contemplated some degree of involvement in the operation of the plant.<sup>114</sup> Pursuant to SBA regulations, SBA was to provide management assistance to the facility, and according to the agreement, SBA was to approve all third party contracts.<sup>115</sup> The financing agreement also allowed SBA to restrict the facility's expenditures.<sup>116</sup> Consequently, SBA was authorized to become involved in the management, the decision-making, and the day-to-day operations of the facility. However, the SBA had never become so involved, and this fact was determinative in the court's decision relieving SBA from liability. To the *Mirabile* court, therefore, actual participation in the affairs of the facility, not the mere authority to do so, was necessary before liability could attach.

Mellon Bank's involvement in the management of the Turco site forced the court to decide more precisely the degree of participation required for liability to attach. Staff from the Bank sat on the facility's Advisory Board which provided oversight for the operations of the facility,<sup>117</sup> giving the Bank the opportunity to participate directly in the management of the facility. As with the SBA, the Bank gave financial advice to the Board. According to the court,

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109. *Id.*

110. *Id.* See also *In re T.P. Long Chem., Inc.*, 45 B.R. 278 (N.D. Ohio 1985) (secured creditor could only be found liable if it participated in the management of the facility). See *infra* notes 294-98 and accompanying text.

111. *United States v. Mirabile*, 15 *Env'tl. L. Rep.* at 20,995.

112. 723 F. Supp. 1214 (W.D. Mich. 1989). See *supra* text accompanying notes 92-95.

113. 15 *Env'tl. L. Rep.* at 20,996.

114. *Id.* at 20,997.

115. *Id.* at 20,996-97.

116. *Id.* at 20,997.

117. *Id.*

these activities alone were not enough to make the Bank an operator under CERCLA.<sup>118</sup> The Bank, however, had more direct involvement with managing the facility. For instance, Bank employees had established a reporting system between the company and the Bank and had conducted site visits. These activities were held to be sufficient to take Mellon Bank out of the secured creditor exemption for the purposes of denying summary judgment. The court stated:

The reed upon which the Mirabiles seek to impose liability on Mellon is slender indeed; however, bearing in mind that all doubts are to be resolved in favor of that party opposing a motion for summary judgment, I conclude that, taken as a whole, . . . a genuine issue of fact [exists] as to whether Mellon Bank . . . engaged in the sort of participation in management which would bring a secured creditor within the scope of CERCLA liability.<sup>119</sup>

Thus, to the *Mirabile* court, the mere opportunity to participate in the management of a facility was an insufficient basis for imposing liability on a lending institution. Further, the mere *financial* participation at a facility, without more, was not enough to cost lenders the protection of the secured creditor exemption.<sup>120</sup> The attendance at facility Board meetings, monitoring of cash, and the visiting of the site, however, were found to have constituted sufficient involvement to withstand a motion for summary judgment.

In contrast, *United States v. Maryland Bank & Trust Co.*<sup>121</sup> held that a lender's purchase of contaminated property on foreclosure could constitute the sole basis for liability. In this case, a farm used for waste disposal operations during the 1970s secured a mortgage from the Maryland Bank & Trust Company.<sup>122</sup> The Bank foreclosed on the property and purchased it at the

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118. *Id.*

119. *Id.* Specifically, the court noted that it would be helpful to have a clearer picture as to the participation of Mellon Bank employees in the manufacturing process and the extent to which Mellon Bank influenced management decisions. *Id.*

120. Since *Mirabile*, most lenders have changed their methods for making loans. Many lending institutions have adopted an environmental risk policy and have hired environmental analysts to assist in the risk assessment. Corash & Behrendt, *supra* note 100, at 865. Lenders, commonly requiring qualified third parties to perform environmental audits on the borrower's facility prior to making a loan, are now also requiring borrowers to (1) provide updated environmental audits during the term of the loan, and (2) set aside a portion of the loan proceeds to cover the costs of removing minor environmental hazards identified during the life of the loan. *Id.* "Such steps not only help lenders manage their risk under CERCLA, but also exert a positive influence in the battle to clean up hazardous substances." *Id.*

121. 632 F. Supp. 573 (D. Md. 1986).

122. *Id.* at 575.

foreclosure sale. In 1983, after leaking and deteriorating drums of chemicals were discovered at the facility, the EPA brought suit against the Bank to recover its costs for cleaning the site.<sup>123</sup>

The Bank argued that it should not be held liable under CERCLA, because it was neither an "owner" nor an "operator," and because it was exempt from CERCLA liability under the secured creditor exemption.<sup>124</sup> The Maryland district court rejected both arguments, finding the Bank to be the "owner" by virtue of its foreclosure and purchase of the facility. The court found the security interest exemption to be inapplicable.<sup>125</sup> The court stated:

The [secured creditor] exemption . . . covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then-held security interest in the land. The verb tense of the exclusionary language is critical. The security interest must exist at the time of the clean-up. The mortgage held by [the Bank] . . . terminated at the foreclosure sale . . . at which time it ripened into full title. [The Bank] purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment. Only during the life of the mortgage did [the Bank] hold indicia of ownership primarily to protect its security interest in the land.<sup>126</sup>

Unlike the *Mirabile* decision, no consideration was given to whether the Bank had participated or even had the capacity to participate in decisions relative to the hazardous substances. Rather, liability was imposed solely because the lender became the record title owner as a result of the purchase of the property upon foreclosure.

The Eleventh Circuit's decision in *United States v. Fleet Factors Corp.*<sup>127</sup> dramatically expanded the basis upon which a secured creditor could be held liable. The facts of *Fleet* are familiar: a financial institution, Fleet Bank, loaned money to a facility, taking a security interest in the facility and its equipment, inventory, and fixtures.<sup>128</sup> Contamination occurred because of activities at the facility. The EPA sued the financial institution to recoup its cleanup costs. In determining whether Fleet could be held liable under CERCLA, the court did

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123. *Id.*

124. *Id.* at 575-76.

125. See also *Guidice v. BFG Electroplating and Mfg. Co.*, 732 F. Supp. 556, 563 (W.D. Pa. 1989) (when a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder would have been).

126. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. at 579.

127. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991). The case was before the court on interlocutory appeal from the district court's denial of the secured creditor's motion for summary judgment. Because the district court's disposition involved legal questions of statutory interpretation, the Eleventh Circuit reviewed the district court's decision de novo. *Id.* at 1553.

128. *Id.* at 1552.



not follow the owner or operator analysis of earlier lender cases, but rather construed the Act to impose liability directly on secured creditors as parties who participate in the financial management of a facility.<sup>129</sup>

Under the standard we adopt today, a secured creditor may incur . . . liability without being an operator, by participating in the financial management of a facility to a degree indicating a *capacity* to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor to actually involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the [secured creditor] exemption.<sup>130</sup>

The *Fleet Factors* court thus departed from the *Mirabile* court's determination that participation in the day-to-day operations of a facility was required to impose liability.<sup>131</sup> The court imposed a broader standard whereby financial management "indicating a capacity to influence" the treatment of hazardous substances could lead to liability. Perhaps recognizing that this new standard provided little real guidance as to the threshold at which involvement would lead to the imposition of CERCLA liability, the court went on to observe:

it [is not] necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.<sup>132</sup>

This standard has proven particularly troubling to lenders because commercial lending arrangements typically give substantial power to supervise a borrower's financial management, and sometimes the facility's day-to-day operations.

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129. *Id.* at 1557. The court reasoned that persons involved in the operations of a facility are already liable as operators under Section 9607(a)(2), and had Congress intended to absolve secured creditors from ownership liability, it would have done so. Instead, Congress chose to explicitly hold secured creditors liable if they participate in the management of a facility.

130. *Id.* at 1557-58 (emphasis added).

131. See *supra* notes 107-19 and accompanying text. Besides *Mirabile*, at least four other district courts have followed the requirement that a secured creditor participate in the day-to-day operational aspects of the facility before it will deny itself the protection of the secured creditor exemption. See *United States v. New Castle County*, 727 F. Supp. 854, 866 (D. Del. 1989); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988); *Coastal Casing Serv. v. Aron*, No. H-86-4463 (S.D. Tex. Apr. 8, 1988). See also Part II *supra* (officer, director, shareholder cases).

132. *Fleet Factors Corp.*, 901 F.2d at 1558 (footnote omitted).

Although the *Fleet* decision is renowned for its holding, a review of the facts makes the court's decision less remarkable. *Fleet*, after the facility went bankrupt: (1) required the printing facility to get *Fleet's* approval prior to shipping goods to customers; (2) established the price for excess inventory; (3) determined when and to whom the finished goods should be shipped; (4) determined when employees should be laid off; (5) supervised the site office administrator; (6) received and processed employment and tax forms; (7) controlled access to the facility; and (8) contracted with an industrial liquidator to dispose of the fixtures and equipment.<sup>133</sup>

Thus, despite the firestorm of criticism<sup>134</sup> over *Fleet's* broad standard for imposing liability on secured creditors, a careful review of the facts reveals the substantial degree of involvement in the debtor's business that would likely lead to liability in other non-secured creditor, factual contexts.<sup>135</sup> While the language of *Fleet* seems to articulate a broad new standard of liability, its facts support a less expansive basis of liability. Nevertheless, counsel advising clients in the future will face the problem of predicting whether the broad interpretation of *Fleet* will be emphasized.

The Ninth Circuit, in *Bergsoe Metal Corp. v. East Asiatic Co.*,<sup>136</sup> although explicitly "leaving for another day" consideration of the *Fleet* standard of secured creditor liability,<sup>137</sup> provided a different perspective on lender liability. *Bergsoe* involved a complex financial arrangement among a recycling company, the Port of St. Helens, a municipal corporation,<sup>138</sup> and the United States National Bank of Oregon. This arrangement involved a sale and leaseback, and a mortgage on the property.<sup>139</sup>

Shortly after the lead recycling facility began construction, *Bergsoe*, the recycling company, defaulted on its leases. Eventually, the Bank forced *Bergsoe* into involuntary bankruptcy.<sup>140</sup> Subsequently, the Oregon Department of

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133. *Id.* at 1559.

134. See, e.g., Michael B. Kupin, *New Alterations of the Lender Liability Landscape: CERCLA After the Fleet Factors Decisions*, 19 REAL EST. L.J. 191 (1991); Sean P. Madden, *Will the CERCLA be Unbroken? Repairing the Damage After Fleet Factors*, 59 FORDHAM L. REV. 135 (1990); See Steven H. Seel, Note, *Fleet Factors and the Vanishing of CERCLA Section 101(20)(A)*, 10 J.L. & COM. 311 (1991); Timothy R. Zinnecker, *Lender Liability Under CERCLA and the Fleet-ing Protection of the Secure Creditor Exemption*, 44 S.W. L.J. 1449 (1991).

135. See *supra* Parts I (parent company liability), & II (officer, director, and shareholder liability).

136. 910 F.2d 668 (9th Cir. 1990).

137. *Id.* at 672.

138. The municipal corporation was empowered to issue revenue bonds to promote the industrial development in St. Helens, Oregon. *Id.* at 669.

139. Although the court's decision offers no explanation for the financial arrangement, probably, it was a mechanism for providing *Bergsoe* with a federal income tax exemption. In this type of financing, typically, a government agency is the issuer and nonrecourse obligor of the bonds, and a bank and/or the public buys the bonds. The agency provides the asset or buys the asset and improves it with the bond proceeds, and then leases it to a business. The lease payments pay off the bonds. When paid in full, the business/lessee acquires the real estate by exercising a purchase option.

140. *Id.*, at 670.

Environmental Quality discovered hazardous substance contamination at the plant and brought an enforcement action against the lenders to procure facility cleanup.

In assessing the municipal corporation's liability as an owner of the facility, the court observed that, in at least one sense, the corporation owned the recycling plant because the deed to the property was in its name.<sup>141</sup> Based upon the financial structure of the agreement, the court concluded that the municipal corporation held the deed in the plant primarily to ensure that Bergsoe would meet its obligations under the bonds. Therefore, the court determined that the municipal corporation, in reality, held only a security interest in the facility.<sup>142</sup>

The court next determined that the Port of St. Helens could not be held liable as an operator of the facility.

The [secured creditor provision of the] statute . . . provides little guidance as to how much control over a facility a secured creditor can exert before it will be liable for cleanup. . . . It is clear from the statute that, whatever the precise parameters of "participation," there must be some actual management of the facility before a secured creditor will fall outside the exception. Here there was none, and we therefore need not engage in line drawing.<sup>143</sup>

The municipal corporation's participation in the financing and planning of the facility's operation was found to be an insufficient ground to remove the corporation from the secured creditor exemption. To the *Bergsoe* court, some actual management of a facility was necessary in order for a secured lender to become liable under CERCLA.

*Bergsoe* and *Fleet* appear to articulate potentially conflicting rules of liability, although upon close examination of the specific facts in each case, the decisions are easily harmonized. Lenders have been confused and duly concerned by these conflicting rules and have been clamoring for legislative specification of the kind and degree of involvement that will result in the imposition of CERCLA liability upon them.<sup>144</sup>

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141. *Id.* at 671.

142. *Id.* As further evidence of this fact, the court noted that Bergsoe, not the Port of St. Helens, held all the traditional indicia of ownership, such as responsibility for the payment of taxes, the purchase of insurance, and the assumption of the risk of loss from destruction or damage to the property. These traditional indicia of ownership, and not mere title to the property, thus were the critical factors for establishing CERCLA liability. *Id.*

143. *Id.* at 672.

144. *Final EPA Rule Allows Traditional Lender Activities Without Superfund Liabilities*, 23 Env't Rep. (BNA) No. 3 at 326 (May 15, 1992) [hereinafter *EPA Rule*]. See also 57 Fed. Reg. 18,344.

In response, the EPA, not the Congress, has issued a rule (Rule) that "allows traditional lender activities without superfund liabilities."<sup>145</sup> The Rule attempts to specify the range of actions lenders may undertake without incurring liability, as well as to identify the kind and degree of involvement that will result in CERCLA liability. For example, while the borrower is in possession of the collateral, a lender is considered to be participating in the management of the facility, and is unprotected by the secured creditor exemption, if the lender: (1) exercises decision-making control over the borrower's environmental compliance to the extent that the lender has undertaken the responsibility for the borrower's hazardous substance handling or disposal practices; (2) exercises control comparable to a manager, such that the lender has responsibility for the borrower's day-to-day decision-making for environmental compliance; or (3) exercises control comparable to a manager, so that the lender has responsibility for the borrower's day-to-day decision-making for substantially all operational aspects of the enterprise other than environmental compliance.<sup>146</sup> Thus, a lender who actually assumes responsibility for a borrower's hazardous substances, environmental matters, or the general facility operations prior to foreclosure, runs the risk of losing the protection of the secured creditor exemption. Financial or administrative decision-making, however, imposes no CERCLA liability. This Rule rejects the *Fleet* standard by providing that participation in management is not shown merely by the existence of an unexercised capacity to control or an ability to influence facility operations.<sup>147</sup>

The Rule also provides guidance to lenders foreclosing on contaminated property. Essentially, lenders who take title through foreclosure or its equivalent, and maintain, protect, operate, or liquidate collateral are protected under the secured creditor exemption, provided that the lender makes certain specified or commercially reasonable efforts to sell or otherwise divest itself of the property, and provided the lender does not outbid an offer at a foreclosure sale or otherwise refuse a reasonable offer for the property.<sup>148</sup>

Although the Rule provides guidance, it still leaves substantial room for interpretation. Since the Rule is not a legislative enactment, courts remain free to determine whether or not EPA's Rule properly interprets the meaning of the secured creditor's exemption of CERCLA. Further, the Rule is not binding on state courts in interpreting state laws similar to CERCLA.<sup>149</sup>

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145. *EPA Rule, supra* 144, at 326. See also 57 Fed. Reg. 18,344.

146. *EPA Rule, supra* 144, at 327.

147. *Id.* at 329.

148. *Id.* at 328. Reasonable commercial means of divesting a lender of contaminated property upon which it has foreclosed is conclusively established under the Rule by listing, within twelve months of foreclosure, the collateral with an appropriate broker, dealer, or agent, or by advertising it at least monthly in a suitable trade publication or specified general circulation newspaper where the collateral is located. *Id.*

149. The Rule aside, lenders also still can be held liable under other provisions of CERCLA as generators or transporters of hazardous substances.

As of this writing, the State of Michigan and the Chemical Manufacturers Association have filed

Although neither the statute, the cases, nor EPA's Rule offer the precise guidance needed to determine the extent to which a secured creditor must participate in the management of a facility before CERCLA liability will attach,<sup>150</sup> the facts of the lender liability cases, as well as EPA's Rule, support the general principle that operator liability turns on participation in the day-to-day management of the facility. While EPA's Rule would not hold liable a lender who merely had the capacity to influence the operation of a facility, *Fleet* still stands as good law, and courts, not bound by the EPA Rule, may still find the rationale of *Fleet* persuasive. However, liability based on the *Fleet* facts is less radical than commentators have suggested, particularly in light of the CERCLA liability cases concerning corporate parents, officers, and directors. If one is going to manage a business, even as a secured creditor, one will have to deal with hazardous waste liability.

#### IV. Leases and Other Contractual Arrangements

Contractual relationships can also lead to liability in two significant circumstances. First, a landlord, through a lease with a tenant, may incur

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separate challenges to the Rule and EPA's authority to adopt it. *Michigan v. EPA*, No. 92-1312 (D.C. Cir., filed July 28, 1992); *Chemical Mfrs. Ass'n v. EPA*, No. 92-1314 (D.C. Cir., filed July 28, 1992). See *Superfund*, 23 *Env't Rep.* (BNA) No. 15, at 1142 (Aug. 7, 1992).

In *Atlantic Richfield Co. v. Oaas*, CV-90-75-BU-PGH, (D. Mont. Jan. 21, 1992), decided during the pendency of the EPA's new lender liability rule, the court considered the proposed EPA rule. See *Toxics L. Rep.* at 1166 (Feb. 26, 1992). ARCO, one of three parties held liable to the EPA for cleanup costs at the Montana Pole & Treating Plant, sought recovery of some \$2.8 million from the bank that took possession of the facility upon liquidation of the property. ARCO argued that under current case law, the bank's participation in the management of the liquidation was so pervasive that it could not hide behind CERCLA's security interest shield. Further, the bank's management activities of the site far exceeded the minimum needed to trigger liability under a *Fleet* test. *Id.* at 1167. The bank, however, secured a letter from the EPA, applying EPA's proposed rule to the case, and concluding that the bank fell within the security interest exemption. A decision in the case is pending. See also *Waterville Indus. v. Finance Auth. of Maine*, 984 F.2d 549 (1st Cir. 1993) (while not explicitly applying the new EPA rules to its analysis of lender liability, the court implicitly did so in declining to find a secured creditor, who held contaminated property as an owner for a period of time, liable under CERCLA).

150. To avoid liability, the precautions taken by lenders should extend beyond the fear of foreclosure. Because lenders also take stock and other forms of equity from borrowers as security on mortgages, it is conceivable that a court could also find such lenders "owners" under CERCLA. Corash & Behrendt, *supra* note 100, at 870.

See also *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 562 (W.D. Pa. 1989). For additional discussion of the potential liability of lenders, see Patricia L. Quentel, Comment, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 *Wis. L. Rev.* 139 (1988), and Scott Wilsdon, Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 *HASTINGS L.J.* 1261 (1987).

Worthy of note is the fact that the courts, in determining operator liability for lenders, are applying standards very similar, and in some cases identical to, the standard used to impose liability on a lender under the Securities Exchange Act. In *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986), the court stated that to hold a lender liable under the Securities Exchange Act as a "controlling person" of a corporation, the plaintiff must prove that the lender actually participated in, that is, exercised control over, operations of the corporation in general. Additionally, the plaintiff must prove that the lender possessed the power to control specific transactions or activity upon which the primary violation is predicated, but need not prove that the latter power was exercised. *Id.* at 630-31.

liability if its tenant's activities result in the release or threatened release of hazardous substances. Second, services performed under a contract may result in the imposition of CERCLA liability.

### A. Landlord/Tenant Contracts

Potential liability arising from a contractual relationship has most frequently arisen in the context of lease arrangements, and has focused on (1) whether there is a direct contractual relationship, (2) whether the owner exercised due care with respect to the tenant's activities, and (3) whether the owner took precautions against events that were foreseeable, given the owner's knowledge of the tenant's activities.<sup>151</sup>

In *United States v. Argent Corp.*,<sup>152</sup> a landowner leased property to a lessee whose activities resulted in the release of sodium cyanide at the facility. In an attempt to escape CERCLA liability, the landowner argued that his only relationship with the tenant was through the lease and that he had no knowledge of or ability to control the tenant's activities. The New Mexico district court rejected the landowner's arguments, finding that existence of contractual relationship dispositive.<sup>153</sup> The extent that a landowner participates in a lessee's activities, or has the power to do so, was immaterial to the *Argent* court in imposing CERCLA liability.<sup>154</sup>

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151. Certain owners of facilities, however, may escape CERCLA liability if they fall within the "innocent landowner" defense. This defense, specifically provided for within the Act, allows an owner of a facility, who is not also an operator, to escape CERCLA liability if it can be shown that the release or threatened release of a hazardous substance was caused solely by:

an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant, . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b)(3) (1988). To prove the element of due care, the defendant must demonstrate that "all precautions . . . that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances" were taken. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1 at 34 (1980), reprinted in U.S.C.C.A.N. 6119, 6137.

In addition to this so-called "innocent landowner" defense, CERCLA also provides for two additional defenses that limit liability in situations where the contamination results solely from (a) an act of God, or (b) an act of war. 42 U.S.C. § 9607(b) (1988).

152. 21 Env't Rep. Cas. (BNA) 1354 (D.N.M. May 4, 1984).

153. *Id.*

154. See also *United States v. South Carolina Recycling and Disposal, Inc.*, 20 Env't Rep. Cas. (BNA) 1753 (D.S.C. Feb. 23, 1984).

It should be noted that section 9607(e) of CERCLA specifically allows contractual parties to allocate liability. Therefore, a lease could be written and entered into that (1) gives a landlord-owner control over the activities of his or her tenant, and/or (2) provides for indemnification by the tenant for any release or threatened release of hazardous substances. Because, by virtue of being an owner (and assuming the innocent landowner defense cannot be successfully raised), a landlord-owner is liable for hazardous substance cleanup, a provision giving the landlord-owner the ability to control the tenants' activities may allow a landlord-owner to prevent conduct by the tenant that could result in the imposition of CERCLA liability and could demonstrate that the landowner took precautions against foreseeable acts or omissions of the tenant. Properly

In *United States v. Monsanto*,<sup>155</sup> the site owners leased a tract of land to a chemical manufacturing corporation for the warehouse storage of raw materials and finished products. More than 7,000 fifty-five gallon drums of chemical waste were stored on the site in a haphazard and careless manner.<sup>156</sup> As a consequence, hazardous substances leaked and commingled, resulting in noxious fumes, fires, and explosions. The EPA conducted a partial surface cleanup, and thereafter brought suit against the site owners to recoup the cleanup costs.<sup>157</sup>

The site owners argued that they were merely absentee landlords unaware of and unconnected with the waste disposal activities and, therefore, could not be held liable under CERCLA. Because (1) they entered a lease and they accepted rent thereunder, and (2) no evidence was presented that the landlord took precautions against the foreseeable conduct of the lessee, the court found the imposition of CERCLA liability appropriate. According to the court:

[The site owners] argued to the trial court that, although they were aware [the lessee] was a chemical manufacturing company, they were completely ignorant of all waste disposal activities at [the site] before 1977. They maintained that they never inspected the site prior to that time. In our view, the statute does not sanction such willful or negligent blindness on the part of absentee owners.<sup>158</sup>

From *Argent* and *Monsanto*, a fundamental liability principle for landlords emerges: by virtue of its contractual relationship with a tenant, a landlord incurs liability unless due care is taken to prevent foreseeable CERCLA violations by the lessee. Given the court's express extension of liability to "owners" of a site, this principle is not surprising.

The degree of care that a landlord must show in order to escape CERCLA liability was addressed by the courts in *Wickland Oil Terminals v. Asarco*,<sup>159</sup> and *Shapiro v. Alexanderson*.<sup>160</sup> In *Wickland*, the defendant landlord knew of the hazardous nature of the tenant's activities prior to the defendant's

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written, the lease/contract could also give a landlord-owner, at a minimum, a breach of contract action against the tenant for activity violative of CERCLA.

155. 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

156. *Id.* at 164. The tenant had placed waste-laden drums "wherever there was space, often without pallets to protect them from the damp ground. It stacked drums on top of one another without regard to the chemical compatibility of their contents. It maintained no documented safety procedures and kept no inventory of the stored chemicals." *Id.*

157. *Id.* at 165.

158. *Id.* at 169. The site owners also contended that their lease with the lessee did not allow the lessee to store chemical wastes on the site and this should thus relieve them of liability. Nevertheless, the court held them liable under CERCLA finding it sufficient that they owned the site at the time the hazardous substances were deposited. *Id.*

159. 19 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,855 (N.D. Cal. Feb. 23, 1988).

160. 741 F. Supp. 472 (S.D.N.Y. 1990).

acquisition of the property. In fact, Wickland had been advised to obtain legal advice about the potential liability that could arise from heavy metal-laden slag located on the property before purchasing the property. Based on these facts, the court determined that Wickland could not escape liability.<sup>161</sup> Although the release of hazardous substances resulted from activities of the tenant, Wickland, having knowledge of these activities prior to his purchase of the property, could hardly demonstrate that he exercised due care with respect to the hazardous substances or took precautions against the foreseeable acts or omissions of the tenant.

In *Shapiro v. Alexanderson*,<sup>162</sup> the court also assessed whether due care had been exercised to the extent necessary to relieve the landlord of CERCLA liability. In this case, the court determined that the landlords had not exercised due care when they knew of the leachate problem resulting from the lessees' activities, but failed to respond to the problem until nearly five years later.<sup>163</sup> Inattention to potential environmental problems, including an attempt to "see nothing," thus affords no basis for claiming innocence when due care would have prompted or necessitated action.

Unlike the problem presented in the previous two cases involving tenant storage of hazardous materials, *General Electric Co. v. Asarco Transmissions*<sup>164</sup> considered landlord responsibility for tenant conduct in arranging for off-site disposal of wastes resulting from the tenant's business operations. In that case, the landlords were large oil companies that leased automobile service stations to tenant operators. The station at issue performed automobile oil changes and contracted for the disposal of the waste oil that was taken to what eventually became a hazardous waste site.

Although the leased premises included a storage tank for the temporary storage of waste oil, the court refused to hold the oil companies liable as landlords. While the oil companies did exercise substantial control over the station operations, through lease provisions and related agreements, "none of [the control] was directed toward either the generation of or the disposal of waste oil."<sup>165</sup> This fact, combined with the absence of any obligation on the landlord's part to exercise control over waste motor oil, led the court to refuse

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161. *Wickland Oil Terminals*, 19 *Env'tl. L. Rep. (Env'tl. L. Inst.)* at 20,856; 792 F.2d 887, 890 (9th Cir. 1989).

162. 741 F. Supp. 472 (S.D.N.Y. 1990).

163. *Id.* at 478.

164. 962 F.2d 281 (2d Cir. 1992).

165. *Id.* at 287.



to find liability. It rejected the plaintiffs' proposed standard, based on the expansive language of *Fleet*, that the oil companies could be held liable if they had the capacity to control the operator's behavior.

While "persons cannot escape liability by 'contracting away' their responsibility or by alleging that [an] incident was caused by the act or omission of a third party[.]" the mere existence of economic bargaining power which would permit one party to impose certain terms and conditions on another, does not itself *create* an obligation under CERCLA.<sup>166</sup>

*General Electric*, contains aspects of both landlord liability and contractual liability, discussed below. As a landlord-tenant case, it can be distinguished by the fact that the tenant's liability-creating conduct was waste generation and arranging for disposal, rather than waste storage. Thus, the landlord was not the "owner" of the waste site and could not be held to have "arranged for disposal" of the wastes. All the other landlord tenant cases concerned "owner" liability for disposal or storage on the leased land.

#### B. *Contractual Services*

Potential liability resulting from a contractual relationship can also arise from work performed under that contract. Again, because of the magnitude of cleanup costs, individuals or companies linked by a contract to the contamination at another's facility may find themselves pursued as a liable owner, operator, or a person who "arranged for" the disposal of hazardous substances.

*Edward Hines Lumber Co., v. Vulcan Materials Co.*<sup>167</sup> involved an owner and operator liability claim arising from the performance of contractual services. Hines Lumber contracted with Osmose Wood Preserving, Inc. (Osmose) to build a wood preserving plant. In addition to the design and construction, Osmose trained Hines's employees to operate the plant's machinery, and licensed Hines to use its trademark. Hines gave Osmose full and immediate access to the plant and to all the chemical processes and products located or produced for the purposes of insuring quality control according to Osmose's standards.<sup>168</sup> Osmose promised to construct a closed-loop manufacturing system so that a toxic preservative, chromated copper arsenate, would not

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166. *Id.* at 286 (emphasis in original).

167. 28 Env't Rep. Cas. (BNA) 1457 (7th Cir. 1988).

168. *Id.* at 1458.

escape. The system, however, did leak, and after Hines Lumber cleaned the site, it sued Osmose to recover its costs. Hines claimed that Osmose was an "operator" because of its involvement with the facility.<sup>169</sup>

While the court noted that "getting rid of the chemicals [by Hines Lumber] had been expensive," and that "[i]t [was] easy to see the attraction of sweeping Osmose into the category of responsible persons"<sup>170</sup> because its alleged faulty construction at the facility had resulted in the release of hazardous substances,<sup>171</sup> the court concluded that Osmose could not be liable as an "operator" of the facility.

The statute does not fix liability on slipshod architects, clumsy engineers, poor construction contractors, or negligent suppliers of on-the-job training—and the fact that Osmose may have been all four rolled into one does not change matters. The liability falls on owners and operators; architects, engineers, construction contractors, and instructors must chip in only to the extent they have agreed to do so by contract.<sup>172</sup>

The court recognized that not holding individuals or companies, such as Osmose, liable as operators provided such companies with little incentive to take greater care in the design and construction of facilities utilizing hazardous substances.<sup>173</sup> Nevertheless, the court reasoned that the parties' contract itself, not CERCLA, was the mechanism for addressing such matters.

The desire of [facility] operators to minimize their own liability will lead them to pay close attention to their designers and supplier. When they lack the expertise to supervise closely, they can induce their contracting partners to take care by insisting on warranties and indemnification. . . . The Superfund Act places liability on the "owner or operator" of the facility. Large potential obligations concentrate the mind wonderfully, leading the owner-operator to assign duties and liabilities by contract to those who can best take precautions.<sup>174</sup>

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169. *Id.*

170. *Id.*

171. As the case arose under a motion for summary judgment, the court had to accept the facts asserted as true.

172. *Id.* at 1458-59.

173. *Id.* at 1458.

174. *Id.* at 1460. See, e.g., *Jones-Hamilton Co. v. Kop-Coat, Inc.*, 750 F. Supp. 1022 (N.D. Cal. 1990); *Niecko v. Emro Mktg. Co.*, 769 F. Supp. 973 (E.D. Mich. 1991).

Therefore, Hines could have bargained for indemnification in its contract with Osmose, and having failed to do so, Hines had “only itself to blame.”<sup>175</sup> The court looked to the various common law categories of vicarious liability and did not find any to fit the facts of this case. The court did not evaluate the extent to which predicating liability on Osmose’s involvement would further fundamental CERCLA policy.

In contrast, *United States v. Aceto Agricultural Chemicals Corp.*<sup>176</sup> found CERCLA liability based on the performance of contractual services. The United States and the State of Iowa sought to recover from eight defendants, the response costs incurred in cleaning a manufacturing site by the Aidex Company. Aidex had contracted with the defendants, manufacturers of active pesticide ingredients, to produce a commercial grade product. Aidex had mixed the manufacturer’s active ingredients with inert materials using the specifications provided by the manufacturer. The resulting commercial grade product was then packaged by Aidex and either shipped back to the manufacturer or shipped directly to the customers of the manufacturer. The defendants owned the technical grade pesticide while it was in Aidex’s possession.<sup>177</sup>

Instead of trying to force fit the defendants into CERCLA’s owner or operator categories, as did the unsuccessful plaintiff in *Hines Lumber*,<sup>178</sup> the plaintiffs here sought to hold the defendants liable as “generators,” defined by CERCLA as the arrangers of hazardous substance disposal.<sup>179</sup> Under section 9607(a)(3), a person or business, that is not an owner or operator of a facility, can still be held liable for cleanup costs if they arranged for the disposal of hazardous substances. In pertinent part, section 9607(a)(3) provides that:

any person who by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances owned or possessed by such person, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, . . . shall be liable for—(A) all costs of removal or remedial action.<sup>180</sup>

The defendants argued that Aidex, not they, owned the hazardous waste and made the crucial decision how it would be disposed of, or treated, and by

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175. *Edward Hines Lumber Co., v. Vulcan Materials Co.*, 28 Env’t Rep. Cas. (BNA) 1457, 1460 (7th Cir. 1988).

176. 29 Env’t Rep. Cas. (BNA) 1529 (8th Cir. 1989).

177. *Id.* at 1530.

178. See *supra* notes 167-69 and accompanying text.

179. 29 Env’t Rep. at 1530. The plaintiffs also sought to recover against the defendants under section 7003 of the Resource Conservation and Recovery Act, arguing that, by virtue of the defendants’ relationship with Aidex, they “contributed to” the handling, storage, treatment, or disposal of hazardous wastes.

180. 2 U.S.C. § 9607(a)(3).

whom.<sup>181</sup> Further, they had contracted with Aidex to formulate, not to dispose of, hazardous substances, and therefore, the imposition of liability under CERCLA, on these facts, would lead to limitless liability. Additionally, the defendants asserted that the plain meaning of section 9607(a)(3) requires an intent to dispose of some waste, or, at the very least, the authority to control the disposal process. Because they had neither the intent to conduct waste disposal nor the ability to control any waste disposal, they could not be held liable under CERCLA.<sup>182</sup>

The Eighth Circuit rejected the defendants' reading of the statute, and guided by the broad language in section 9607(a)(3) and the liberal interpretation previous courts had afforded CERCLA, denied the defendants' motion to dismiss. It reasoned: "Aidex is performing a process on products owned by the defendants for the defendants' benefit and at their direction; waste is generated and disposed of contemporaneously with the process."<sup>183</sup> Because waste generation, and presumably its disposal was an inherent part of manufacturing the defendants' products, the court refused to allow the defendants, by contract, to avoid the responsibility for the disposal of those wastes.

Thus, the court concluded that the defendants could be held liable under CERCLA as arrangers of hazardous substance disposal. "Any other decision under the circumstances of this case, would allow [the] defendants to simply close their eyes to the method of disposal of their hazardous substances, a result contrary to the policies underlying CERCLA."<sup>184</sup>

While different statutorily defined categories of liability are involved, the cases in this Section appear to articulate different basic CERCLA policies. In *Hines Lumber*, the court did not impose liability on one whose contractual work arguably resulted in the release of hazardous substances; in *Aceto*, relying on "arranged for" liability, the court imposed liability based on a contractual relation. *Aceto* indirectly supports the principle that a manufacturer must take care to insure proper disposal of the hazardous substances that are part of its manufacturing operations.<sup>185</sup> However, the court had to extend the statutory language and liberally interpret the contract to include disposal as part of the process of pesticide manufacturing.

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181. *Id.* at 1533.

182. *Id.*

183. *Id.* at 1535.

184. *Id.* at 1536 (internal quotation omitted).

185. See also *Transportation Leasing Co. v. California*, 34 Env't Rep. Cas. (BNA) 1203, 1212 (C.D. Cal. 1991) (noting that case law has established three approaches for determining whether particular acts constitute "arranger" liability: (1) courts look beyond a defendant's characterization to determine whether a transaction, in fact, involved an arrangement for hazardous waste disposal; (2) courts determine if persons have a legal responsibility for hazardous substance disposal, finding that such individuals cannot evade their responsibility by closing their eyes to the method of disposal; and (3) courts have stated that a liberal interpretation of CERCLA's terms is necessary to achieve CERCLA's overwhelmingly remedial goal).

*Hines Lumber* was concerned with owner or operator liability, rather than arranged-for-disposal liability, but this does not satisfactorily distinguish the cases.<sup>186</sup> Without questioning the result reached by the court, the court's approach towards the case is troubling because it did not look to Osmose's actual involvement with the business or its waste management. If the court had done so, it would likely have concluded that Osmose was not so directly involved with the operation of Hines's business in general, or its waste disposal, specifically, to warrant liability. In this respect, the decision in *Hines Lumber*, if not the rationale, is compatible with the results of the parent-subsidary and corporate principal cases discussed above.<sup>187</sup>

This conclusion is broadly supported by the Second Circuit's recent opinion in *General Electric Co. v. AAMCO Transmissions, Inc.*,<sup>188</sup> discussed above. That opinion refused to find oil companies liable for the offsite waste disposal of used motor oil by their franchise service station operators. The station operators were liable because, in CERCLA terms, they arranged for the disposal of oil. The plaintiffs sought to extend this liability to the oil company franchisors because they had the unexercised capacity to control their franchisees' waste disposal practices. However, the court found such unexercised capacity, without more, to be an insufficient basis for liability.

Specifically, the court required some obligation to control waste disposal as the key to arranger liability.<sup>189</sup> Here, the oil companies did not require station operators to perform oil changes which generated the wastes, and did not get involved in any aspect of the station operators' waste disposal. The court concluded that an insufficient "nexus [existed] between the potentially responsible party and the disposal of a hazardous substance."<sup>190</sup> *Aceto* was distinguishable because the defendant there owned the raw material and contracted for the production of the final product, thus providing the "nexus" to the disposal of the waste that was inevitably generated.

Within a contractual relationship, therefore, liability will attach to landlords who fail to exercise due care with respect to their tenant's activities. Other contracting parties will be liable if their involvement with the handling of disposal of hazardous substances is reasonably direct.

## V. Government Liability

This Part examines cases where the government allegedly became an operator of a facility, either in the course of regulating to supervise cleanups,

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186. See *supra*, Part I, courts refusing such a distinction in the parent-subsidary cases.

187. See Parts I & II, *supra*.

188. 962 F.2d 281 (2d Cir. 1992). The franchisors were also landlords. See *supra* notes 163-65 and accompanying text.

189. *Id.* at 286.

190. *Id.*

or through contractual or other controls over facility operations.<sup>191</sup> These cases provide general support for the proposition that those managing the business must bear liability for its waste disposal. But they also reflect a desire to limit the liability flowing from regulatory actions.

CERCLA has two specific provisions on governmental liability. Its definition of owner or operator provides that "[t]he term . . . does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."<sup>192</sup> The definition notes that this exclusion "shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance."<sup>193</sup>

Section 9620(a)(1) further provides that:

[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.<sup>194</sup>

In *FMC Corp. v. United States Department of Commerce*,<sup>195</sup> a Pennsylvania district court held that the government, by virtue of its comprehensive regulations, supervision, and control of the rayon industry, was liable under CERCLA as an operator.<sup>196</sup> During World War II, the United States government classified high tenacity rayon as a high priority defense item and, through the War Production Board, worked to facilitate its production. As a result, American Viscose, the predecessor to FMC increased its production of high tenacity rayon tire cord from approximately fifteen million pounds to over eighty-two million pounds per year.<sup>197</sup> In 1982, carbon disulfide was

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191. Our concern is with these indirect governmental liability cases; we will not consider CERCLA liability of governmental entities based on their own disposal of wastes.

192. 42 U.S.C. § 9601(20)(D) (1988). See also 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. § 300). EPA's lender liability rule also provides government agencies with the same protection as those for lenders. Further, the Rule provides that where a governmental lending institution involuntarily acquires assets to which the exemption would not apply, such assets may be considered "involuntarily" acquired for purposes of the innocent landowner defense. See *supra* note 149.

193. 42 U.S.C. § 9601(20)(D).

194. 42 U.S.C. § 9620(a)(1) (1988).

195. 786 F. Supp. 471 (E.D. Pa. 1992). See also *FMC Corp. v. United States Dep't of Commerce*, 20 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 21,403 (E.D. Pa. July 18, 1990) (proceeding on a motion to dismiss).

196. Pursuant to 42 U.S.C. § 9607(a), CERCLA liability may attach if a party's past actions contributed to the environmental damage even if that party is not currently in possession of the property or toxic substances. On this basis, FMC sought to hold the United States liable under CERCLA. *FMC Corp. v. United States Dep't of Commerce*, 786 F. Supp. at 472.

197. *Id.* at 476-77.

discovered in the ground water in the vicinity of the American Viscose facility, and in 1986 the EPA listed the facility on the National Priorities List of locations to be given top priority for remedial action. FMC, which had owned the facility since 1963, complied with the EPA's cleanup orders and then sued the federal government.<sup>198</sup>

FMC pointed to evidence that the government determined and decided (1) the quantity of rayon to be produced, (2) the sales price of the rayon, (3) the plant size, and (4) the design and installation of government equipment at the site.<sup>199</sup> Further, during the time that the government personnel were at the site, highly visible waste disposal was on-going.<sup>200</sup> The court agreed with FMC's argument that the United States government was an operator of the facility because its total domination of the rayon production market gave it effective control over the daily management decisions at the facility.<sup>201</sup>

In *United States v. Dart Industries, Inc.*,<sup>202</sup> three generators of hazardous waste who disposed of their waste at the Fort Lawn waste disposal site brought suit against the South Carolina Department of Health and Environmental Control (DHEC), alleging that the DHEC was an owner or operator of the facility.<sup>203</sup> The DHEC authorized the storage of certain chemicals at the waste site and required generators to comply with a waste tracking manifest system for the transportation of hazardous wastes to the site. The DHEC also promised to install monitoring wells on the site, but failed to do so.<sup>204</sup>

The court ruled that the DHEC's regulatory activities would not support CERCLA liability. The DHEC was found to have only "loosely" regulated activities at the Fort Lawn site. The court concluded that DHEC's involvement did not go beyond the governmental supervision necessary to bring the site into compliance with the State's environmental regulations.<sup>205</sup> That DHEC had approved or disapproved applications to store wastes at the Fort Lawn site, and required proper transportation of the wastes delivered to the site, was adjudged to be insufficient grounds upon which to hold DHEC liable as an operator.

Although the court did not dispute that DHEC may have inadequately enforced the state environmental regulations with respect to the installation of monitoring wells, such a deficiency did not constitute "ownership or control" upon which liability could be based.<sup>206</sup> Because the generators were unable to specify any "hands on activities by DHEC that contributed to the release of

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198. *Id.* at 473.

199. *Id.* at 475-78, 480, 483.

200. *Id.* at 478, 484-85.

201. *Id.* at 472, 474-75.

202. 847 F.2d 144 (4th Cir. 1988).

203. *Id.* at 145.

204. *Id.*

205. *Id.* at 146.

206. *Id.*

hazardous wastes,"<sup>207</sup> the DHEC's activities could only be described as "a series of regulatory actions," and not activities upon which operator liability could attach.<sup>208</sup>

These cases share a common foundation. If the government goes beyond regulating to insure compliance with the law and makes management decisions about a facility, or has the power to control the site, it may be liable as an operator under CERCLA. The government liability cases are broadly supportive of the thesis that liability is based on actual management of the business and its waste operations.<sup>209</sup> However, the cases also limit liability of governments when they act solely as regulators.

## VI. Successor Corporation Liability

This Part and the next are concerned with cases which present rather different fact patterns from the discussion thus far. To this point, this Article has been concerned with applying CERCLA to reach parties that have had some involvement with the business or its waste. In contrast, this Part and the next are concerned with entities, corporations or individual shareholders, that are potentially liable under CERCLA because of their relationship to the relevant owner, operator, or generator, rather than as a result of their specific conduct. This Part considers the extent to which corporate successors are liable for the transgressions of their predecessors. The next Part will examine the extent to which corporations, otherwise formally dissolved, will be held accountable for past CERCLA liabilities.<sup>210</sup>

Successorship liability under CERCLA typically turns on the application of common law exceptions to the general principle of nonliability in asset acquisitions. The common law starts with the idea that liability of a corporation acquiring the assets of another is controlled by the contract of sale which, typically, does not make the buyer responsible for the seller's liabilities.<sup>211</sup> However, the common law has developed several well recognized exceptions to this general principal of nonliability, four of which have been applied

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207. *Id.*

208. *Id.*

209. See also *Transportation Leasing Co. v. California*, No. CV 89-7368-WMB (C.D. Cal. Sept. 24, 1991); *United States v. George Trucking Co.*, No. 85-2463-WD (D. Mass. Aug. 14, 1991) (both denying the governments' motions for dismissal finding that the government could be liable under CERCLA).

210. This frequently becomes a claim against the present holders of former corporate assets. BLUMBERG, *supra* note 13, at § 13.05 (1987), and authorities cited therein, gives an excellent summary of the common law and its exceptions. See 15 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* §§ 7122-23 (Rev. Perm. ed. 1983).

211. In contrast, a stock acquisition or merger would leave the liabilities with the acquired corporation, ultimately diminishing its value and presumably its price, to the extent liabilities were known.



regularly in CERCLA cases.<sup>212</sup> First, successor liability can be found where the successor is a “mere continuation” of the predecessor. Second, corporation law doctrine that the transaction was a real or “de facto” merger of the two companies has provided a basis for successor liability. Third, liability has been found where the successor contractually agreed, expressly or implicitly, to be responsible for the liabilities of its predecessor. Fourth, successor liability has been imposed on asset transfers that are merely fraudulent attempts to evade liability. These common law theories, both in their traditional form and as specifically developed, have provided the rationale for successor liability in CERCLA cases.<sup>213</sup>

The broad principle of successor liability in CERCLA cases was established in *Smith Land & Improvement Corp. v. Celotex, Corp.*<sup>214</sup> Here, Phillip Carey Corp. deposited wastes on property subsequently sold to the plaintiff, and the plaintiff sought contribution for the cleanup costs from Carey’s corporate successor, Celotex.<sup>215</sup> The Court of Appeals for the Third Circuit applied the general corporate law rule that the resulting corporation in a merger or consolidation assumes all of the liabilities of the combining corporations. Although it concerned the easier situation of a corporate merger, rather than

212. BLUMBERG, *supra* note 13, at § 13.05.1 discusses five exceptions. In addition to the ones discussed here, successor liability can be based on commercial, corporation or bankruptcy law where the transfer was without sufficient consideration and left insufficient assets to cover outstanding liabilities. *Id.*

213. The following discussion draws heavily from BLUMBERG, *supra* note 11, § 18.02 and BLUMBERG, STRASSER & EVANS, 1992 SUPPLEMENT, THE LAW OF CORPORATE GROUPS: STATUTORY LAW—GENERAL (1992).

Successor liability has attracted an enormous volume of law review commentary. In addition to articles cited in note 11, *supra*, see, Merritt B. Fox, *Corporate Successors Under Strict Liability: A General Economic Theory and the Case of CERCLA*, 26 WAKE FOREST L. REV. 183 (1991); Teresa Stewart, Note, *Cover Your Assets! Expanding Successor Liability Under CERCLA*, 56 MO. L. REV. 427 (1991); Chatfield-Taylor, *Successors Beware: Expanding the Liability Net Under CERCLA Section 9607(a) Through Application of Exceptions to the Traditional Common Law Doctrine of Successor Nonliability in Asset Acquisitions*, 29 WASHBURN L.J. 442 (1990); David C. Clarke, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300 (1990); W. Scott Laseter & Cheryl A. Long, *CERCLA Liability for Successor Corporations Revisited*, 41 MERCER L. REV. 1027 (1990); L. DeWayne Layfield, Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding to An Uncertain Legal Standard*, 68 TEX. L. REV. 1237 (1990); Alfred R. Light, “Product Line” and “Continuity of Enterprise” Theories of Corporate Successor Liability Under CERCLA, 11 MISS. COLL. L. REV. 63 (1990); Daniel H. Squire et al., *Corporate Successor Liability Under CERCLA: Who’s Next?*, 43 SW. L.J. 887 (1990); Guerra, *The Doctrine of Corporate Successor Liability is Appropriate in Contribution Claims Under CERCLA but Caveat Emptor is Not Available as a Defense to the Seller of Property in an Action Seeking Contribution for Clean-up Costs*, 20 RUTGERS L.J. 823 (1989); Mark J. Rater, Comment, *The Implications of CERCLA in Corporate Reorganizations*, 22 CREIGHTON L. REV. 765 (1989); Mark J. Thurber, Note, *Successor Liability of Financial Institutions Under CERCLA—A Takings and Policy Analysis*, 1988 COLUM. BUS. L. REV. 243 (1988); Kathryn A. Barnard, *EPA’s Policy of Corporate Successor Liability Under CERCLA*, 6 STAN. ENVTL. L.J. 78 (1986-87); Diane M. Connolly, Comment, *Successor Landowner Suits for Recovery of Hazardous Waste Cleanup Costs: CERCLA Section 107(a)(4)*, 33 UCLA L. REV. 1737 (1986); John C. Solomon, Comment, *Successor Corporate Liability for Improper Disposal of Hazardous Waste*, 7 W. NEW ENG. L. REV. 909 (1985).

214. 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

215. Through a series of statutory mergers and consolidations that began in 1967, Celotex emerged as the ultimate successor. There was no claim that these transactions had been undertaken to evade cleanup liability.

an asset acquisition, the case is important because the court expanded CERCLA's basic policy of polluter liability, to include a policy favoring successor liability:

Congressional intent supports the conclusion that, when choosing between the taxpayers [via superfund payment for cleanup] or a successor corporation, the successor should bear the cost. Benefits from use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective stockholders and accrued only indirectly, if at all, to the general public. We believe it is in line with the thrust of the legislation to permit—if not require—successor liability under traditional concepts.<sup>216</sup>

The court concluded that Congress intended the federal courts to develop a body of federal common law to determine CERCLA liability, and instructed the federal courts that: “[T]he general doctrine of successor liability in operation in most states should guide the court’s decision rather than the excessively narrow statutes which might apply in only a few states.”<sup>217</sup>

#### A. “Mere Continuation” Liability

Several cases have found the successor to be a “mere continuation” of the original corporation, and thus liable under CERCLA. *United States v. Distler*<sup>218</sup> concerned a new business that had different shareholders but was otherwise a continuation of the same commercial operation. Three of the company’s top employees purchased the business through a new corporation and the court relied heavily on the principles articulated in *Smith Land* to decide that successor liability was appropriate. The traditional mere continuation rule requires an identity of shareholders between the buyer and the seller, a requirement that was not satisfied here. However, the court expanded the concept of mere continuation, relying on recent developments in successor liability that emphasized the ideas of “substantial continuity” or “continuation of enterprise.” The court adopted this standard and found it satisfied in this case. As a commercial matter, this corporation clearly was a continuation of

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216. *Smith Land*, 851 F.2d at 92. See also *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478 (4th Cir. 1992) at 486-87 for a similar discussion, although in a case where the court ultimately held that the facts did not support finding successor liability.

217. 851 F. 2d at 92. Where none of the four traditional exceptions to successor nonliability are applicable, successor liability has been denied. *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1491 (E.D. Pa. 1989) (claimed successor was a trust which had not been fraudulently set up to evade CERCLA liability).

218. *United States v. Distler*, 31 Env't Rep. Cas. (BNA) 1097 (W.D. Ky. 1990).

the same business, complete with the same employees, supervisors, production facilities, products, name, assets, and general business operations. The company was also held out to the public as the same business.

*United States v. Carolina Transformer Co.*<sup>219</sup> applied a broad conception of “substantial continuity” to ensnare a blatant attempt to avoid CERCLA liability. Carolina Transformer transferred a large portion of its assets, business, equipment inventory, and employees to FayTranCo. The two companies also shared several directors. The court held that FayTranCo was liable as a corporate successor to Carolina Transformer, despite changes in the identity of shareholders. The sole shareholder of Carolina Transformer owned no stock in the successor, but his children did, and the court found that he had control, in fact, over the company. Thus, the nominal change of shareholders, with no real change in the control over the business, did not defeat application of the mere continuation rule.

In *Sylvester Brothers Development. Co. v. Burlington Northern R.R.*,<sup>220</sup> the court applied the broader mere continuation principle, though there was no continuity of shareholders, because the transaction had been arranged as an asset purchase. The buying corporation had several of the same corporate officers, and at least one continuing director. It also occupied the same physical location, conducted its business with the same assets, and had the same address and phone number. The court found substantial continuity based on these specific facts. The court also noted that it would have applied a broader continuity concept than the traditional common law one if required to effectuate CERCLA’s remedial purposes. As discussed below, the court gave the de facto merger doctrine of successor liability a much more restrictive reading.

However, two cases show that the courts do not uniformly attach liability under either branch of the “continuation” tree. The first case used the traditional mere continuity standard in its analysis. In an asset purchase, the court, in *Con-Tech Sales Defined Benefit Trust v. Cockerham*,<sup>221</sup> held that the fact that the shareholders of the two companies were different, combined with the fact that the seller did not dissolve shortly after the transaction, made this doctrine inapplicable. As a question of CERCLA policy, this result is questionable, for

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219. *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030 (E.D.N.C. 1989), *aff’d*, 978 F.2d 832 (4th Cir. 1992). The Court of Appeals concluded:

We are unwilling to hold that merely by splitting-off the particular part of its operations that resulted in its environmental problems and shifting the remainder of its assets, employees, management, customers, accounts and production methods to another corporation, an otherwise responsible company could all but completely wash its hands of its environmental liability. Such a result, we think, would not serve the remedial purposes of CERCLA. . . *Id.* at 840.

The “substantial continuity” doctrine grows out of labor law and modern products liability cases. *Kezsbom et al.*, *supra* note 11, at 50-51.

220. *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, 1990 (772 F. Supp. 443) (D. Minn. 1990).

221. *Con-Tech Sales Defined Benefit Trust v. Cockerham*, 1991 Trade Cas. (CCH) ¶69, 294, (E.D. Pa. 1991).

it leaves open the possibility of evading liability, and thus, CERCLA's polluter pays policy, in a carefully structured transaction. However, the doctrinal damage was contained in this case. The court found potential successor liability on the theory that the buyer had contractually assumed the seller's liabilities as part of the transaction, and denied the defendant's motion for summary judgment.

*United States v. Chrysler Corp.*<sup>222</sup> also found no continuation liability. This case involved a business that had previously operated a bus service and a waste disposal service. In essence the business was split in two, and each operation was then conducted by a separate corporation. The waste disposal business wound up with CERCLA liabilities, and the government unsuccessfully sought to hold the corporation operating the bus company liable as a mere continuation of the whole business. Although there was little question that the bus company corporation was a continuation of the bus business operations of the predecessor corporation, the court held that it was not liable on a continuation theory because there was no "substantial commonality" of either shareholders or directors.

The result is defensible, but could perhaps be better justified with reference to the real business activities of the bus company. The bus company business operations were not responsible for generating the waste at issue, so those operations should not necessarily be used to fund the cleanup. However, in both this case and *Con-Tech*, the protection afforded to the successor from the continuation doctrine proved ultimately ineffective. In each, the successor was eventually held potentially liable because it contractually assumed the obligations of the predecessor in the transfer transaction. This relatively easy route to liability in each case undercuts, to some degree, each court's refusal to find liability on continuation grounds.

The decision-making in specific cases can be genuinely difficult, as shown in *United States v. Mexico Feed and Seed Co.*<sup>223</sup> The successor purchased its former competitor's business in order to acquire its waste oil collection routes, trucks, and operating personnel. The district court found liability despite the fact that the corporate successor had different shareholders, officers, and directors. The successor continued the oil collection business in virtually identical fashion. Specifically, it used the same management and employees, serviced the same customers over the same routes, and kept the same telephone number, address, trucks, and receipts. The successor held itself out to the public as the same business; indeed, many customers were unaware that they were

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222. *United States v. Chrysler Corp.*, 31 Env't Rep. Cas. (BNA) 1997 (D. Del. Aug. 28, 1990).

223. 764 F. Supp. 565 (E.D. Mo. 1991), *rev'd*, 980 F.2d 478 (8th Cir. 1992).

doing business with a different corporation. In addition, the purchase agreement required the successor to use its best efforts to elect the son of the predecessor's president and major shareholder to the successor's board, and the son was ultimately hired to manage the facility.

The district court found liability "as a successor corporation of PWOS [the predecessor] under a broadened version of the 'mere continuation' exception known as the 'substantial continuity' or 'continuity of enterprise' exception."<sup>224</sup> (It refused to find liability on a de facto merger theory.) However, the Eighth Circuit reversed, emphasizing two facts. First, the successor was a separate business organization with larger operations, and these operations preceded the acquisition. In addition, the successor was completely unaware of the oil storage tanks that led to the liability at issue. They were not used as part of the operation acquired, had never been listed as assets belonging to the seller, and had apparently never been discussed in connection with the transaction. While the court's language strongly supported the principle of successor liability, it determined that the facts presented did not warrant liability.

#### B. "De Facto Merger" Liability

In a broadly reasoned opinion that relied on *Smith Land, In re Acushnet River & New Bedford Harbor*<sup>225</sup> found one defendant's purchase of corporate assets to be a de facto merger. A de facto merger requires, first, a real continuity of the enterprise. In *Acushnet*, the new business had the same president, vice-president, treasurer, three directors, employees, and product lines. De facto mergers have also traditionally required that the same stockholders own the business after the transaction as before. This opinion slightly modified the traditional requirement of shareholder identity, finding continuity even though the buyer, a wholly-owned subsidiary, was technically a different corporation. The buyer paid for the transaction with stock of its corporate parent rather than with its own shares. The court noted that any other rule would permit easy evasion of responsibility under CERCLA by setting up a wholly-owned subsidiary to buy another firm's assets, even though real

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224. *Id.* at 20. In *Allied Corp. v. Acme Solvent Reclaiming, Inc.*, No. 86C 20377, 1991 U.S. Dist. LEXIS 19183 (N.D. Ill. May 16, 1991), the contract for sale of the operating business assets also provided for the buyer to lease the seller's business premises, to employ the seller's president and another of its principals, and to pay the seller's severance pay and other collective bargaining obligations. The court held that these facts stated a cause of action under either the traditional "mere continuation" theory or the more modern "continuing enterprise," and thus denied the buyer's motion for summary judgment. *Chesapeake and Potomac Tel. Co. of Virginia v. Peck Iron & Metal Co.*, No. 92-506, 1992 U.S. Dist. LEXIS 18,905 (E.D. Va. Dec. 3, 1992) applied the continuation doctrine to a business continued as a sole proprietorship.

225. *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 712 F. Supp. 1010 (D. Mass. 1989). See also *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 (W.D. Mich. 1988); *Ametek, Inc. v. Pioneer Salt & Chem. Co.*, 709 F. Supp. 556 (E.D. Pa. 1988).

control over the purchased business would remain with the parent. Reality of control, rather than technical ownership, controlled here. Finally, as required by the traditional de facto merger analysis, the predecessor ceased business and liquidated the business after the large sale. The sale was conditioned on treatment as a tax free reorganization. Indeed, the transaction was set up to be a true merger except for the disclaimer of environmental cleanup liability.

In summary, this Court will not enforce Aerovox's [the successor parent] attempt to separate the burdens from the benefits of acquiring Belleville. The transaction was structured to provide the maximum continuity possible. . . It would be manifest injustice under these circumstances to permit Aerovox to contract away Belleville's liability for PCB contamination.<sup>226</sup>

In contrast to generally broad findings of liability, several de facto merger cases have applied the doctrine more strictly and have refused to find CERCLA liability. The leading case, *Louisiana-Pacific Corp. v. Asarco, Inc.*,<sup>227</sup> cited *Smith Land* favorably and spoke in general terms of the need for broad successor liability to implement the underlying policy of CERCLA. However, it held that the requirements of successor liability were not satisfied. There was no de facto merger because, in this asset purchase, there was no continuity of shareholders.<sup>228</sup>

Two opinions in *American National Can Co. v. Kerr Glass Manufacturing Corp.*,<sup>229</sup> in combination, reach a similar result. The first, granting summary judgment to the plaintiff, emphasized the need for broad successor liability, cited *Smith Land* approvingly, and found a de facto merger, even though the successor had substantially expanded and improved the predecessor's business and terminated one part of its operation. Many of the employees, customers, and operations remained the same. However, the second opinion reversed this grant of summary judgment after considering the defendant's reply brief. Emphasizing "numerous manufacturing and marketing changes," as well as the new fact that the successor stopped using the predecessor's distinctive marks on the manufactured product, the court held that a triable issue of fact was presented.

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226. *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 712 F. Supp. 1010, 1019 (D. Mass. 1989).

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

228. Interestingly, the court also found no successor liability on a continuity theory, not because of the change in shareholders, but because the buyer did not continue the business that handled the hazardous waste and it had no knowledge of the potential CERCLA liability.

229. *American Nat'l Can Co. v. Kerr Glass Mfg. Corp.*, No. 89 C 0168, 1990 U.S. Dist. LEXIS 10,999 (N.D. Ill. Aug. 26, 1990); No. 89 C 0168, 1990 U.S. Dist. LEXIS 11,417 (N.D. Ill. Aug. 29, 1990).

As discussed above, two cases that applied a strict de facto merger doctrine to deny liability on that ground, did find liability based on other exceptions, although one was reversed on appeal.<sup>230</sup>

### C. *Fraudulent Conveyance*

The third exception to successor corporation nonliability, the fraudulent conveyance theory, has been applied in one case to hold a successor liable.<sup>231</sup> One of the motivations for the corporate restructuring in this case was the desire to avoid making all the assets of the corporation subject to CERCLA cleanup liability. The court held that this motivation was sufficient to establish a fraudulent intent once the corporation knew that some liability was likely, even if the exact amount of liability was not then known.<sup>232</sup> The effect of this decision, if it is sustained on appeal, will be to greatly restrict the strategy of restructuring to limit environmental cleanup liability.

The brief discussion of successor liability in *United States v. Petersen Sand & Gravel, Inc.*<sup>233</sup> used the absence of fraudulent purpose to reach a surprising result. Here a sole proprietorship had been incorporated in 1970, with no purpose to evade CERCLA liability. The court relied on the absence of fraudulent intent, as well as the absence of contractual assumption of liabilities, to justify a finding of no successor liability. However, the court's brief treatment of the issue did not consider or evaluate continuation theory of liability that would, apparently, have fit the facts.<sup>234</sup>

### D. *Choice of Law*

Choice of law issues arise in successorship cases because the relevant rules are typically based on state corporation law doctrines. *Anspec v. Johnson Controls, Inc.*<sup>235</sup> offered a clear discussion of the source of law questions to

230. *United States v. Mexico Feed & Seed Co.*, 764 F. Supp. 565 (E.D. Mo. 1991), *rev'd*, 980 F.2d 478 (8th Cir. 1992); *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, 772 F. Supp. 443 (D. Minn. 1990). Both used modern "substantial continuity" analyses.

231. *Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 (W.D. Mich. 1988).

232. *Id.*

233. 806 F. Supp. 1346, 1349-51 (N.D. Ill. 1992).

234. The fourth exception is contractual assumption of the seller's liability by the buyer. As discussed above, this has been found potentially applicable in two cases that refused to find mere continuation liability. *Con-Tech Sales Defined Benefit Trust v. Cockerham*, No. 87-513, 1991 U.S. Dist. LEXIS 664 (E.D. Pa. Jan. 16, 1991); *United States v. Chrysler Corp.*, 31 Env't Rep. Cas. (BNA) 1997, 1991-1 Trade Cos. (CCH) ¶ 69,294. (D. Del. Aug. 28, 1990).

235. 922 F.2d 1240 (6th Cir. 1991). See *GRM Indus. v. Wickes Mfg. Co.*, 749 F. Supp. 810 (W.D. Mich. 1990).

The district court's opinion in *Anspec* had been the leading exposition of the view that successor liability was generally inappropriate under CERCLA because Congress had not expressly provided for it. The lower court had written quite broadly of CERCLA policy, expressly disagreeing with *Smith Land* and purported to adopt a general rule precluding successor liability. *Anspec Co., v. Johnson Controls, Inc.*, 734

be used to determine successor liability. After reaffirming its basic policy favoring broad successor liability in CERCLA cases, the Sixth Circuit held that when Congress used the term "corporation" in CERCLA, it intended to adopt prevailing ideas of successor liability in state corporation law. This holding was supported by the general federal statutory interpretation policy to include successors whenever corporations are referred to. Thus, according to the court, state corporation law on successor liability will control. This conclusion mirrors the policy expressed in both *Smith Land* and *Louisiana-Pacific Corp. v. Asarco, Inc.*,<sup>236</sup> although the court in the latter case also noted the need for a uniform rule.

Unfortunately, the cases have not been consistent in this preference for state law. While most have avoided explicitly adopting a federal common law of CERCLA successor liability, many emphasize the need for broad liability to meet the statute's remedial goals and indicate their willingness to use and broaden state law liability concepts if needed.<sup>237</sup> This appears to present a conflict over the source and content of successor liability law, although the conflict may be of little consequence. As shown above, the state law doctrines of successor liability are themselves evolving, and are somewhat elastic, so they may be able to accommodate federal policy goals.

#### E. Conclusion

Precise conclusions from the cases about the extent of successor corporate liability are difficult to develop. Most of the continuation theory cases speak broadly of CERCLA's remedial purposes and hold in favor of successor liability, although a recognizable minority refuse to find such liability. The de facto merger cases, while expressing concern for CERCLA's remedial purposes, also express concern for the limits of successor liability. More often than not, the courts, in considering de facto merger cases, do not hold successors liable. Most cases ultimately impose successor liability on one of these theories.

Where liability is denied on either theory, however, the absence of continuity of shareholders is emphasized as a prominent fact. This is not a good predictive variable because many of the continuity theory cases have been untroubled by the lack of shareholder continuity in finding liability. The cases appear to be split on the importance of shareholder continuity although the majority of cases have not insisted on it for the imposition of liability. Nevertheless, the conflict should not be overstated. Some of the cases with no

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

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

237. *See, e.g.*, *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, No. 4-88-692, 1990 U.S. Dist. LEXIS 15,115 (D. Minn. 1990); *American Nat'l. Can Co. v. Kerr Glass Mfg. Corp.*, No. 89 C 0168, 1990 U.S. Dist. LEXIS 10,999 (N.D. Ill. 1990); No. 89 C 0168, 1990 U.S. Dist. LEXIS 11,417 (N.D. Ill. 1990); *United States v. Distler*, 31 *Env't Rep. Cas. (BNA)* 1097 (W.D. Ky. 1990).



shareholder continuity merely involved use of a wholly-owned subsidiary or nominee shareholders who were family members, with no change in control. Where control is unchanged, this is a strong basis for attaching liability. Where there is a change in control, some courts may still find liability in a particular case.<sup>238</sup>

The cases in this Part are farthest from our general principles of CERCLA liability, primarily because they arise in such different factual contexts from the others. Successor liability is usually not based on successor management of the business or handling of its waste. Rather, liability is determined primarily by the extent to which the successor is really the same, or nearly the same, business. Most of the cases look to the commercial reality of the continuing business operations, although some continue to rely on the traditional requirement of identical shareholders which may accurately reflect commercial reality, or may only be testament to the planning ingenuity of careful counsel. By emphasizing the question of whether the successor is, in fact, the same business, these cases offer limited, indirect support for our liability principles.

## VII. The Liability of Dissolved Corporations

Like the successor liability cases, the dissolved corporation liability cases turn less on the particular management and waste handling practices of the defendant than on identification of the proper party to be charged with liability. However, unlike the forward-looking inquiry of successor liability, with dissolved corporations, the look is backward in time since the proper corporate actor is no longer available. The claim will ultimately be made against shareholders who received assets formerly held by the corporation. Further, a liability problem arises only for claims made after dissolution is completed. Corporate dissolution statutes require that corporate obligations owed, as of dissolution, be paid as part of the process of dissolving.<sup>239</sup> Liability is clear where the CERCLA claim is made within the statutory period for claims in dissolution,<sup>240</sup> and where the corporate charter has been forfeited.<sup>241</sup>

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238. The CERCLA successor liability cases apply general principles of tort and corporation law, although in a new factual context. See generally BLUMBERG, *supra* note 13; Oswald & Schipani, *supra* note 11, at 318.

239. Audrey J. Anderson, Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131 (1989). Where a potential CERCLA creditor was not given notice of the dissolution until after the statutory period for claims, the dissolution was held ineffective to defeat those claims. *Soo Line R.R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472 (D. Minn. 1992).

CERCLA claims against the assets of a corporation in bankruptcy will be discussed in Part VIII below.

240. *United States v. Mexico Feed & Seed Co.*, 1991 U.S. Dist. LEXIS 6789 (E.D. Mo. 1991). In dicta, the court said it would apply *Sharon Steel* to find liability if the claim had not been filed within the statutory period. *Id.* at 17.

241. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1985), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

The emerging CERCLA case law makes a critical distinction between liability where the dissolution is still in progress and liability where the dissolution has been completed. Where the dissolution process has been completed with payment of known claims and proper distribution of assets to shareholders, no case has found CERCLA liability. In contrast, liability has been found where the dissolution is still on-going. The confused rationales and overbroad holdings of important early cases have tended to obscure this clear distinction. The situation is further complicated by a fundamental question of whether CERCLA liability will preempt state law on corporate dissolutions.

The notion of CERCLA liability for completely dissolved corporations presents a clear conflict with the dissolution procedures of state corporation law.<sup>242</sup> Under state law, the shareholders can dissolve a corporation and, after paying all obligations and winding up its affairs, can receive distributions of the remaining assets.<sup>243</sup> The statutes provide a period—typically two or three years—in which claims are to be presented. Claims not presented within that period are barred.<sup>244</sup> In general, Rule 17(b) of the Federal Rules of Civil Procedure respects this state law determination of corporate capacity: “The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.”<sup>245</sup>

In contrast, CERCLA’s liability provisions apply “[n]otwithstanding any other provision or rule of law.”<sup>246</sup> Further, liability is effectively retroactive, reaching the past activities of “persons” who generated wastes or owned or operated a waste handling facility. “Persons” includes corporations with no exception in the statutes for those corporations which have subsequently dissolved.<sup>247</sup> Thus, under CERCLA, the corporation is literally liable for its past hazardous waste activities; an intervening bar to liability created by state corporate law of dissolution appears to be literally preempted. If CERCLA is given this broad preemption interpretation, it would effectively nullify corporate dissolutions for CERCLA purposes, and liability would attach as long as the assets or their value could be traced to stockholders. To date, however, no cases have extended CERCLA liability this far.

*Levin Metals Corp. v. Parr-Richmond Terminal Co.*,<sup>248</sup> an early case finding no liability, was a substantial contributor to the confusion. The case involved a dissolution that was completed nine years before CERCLA was

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242. This section is based on BLUMBERG, *supra* note 11, at § 18.02.4 and BLUMBERG & STRASSER, *supra* note 11, 1991 SUPPLEMENT § 18.02.5.

243. HENN & ALEXANDER, *LAW OF CORPORATIONS*, § 348 (3d ed. 1983); 16A *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS*, ch. 65 (1988).

244. *Id.* See also Anderson, *supra* note 239.

245. FED. R. CIV. P. 17(b).

246. 42 U.S.C. § 9607(a). The statute does have a limited number of specific defenses, but none are relevant to these cases.

247. 42 U.S.C. § 9601(21).

248. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987).

enacted and twelve years before suit was brought. Because CERCLA imposes retroactive liability, *Levin Metals Corp.*, the claimant, argued that the cause of action arose when the waste handling activities took place, prior to the defendant's dissolution. However, the court emphasized that CERCLA was not passed until nine years after the dissolution and reasoned that the cause of action could not have arisen under CERCLA prior to its passage. Of course, this rationale will become less applicable over time because the acts giving rise to liability are increasingly likely to take place after CERCLA's passage, regardless of whether the claims precede dissolution.

Levin also argued that CERCLA preempted state dissolution law because that law impedes accomplishment of the basic purposes of a federal law. In rejecting this preemption claim, the court distinguished between state laws that limit liability, and those that only determine legal capacity; only the former are preempted.<sup>249</sup>

However, preemption policies do not support this distinction. Any state law that interferes with accomplishing the purposes and objectives of a federal statute should be preempted, regardless of how the state law characterizes the problem. Preemption here should turn on whether the state law interferes with CERCLA purposes and policies, rather than a distinction between liability limits and capacity definitions in state law.

Despite this flaw in the court's reasoning, *Levin* has been generally followed, although sometimes most reluctantly,<sup>250</sup> in cases in which the claim is brought after dissolution is complete and assets have been distributed to stockholders.<sup>251</sup> These cases typically do not voice support for *Levin's* rationale, but rather emphasize the long time period between dissolution and bringing the claim—from five to nine years in the cases—and the lack of precedent authorizing liability of a corporation whose “funeral is long over and . . . [the corporation] is dead and buried.”<sup>252</sup>

This result reflects an unstated policy to protect individual shareholders from claims against assets that formerly belonged to the corporation; all these cases appear to concern small corporations whose assets had been distributed to individual shareholders in the dissolution proceeding. The courts have not articulated this policy as the basis for deciding these cases. However, it is

249. *Id.* at 1451.

250. The court in *Columbia River Serv. v. Gilman*, 751 F. Supp. 1448 (W.D. Wash. 1990), followed *Levin*, but only with great reluctance, expressing its preference for liability but felt bound by *Levin* as controlling Ninth Circuit precedent.

251. *Onan Corp. v. Industrial Steel Corp.*, 770 F. Supp. 490 (D. Minn. 1989), *aff'd*, 909 F.2d 511 (8th Cir.) (unpublished opinion), *cert. denied*, 498 U.S. 875 (1990). *cf.* *T-K City Disposal, Inc. v. Commercial Union Ins. Co.*, 761 F. Supp. 552 (N.D. Ill. 1991) (holding that a dissolved corporation could not sue its former insurance carrier for a CERCLA defense and liability coverage years after the dissolution.)

252. *Id.* at 555. *See Onan Corp. v. Industrial Steel Corp.*, at 495 (“Not even the important policy goals underlying CERCLA can resurrect [the dissolved corporation]”); *United States v. Distler*, 741 F. Supp. 643 (W.D. Ky. 1990).

clearly related to one of the common law's most fundamental corporate law policies which limits the liability of individual shareholders for corporate obligations. Once the dissolution is complete and assets have been properly distributed, shareholders should be protected from claims based on this distribution, absent a corporate law violation or other fraudulent conveyance. However, this policy is unlikely to be extended uncritically to the situation where a corporate parent dissolves a subsidiary in its group and continues to operate the assets in another part of the enterprise.

In contrast to *Levin*, *United States v. Sharon Steel Corp.*<sup>253</sup> held that CERCLA preempts state dissolution law and overrides Rule 17(b). The court's preemption holding was clear:

This court joins those courts that have refused to 'interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise.' Rather, given CERCLA's broad remedial purpose and Congress' [sic] expressed intent that those responsible for hazardous waste sites bear the cost of cleaning them up, the court concludes that CERCLA's language—"any person" who owned or operated a hazardous waste disposal site "shall be liable for" cleanup costs [n]otwithstanding any other provision or rule of law"—clearly expresses Congress's intent to supersede any rule that would otherwise relieve a responsible party from liability."<sup>254</sup>

Thus, the court declined to follow *Levin's* distinction between state statutes limiting liability and those determining capacity: "Surely Congress could preempt both state capacity statutes and state statutes limiting liability. The only question in a particular case is whether Congress did."<sup>255</sup> Here, the court concluded that Congress did preempt state law and as a result, the dissolved corporation was potentially liable.

While the broad language and expansive reasoning of *Sharon Steel* conflict with *Levin*, the cases can be distinguished on their facts. In *Sharon Steel*, the dissolution was still in progress and the assets claimed were still held by those managing the dissolution rather than the ultimate recipients. Thus, unlike *Levin* and its progeny, *Sharon Steel* did not seek return of corporate assets that had been permanently transferred to the shareholders at the end of a dissolution process. Later cases have stressed this distinction, although the court did not

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253. 681 F. Supp. 1492 (D. Utah 1987). See *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 22 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 2135, (D. Kan. Mar. 12, 1992); *Traverse Bay Area Intermediate School Dist. v. Hitco*, 762 F. Supp. 1298 (W.D. Mich. 1991) (both applying *Sharon Steel* to deny the defendant's motion for summary judgment and to order factual determination of whether undistributed assets remained).

254. *Sharon Steel*, 681 F. Supp. at 1496 (citations omitted).

255. *Id.* at 1497.

emphasize it in *Sharon Steel*. These cases typically express support for *Sharon Steel's* rationale, but limit its holding to situations in which the dissolution is still in progress and where at least some assets have not yet been transferred to shareholders.<sup>256</sup> Both the weak reasoning in *Levin* and the overbroad rule of *Sharon Steel* should be confined to their specific factual contexts.

The distinction between claims made against assets held by those managing the dissolution and claims made against shareholders to recover distributions is emerging as the rule in dissolution cases. This new rule achieves a harmonization of CERCLA policies with state corporation law policies. However, it will also have the unintended effect of strongly encouraging speedy wind up and distribution of assets in dissolution cases, although the statutory period for claims will still apply.

As with successor liability, these cases do not turn on specific behavior of the defendants in managing the business and its waste handling. Rather, the key here is to determine how far the dissolution process has progressed. The distinction between claims against those managing a corporate dissolution and claims against shareholders after completed dissolution provides some limited support for the idea that the conduct of the business should be the reference point for CERCLA liability. Assets held by those managing a corporate dissolution are still part of the corporate enterprise and should be used for its liabilities. In contrast, assets held by shareholders following a completed distribution are not properly characterized as corporate assets and hence are not available to satisfy the corporation's liabilities. In such a situation, shareholder liability would have to be based on more than the managerially passive act of shareholding.

### VIII. Liability of Beneficiaries, Executors, and Trustees

The question of CERCLA liability can arise when property containing hazardous substances is inherited, devised, or placed in trust, voluntarily or through bankruptcy. CERCLA purports to protect individuals that acquire contaminated property by bequest or inheritance,<sup>257</sup> by excluding such an

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256. *Distler*, 741 F.Supp. at 646. See *Columbia River Serv. v. Gilman*, *supra* note 250; *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663 (N.D. Ohio 1992); *Waste Management of Wisconsin, Inc. v. Uniroyal, Inc.*, 23 *Envtl. L. Rept. (Envtl. L. Inst.)* 20,114 (W.D. Wis. 1992).

257. See *Snediker Developers Ltd. Partnership v. Evans*, 6 *Toxics L. Rep.* 586 (E.D. Mich. 1991) (individuals who inherited contaminated property were not liable for CERCLA cleanup costs). In *Starr v. Connecticut Dep't of Env'tl. Protection*, No. Civ 91-039-81-62 (Sup. Ct. Feb. 10, 1992), the Connecticut Department of Environmental Protection (DEP) ordered a decedent's wife to clean up the contaminated property that she acquired upon her husband's death. Although the DEP's claim against the widow was based upon sections 22a-431 and 22a-433 of the Connecticut General Statutes, and the court's decision was based on the statutory construction of these sections, and not CERCLA, it is noteworthy that the court found that the widow could not be held liable for the contamination. Facts pertinent to the court's decision were that (1) the dumping of the pollutants at the site occurred long before the decedent owned the property, (2) the decedent was not responsible for the polluting activity, and (3) the widow was denied access to the

acquisition from the statutory definition of a covered contractual relationship. However, the limited case law, CERCLA's legislative history, trust and estate statutory authority, as well as the statutory authority given to trustees in bankruptcy to operate a debtor's business, all leave lingering questions about the protection given to such parties under CERCLA.

#### A. Beneficiary Liability

In *United States v. Pacific Hide & Fur Depot, Inc.*,<sup>258</sup> multiple parties received various interests in the subject property over a period of time, by gift or inheritance. All of the beneficiaries had been involved in the property either through summer jobs or post-inheritance operations, and some should have known of the hazardous substances at the facility when their clothing was eaten away by battery acid during their summer jobs.<sup>259</sup> Despite these facts, the *Pacific Hide* court held that none of the parties were liable as owners or operators. In so holding, the court observed that CERCLA's legislative history indicated that commercial transactions are to be treated differently from private noncommercial transactions and inheritances. "Commercial transactions are held to the strictest standard; private transactions are given a little more leniency; and inheritances and bequests are treated the most leniently . . ."<sup>260</sup> The court briefly analyzed the issue of whether the individuals knew or should have known of the hazardous substances on the site and, determining that they did not know, concluded, without explanation or analysis, that the individuals made appropriate inquiries into the previous ownership and uses of the property before accepting their gifts and inheritances.<sup>261</sup> Consequently, the court found that the individuals were not subject to CERCLA liability.

The case is significant because the court, albeit superficially, inquired into the beneficiaries' knowledge of hazardous waste disposal. It was not content to simply conclude that CERCLA imposed no liability upon the beneficiaries because the gifts and inheritances involved no contractual relationship involving such individuals, and that the contamination was the result of the activities of individuals other than the defendants. The court's consideration of the beneficiaries' knowledge of the facility's contamination is consistent with CERCLA's legislative history, which indicates that where the heirs or devisees

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property for well over a year after her husband's death. Such evidence indicated to the court that the "plaintiff's ownership of the property was utterly passive up to the time the pollution was discovered." *Id.* at 3.

258. 716 F. Supp. 1341 (D. Idaho 1989).

259. *Id.* at 1348. In refusing to give weight to the evidence of the clothing eaten by battery acid, the court noted that the case was brought because of PCB contamination, not battery acid contamination.

260. *Id.* (citing H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3279-80).

261. *Id.* at 1348-49.

know of the presence of hazardous substances, or should have known to make reasonable inquiry into the facility's compliance with environmental regulations, liability may be imposed.<sup>262</sup>

B. *Executor and Trustee Liability*<sup>263</sup>

The executor of an estate accumulates the decedent's assets, pays the decedent's debts, and distributes property to the devisees. In essence, and in function, an executor acts as a conduit for the proper allocation of the decedent's resources. The devisees, not the executor, hold legal title to the decedent's real property. Therefore, although no court has been faced with the issue, it seems likely that an executor will not be held liable as an owner if the devised property is contaminated by a hazardous substance.<sup>264</sup>

Executors may become vulnerable to CERCLA liability as operators, however, through the execution of their duties in administering the decedent's estate. Under the Uniform Probate Code,<sup>265</sup> an executor may be authorized and even required, to perform various acts that involve the operation of a facility. Except as provided by the decedent's will,

every [executor] has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. . . . The [executor] shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession.<sup>266</sup>

Additionally, an executor may (1) perform, compromise, or refuse performance of the decedent's contracts, (2) convey and lease land, (3) manage,

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262. H.R. CONF. REP. No. 962, *supra* note 260, *reprinted in* 1986 U.S.C.C.A.N. at 3279-81.

263. Although the term "executor" will be used throughout, it should be noted that this discussion is equally applicable to an "administrator" of an estate. An executor administers the decedent's will; an administrator administers an estate, distributing property to the decedent's heirs according to the state's intestacy statute, where the decedent dies intestate.

264. It should be noted, however, that the bankruptcy cases and CERCLA's legislative history indicate that "equivalent evidence of ownership" may lead to the imposition of personal liability on an executor as a facility owner. *See* §§ C, *infra*; *In re* T.P. Long Chem. Co., 45 B.R. 278, 283 (N.D. Ohio 1985); H.R. REP. No. 172, 96th Cong., 2d Sess. 36, *reprinted in* 1980 U.S.C.C.A.N. 6160, 6181.

265. UNIF. PROBATE CODE, §§ 1-101 to 8-102, 8 U.L.A. (1983).

266. UNIF. PROBATE CODE § 3-709 (1991).

develop, exchange, and change the character of an estate asset, (4) make repairs and alterations to buildings or other structures, and (5) continue any unincorporated business.<sup>267</sup>

An executor performing these duties may easily become an operator for CERCLA purposes. To date, no reported opinions have concerned the potential liability of executors. By analogy, however, from the decisions concerning corporate officers and directors who also manage the assets of others under a fiduciary responsibility,<sup>268</sup> it would appear that an executor will likely be held liable for CERCLA cleanup costs if she (1) assumes and exercises responsibility for waste handling, or (2) exercises a high level of supervision over the general operations of a facility. However, the analogy to corporate officers and directors cases also teaches that liability will arise only for disposal during the period of management.<sup>269</sup>

A trustee of a testamentary or inter vivos trust faces similar potential liability as either an owner or an operator. A trustee holds the most fundamental indicia of ownership, legal title to trust property.<sup>270</sup> Further, trust instruments and state statutes typically endow the trustee with broad authority to use and manage the trust property,<sup>271</sup> and a trustee exercising these powers may well become liable as a CERCLA operator.

In *United States v. Burns*<sup>272</sup> the potential CERCLA liability of a trustee as an owner of the facility was considered.<sup>273</sup> Crowley, the trustee of property on which hazardous substances had been disposed, was sued by the EPA to recover its costs of cleaning the contaminated property. Crowley moved to dismiss the action claiming that he could not be held liable as he never owned the subject property or participated in the illegal conduct.<sup>274</sup> The court denied Crowley's motion, noting that given the facts alleged, if true, Crowley could be considered an owner of the site for two reasons. First, "[t]he term 'owner,' like the Act generally, should be construed broadly,"<sup>275</sup> and second, CERCLA's legislative history indicated that the term "owner" includes title holders of property.<sup>276</sup> Crowley, as trustee, held legal title to the trust

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267. *Id.* § 3-715(3), (6), (7), (9), [on leases] and (24).

268. *See supra* Part II.

269. *See, e.g.*, authorities cited *supra* note 21.

270. This is true for both testamentary and inter vivos trusts. *See* G. BOGART, TRUSTS § 1 (6th ed. 1987). *See also In re Hemingway Transp., Inc.*, Bankr. L. Rep. (CCH) ¶ 973,314 (Bankr. D. Mass. Sept. 13, 1989) (trustees of the property (not the trustees in bankruptcy) were the present property owners and were therefore liable under § 9607(a) of CERCLA as owners).

271. *See* RESTATEMENT (SECOND) OF TRUSTS § 175 (1959).

272. *United States v. Burns*, No. C-88-94-L, 1988 U.S. Dist. LEXIS 17340 (D.N.H. Sept. 12, 1988).

273. It appears that Crowley was trustee for an inter vivos trust.

274. *Burns*, No. C-88-94-L, 1988 U.S. Dist. LEXIS 17,340, at \*1.

275. *Id.* at \*3 (internal quotes and citation omitted). "CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes." *Id.*

276. *Id.* (quoting H.R. REP. NO. 172, 96th Cong., 2d Sess. 36, reprinted in 1980 U.S.C.C.A.N. 6160, 6181).



property, and under trust law, could be liable for obligations as the owner of the property.<sup>277</sup> The decision was a straightforward application of the term "owner" to anyone who holds legal title to contaminated property encumbered by CERCLA liability.<sup>278</sup>

In *City of Phoenix v. Garbage Services Co.*,<sup>279</sup> the court considered whether a trustee could be held liable as an operator.<sup>280</sup> The trustee exercised a purchase option of the decedent's and purchased a landfill being managed by and leased to Garbage Services Company (GSC). The trustee continued leasing the site to GSC for the next six years, after which time, the landfill was closed. Throughout that period of time, the trustee paid the property taxes on the site and procured liability insurance for the landfill. After the City of Phoenix incurred cleanup costs at the site, it filed an action against the trustee.

The court held that operator liability only attaches where the defendant had control over the day-to-day management and administration of the facility.<sup>281</sup> Mere authority to conduct such management was not enough.<sup>282</sup> The trustee did not enter into or negotiate contracts for the disposal of wastes, nor did it know the identity or the nature of GSC's customers. The trustee's communication with GSC's personnel was limited to such matters as tax

277. *Id.* Crowley was also the beneficiary of the trust. The court observed that Crowley could similarly be held liable as an owner in his dual capacity as a trustee and beneficiary. *Id.*

Although *Burns* indicates that trustees can be held personally liable under CERCLA, trustees have the right to indemnification out of the trust property. G. BOGART, TRUSTS § 132 (6th ed. 1987). Where cleanup costs exceed the value of the trust property, however, the trustee, as an "owner" of the property, would appear to be personally liable. While this result may seem harsh, it is prudent in those cases where the value of the trust property is exceeded by the cleanup costs. If an individual thought that liability could be avoided by simply establishing a trust, the ability to implement and enforce CERCLA's provisions would be seriously undercut.

See also *infra*, note 278 and text accompanying notes 279-83, discussing the decision in *City of Phoenix v. Garbage Serv. Co.*, No. C 89-1709 SC (D. Az. Jan. 19, 1993).

278. The contamination of the trust property in *Burns* occurred while Crowley was trustee for the property. While this fact may have influenced the court's decision if the court had engaged in an "operator" analysis, because the court instead relied on Crowley's status as the property's owner, this fact should not have affected the court's determination.

In *City of Philadelphia v. Stepan Chem. Co.*, 713 F. Supp. 1491 (E.D. Pa. 1989), the traditional route for imposing CERCLA liability on the owner or operator of trust property was abandoned and a successor liability theory pursued. In that case, the decedent's estate apparently had no money from which the city could recoup its cleanup costs. The city therefore sued a trust that the decedent had established for his daughter. The court held that the trustee never expressly or implicitly agreed to assume the obligations of the decedent's business and therefore was not liable for cleanup costs.

See also *United States v. Petersen Sand and Gravel Inc.*, No. 91 C 5835, 1992 U.S. Dist. LEXIS 13,268 (N.D. Ill. Sept. 3, 1992). In that case, the court ruled that a trustee who merely held title to contaminated property, without any other incident of ownership, was not an owner under CERCLA. In analyzing the trustee's liability, the court explained that the trust was created at common law and had one duty only: to hold and dispose of legal title at the written direction of the beneficiary. It was the beneficiary who retained all other incidents of real property ownership, including full management and control of the property.

279. No. C 89-1709 SC (D. Az. Jan. 19, 1993).

280. The court also considered whether the trustee could be held liable as an owner. The court found that a trustee is an owner for the purposes of CERCLA liability, even though the trustee may hold only bare legal title. *Id.* at 9.

281. *Id.* at 5.

282. *Id.* at 5-6.

questions, and not the operation of the landfill. Accordingly, the court held that the trustee was not liable as an operator under CERCLA.<sup>283</sup>

Although the *City of Phoenix* decision did not find the trustee liable as an operator, the decision does not mean that a trustee will never be held liable as an operator. On different facts, a trustee exercising his or her powers as a trustee could well be found liable as an operator.

Trustees typically are given broad powers within trust instruments and under state law to deal with trust property. The Uniform Trustees' Powers Act<sup>284</sup> is representative of the typical statutory provisions adopted by many states which delineates the powers of a trustee.<sup>285</sup> Under this Act, the trustee is empowered to: (1) continue or participate in the operation of any business or enterprise;<sup>286</sup> (2) invest trust assets;<sup>287</sup> (3) manage, develop, or improve a trust asset;<sup>288</sup> (4) repair, alter, or demolish, or raze existing buildings;<sup>289</sup> and (5) enter into leases.<sup>290</sup> These broad powers make it highly probable that a trustee dealing with trust property contaminated with hazardous substances could readily incur CERCLA "operator" liability.<sup>291</sup> While the absence of case law leaves some uncertainty, once again the corporate officer and director liability cases offer the best analogy. Based upon that area of law,<sup>292</sup> it seems quite likely that courts will hold a trustee liable as an operator if the trustee assumes and exercises responsibility for waste handling, or exercises a high level of supervision over a facility's operations.<sup>293</sup>

### C. Bankruptcy Trustees

If a bankrupt debtor's conduct results in the release or threatened release of hazardous substances, the assets of the bankrupt estate can be reached for CERCLA cleanup costs.<sup>294</sup> The potential liability of a trustee in bankruptcy is, however, a more problematic question.

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283. *Id.*

284. The Uniform Trustees' Powers Act can be found within the Uniform Probate Code. *See* 8 U.L.A. §2-101 (1983).

285. *See, e.g.*, CONN. GEN. STAT. § 45-100f(7) (1989).

286. 8 U.L.A. §3.

287. *Id.* §5.

288. *Id.* §7.

289. *Id.* §8.

290. *Id.* §10.

291. Because of the special status trustees hold, especially with respect to a testamentary trust, the imposition of CERCLA liability may seem unduly harsh. It should be noted, however, that trust law also imposes liability without fault on trustees. A. SCOTT, TRUSTS § 265.4, at 459 (4th ed. 1988).

292. *See supra* Part II.

293. *See* Denise Rodosevich, *The Expansive Reach of CERCLA Liability: Potential Liability of Executors of Wills and Inter Vivos and Testamentary Trustees*, 55 ALBANY L. REV. 143 (1991).

294. *See, e.g.*, *In re National Gypsum Co.*, No. 3-91-1653-H (N.D. Tex. Feb. 12, 1992); *New Jersey Dep't of Env'tl. Protection v. North Am. Prods. Acquisition Corp.*, No. 91-4602 (D.N.J. Jan. 21, 1992); *Penn Cent. Corp. v. United States*, No. 91-761 (U.S. Mar. 2, 1992).

When a business declares bankruptcy, a “trustee in bankruptcy” may be designated to, among other things, manage the business or property while the creditors and their priority of interests are determined. Although such management would seem to leave a trustee of a bankrupt corporation open to liability for CERCLA cleanup costs as an operator of a facility, to date, owner or operator liability of trustees has been narrowly construed and no trustee in bankruptcy has yet to be held personally liable for cleanup costs. Nevertheless, the courts have implied that trustees may be reachable as operators, under the right circumstances.

*In re T.P. Long Chemical Co.*<sup>295</sup> considered the personal liability of a trustee in bankruptcy. The trustee administered a bankrupt estate that included property upon which drums of hazardous material were stored. As a result of vandalism, hazardous substances were released on the property during the trustee’s management of the estate. The EPA cleaned up the release and brought suit against the bankrupt estate to recoup the cleanup costs. For reasons not apparent from the facts, the trustee raised the personal defense that *he* was not an owner or operator of the facility, and therefore, the *estate* could not be held liable under CERCLA. By so arguing, the court was afforded the opportunity to comment on the trustee’s personal liability assertion.

The Ohio Bankruptcy Court concluded that the trustee was not an owner or operator. “In the sense that the trustee did not acquire title to the property of the estate, he is technically correct that he is not an owner of the Long facility.”<sup>296</sup> The court went on, however, to observe that “[i]n the sense that no business operations were being conducted at the Long facility at the time the trustee was appointed, he is technically correct that he is not an operator of the facility.”<sup>297</sup> The court therefore left open the possibility that a trustee may be held liable as an operator if operations are ongoing during the trustee’s oversight of the bankrupt estate. Because both Chapter 11 and Chapter 7 of the Bankruptcy Code<sup>298</sup> authorize a trustee to operate a debtor’s business, the potential operator liability of a trustee in bankruptcy is quite likely.<sup>299</sup>

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295. 45 B.R. 278.

296. *Id.* at 283.

297. *Id.*

298. The Bankruptcy Code provides: “Unless the court orders otherwise, the trustee may operate the debtor’s business.” 11 U.S.C. § 1108 (1988). It also provides: “The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.” 11 U.S.C. § 721.

299. See also *In re Peerless Plating Co.*, 70 B.R. 943 (W.D. Mich. 1987)

y. The bankrupt estate was not operating the facility, so operator status would be inapplicable. However, the estate was the “owner” of the site and therefore could not escape CERCLA liability.

Of possible historic interest is the fact that under the former Bankruptcy Act, 11 U.S.C. § 110(a), a trustee in bankruptcy did acquire title to the bankrupt’s property, and therefore certainly would have been found to be an owner under CERCLA.

**Conclusion: Seeing the Forest for the Trees**

Looking beyond the trees, the many diverse cases and fact patterns that exist in the area of CERCLA liability, one can see the forest. CERCLA liability is not so elusive and ill-defined as often argued. Some rather straight-forward principles appear to guide liability, albeit in unanticipated ways. Those who manage a business will be held liable for the disposal of its hazardous substances. Liability will also extend to those who specifically manage the disposal of hazardous substances when there is a release or threatened release. Despite language in a few opinions, this study also establishes a related corollary principle: Parties far removed from the management of a business or its hazardous substances will not be held liable as operators or arrangers simply because they have the ultimate, unexercised capacity to control such substances.

These general principles have been obscured by the way cases have conventionally been grouped for decision and commentary. The emphasis has been on specific fact patterns, such as parent-subsidiary or lender liability. As a result, the discussion and analysis has largely confined itself to these groups and general principles have not emerged. This narrow approach deprives courts and counsel of the information available from other groups of cases and from the general liability principles this Article proposed.

The strength of these principles is shown by the wide diversity of cases and fact patterns that support them. Strong support is found in the cases concerning parent and subsidiary corporations, corporate officers, directors and shareholders, lenders, and government regulators. Support is apparent in the case of bankruptcy trustees, bankrupt corporations, inter vivos trustees, as well as executors and beneficiaries of wills, though, this support is based on somewhat limited case authority. Contractual arrangement cases also offer some support. Because the cases that look forward with respect to time, successor corporation cases, and backward, dissolved corporation cases, to identify the liable corporate actor present different issues and different fact patterns, these two groups of cases provide only indirect support for our hypothesis.

This Article has demonstrated that a common basis exists upon which judges have determined CERCLA liability, regardless of whether the case concerns traditional CERCLA liability categories or, the more attenuated status of lenders, parent corporations, or bankruptcy trustees. Close analysis of the case law provides the foundation from which the general principles of CERCLA liability emerge. By viewing CERCLA liability cases in this manner, the forest can be seen for the trees.