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# Parent Corporation Liability under CERCLA: Toward a Uniform Federal Rule of Decision

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## I. INTRODUCTION

Congress adopted the Comprehensive Environmental Response, Compensation and Liability Act (hereinafter CERCLA) in 1980.[1] CERCLA provides legal procedures and funding mechanisms in an attempt to abate the danger to public health and the environment from the legacy of decades of improper storage and disposal of hazardous wastes at thousands of inactive or abandoned dump sites throughout the nation.[2] In what has been characterized as perhaps the most radical environmental statute in American history,[3] CERCLA imposes liability for clean-up costs on a broad class of potentially responsible parties.[4] Adopted by Congress in a last

1. Pub. L. No. 96-510, 94 Stat. 2767 (1980); amended by the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in part at 42 U.S.C. § 9601-9657 (1988)).

2. "[A] major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the 'inactive hazardous waste site problem.' . . . Existing law is clearly inadequate to deal with this massive problem." H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17-18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

3. Note, *Developments in the Law--Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465 (1936) [hereinafter *Developments in the Law*].

4. *See infra* notes 53-64 and accompanying text (describing classes of parties implicated by CERCLA as potentially liable for cleanup and other response costs).

minute, hastily drawn compromise,[5] CERCLA has little definitive legislative history to aid courts in interpreting its ambiguous liability provisions.[6]

Nevertheless, courts have found in the Act's language and meager legislative history the basis to adopt broad and controversial standards of joint and several retroactive strict liability with loose causation requirements.[7] The result of the courts' application of expansive liability standards to CERCLA's broad categories of potentially liable parties has been to extend liability to remote parties with, at best, an attenuated connection to the contaminated site.[8] These parties would not normally be liable in tort[9] or under traditional corporate law doctrines used to disregard the corporate entity.[10]

Although many of CERCLA's ambiguous liability provisions have been definitively construed, considerable uncertainty still

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5. *See* United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984) ("CERCLA is in fact a hastily drawn piece of compromise legislation, marred by vague terminology and deleted provisions . . . . The courts are once again placed in the undesirable and onerous position of construing inadequately drawn legislation."), *aff'd. in part, rev'd. in part*, 810 F. 2d 726 (8th cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983). The *Wade* court commented that "[t]he Superfund legislation [CERCLA] . . . leaves much to be desired from a syntactical standpoint, perhaps a reflection of the hasty compromises which were reached as the bill was pushed through Congress just before the close of its 96th Session. Any attempt to divine the legislative intent behind many of its provisions will inevitably involve a resort to the Act's legislative history. Unfortunately, the legislative history is unusually riddled by self-serving and contradictory statements." *Id.*

6. *See* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080-81 (1st Cir. 1986). The court commented that "'CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history.' . . . CERCLA's legislative history is shrouded with mystery . . . . *Id.* (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)). *See also infra* notes 73-78 and accompanying text (describing the ambiguity of the legislative history of the Act's liability provisions).

7. *See infra* notes 65-81 and accompanying text (summarizing case law establishing retroactive, joint and several strict liability under CERCLA and the Act's minimal causation requirements).

8. *See infra* notes 61-62 and accompanying text (giving examples of remote parties which have been held liable under CERCLA).

9. *See infra* notes 79-81 and accompanying text (noting liability under CERCLA can attach despite absence of proof of elements of a traditional tort cause of action such as cause-in-fact and proximate cause).

10. *See infra* notes 168-221, 366 and accompanying text (summarizing cases holding parent corporations and individual shareholders liable despite absence of factors traditionally used to justify "piercing the corporate veil"). *See also infra* note 64 (discussing cases holding corporate officers personally liable).

exists as to the applicable standards for ascertaining the liability of a responsible party's parent corporation[11] for cleanup costs. Recent decisions have articulated varying standards, ranging from the traditional approach of piercing the corporate veil[12] to virtual strict liability of parent corporations.[13] This uncertainty makes financial forecasting and planning difficult for potentially liable parent corporations. The uncertainty also impedes efficient settlement of actions under CERCLA, consuming public and private resources in otherwise avoidable litigation expenses, and delays cleanup of sites posing risks to public health and natural resources.[14]

Part II of this Comment explores the general liability provisions of CERCLA and the interpretation of these provisions by the courts.[15] Part III provides an overview of state and federal common law approaches traditionally applied to determine whether to disregard the corporate entity and to hold a parent corporation liable for the acts of a subsidiary.[16] Next, the various standards which have been applied in recent case law to determine the liability of parent corporations under CERCLA are reviewed in Part IV.[17] Part V evaluates alternative rules for finding parent corporations liable under CERCLA based on the consonance of each alternative with the objectives furthered by the Act's liability scheme,[18] and argues for adoption of a single federal rule of decision applicable in CERCLA parent/subsidiary cases that is consistent with the current general framework for liability under CERCLA.[19]

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11. A parent company or corporation is one "owning more than 50 percent of the voting shares, or otherwise a controlling interest, of another" company, called the subsidiary. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

12. *See infra* notes 243-270 and accompanying text (discussing cases using traditional veil-piercing doctrine).

13. *See infra* notes 168-191, 198 and accompanying text (discussing cases articulating a "capacity to control" standard of liability).

14. *See infra* notes 286-288 and accompanying text (discussing benefits to the public and private sectors of voluntary settlement).

15. *See infra* notes 20-82 and accompanying text.

16. *See infra* notes 83-160 and accompanying text.

17. *See infra* notes 161-281 and accompanying text.

18. *See infra* notes 282-396 and accompanying text.

19. *See infra* notes 372-396 and accompanying text.

## II. LIABILITY UNDER CERCLA

### A. Purposes of CERCLA

Following three years of deliberation on various hazardous waste measures, Congress, in an eleventh hour compromise after very limited debate,[20] adopted "a relatively complex solution to a complex problem."[21] Unlike much of the environmental legislation passed in the previous decade,[22] CERCLA is not primarily a regulatory program.[23] The sponsors of bills that ultimately gave rise to passage of CERCLA introduced the initial legislation to fill a void left by the principal hazardous waste regulatory program, the Resource Conservation and Recovery Act of 1976[24] (hereinafter RCRA). Although RCRA established a comprehensive prospective "cradle-to-grave" regulatory program governing hazardous waste storage, transport and disposal, it did

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20. *See generally* Grad, *A Legislative History of the Comprehensive Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 29-35 (1982) (tracing the legislative history of the bills which led to CERCLA's adoption).

21. United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983).

22. *See, e.g.*, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1376 (1988)); Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-2671 (1988)); Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f-300j (1988)).

23. CERCLA created a legal and financial apparatus to respond to the release or threatened release of hazardous substances into the environment from already existing toxic dump sites. *See infra* notes 36-41 and accompanying text (describing the avenues for cleaning up sites and using and reimbursing monies in the Superfund).

24. Pub. L. No. 94-580, 90 Stat. 2796 (1976) (codified at 42 U.S.C. §§ 6901-6987 (1988)). One of the bills which ultimately gave rise to congressional passage of CERCLA, H.R. 7020, entitled the "Hazardous Waste Containment Act," was reported out of committee in the form of an amendment to RCRA. *See* H.R. REP. NO. 1016, Pt. I, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119. *See also infra* note 25 and accompanying text (describing gaps left by RCRA). *See generally* Grad, *supra* note 20, at 4-5, 8; W. FRANK & T. ATKESON, SUPERFUND: LITIGATION AND CLEANUP 1 (BNA 1985) (discussing how H.R. 7020, and another of CERCLA's predecessors, S. 1480, the "Environmental Emergency Response Act," were intended to fill gaps left by RCRA and state law).

not redress the problem of waste already generated and stored.[25] CERCLA responded to the health and environmental risks[26] of hazardous waste[27] sites[28] by establishing a fund (the

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25. The House Report accompanying the original bill, H.R. 7020, stated:

> (c) Deficiencies in RCRA have left important regulatory gaps.
> (1) [RCRA] is prospective and applies to past sites only to the extent that they are posing an imminent hazard. Even there, the Act is no help if a financially responsible owner of the site cannot be located . . . . It is the intent of the Committee . . . to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive disposal sites.

H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, 22 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6125.

26. The impetus for the hasty adoption of CERCLA was public reaction to the perceived health and environmental risks posed by inactive and abandoned hazardous waste sites, as symbolized by the discovery of widespread contamination of a residential neighborhood adjacent to the former 16-acre Love Canal toxic dump site, on which a school had been constructed. *See* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, COMING CLEAN: SUPERFUND'S PROBLEMS CAN BE SOLVED 22 (1989) [hereinafter COMING CLEAN] ("Superfund was born out of something close to public hysteria, news stories about leaking toxic waste sites, vivid pictures of sites, and first-person accounts of health effects"). *See also* Silverman, *Love Canal: A Retrospective*, 20 Env't. Rep. (BNA) 835 (September 15, 1989) (examining the environmental and health effects and legal implications of Love Canal). In the years since enactment of CERCLA, however, the relative magnitude and seriousness of actual risks posed to public health and to the environment by inactive and abandoned hazardous waste sites has been questioned. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987) (finding that "total health impacts [of hazardous waste sites] do not appear to match public concerns in most areas," and that despite Superfund's statutory command of significant EPA resources, the program addresses "low to medium" health and environmental risks). *But see* COMING CLEAN, *supra*, at 22 (finding that exposure and risk assessments for many of the prevalent contaminants at toxic waste sites support a conclusion that the health and environmental problems posed therefrom justify a multibillion dollar program).

27. This Comment uses the terms "hazardous waste," "toxic waste," and "hazardous substance" interchangeably. CERCLA uses only the term "hazardous substance." *See* 42 U.S.C. § 9601(14) (1988) (definition of hazardous substance, which includes substances defined as hazardous by several earlier federal pollution control statutes as well as substances with respect to which the Administrator of the Environmental Protection Agency (EPA) has taken action pursuant to section 7 of the Toxic Substances Control Act (15 U.S.C. § 2606 (1988))).

28. In 1979 it was estimated that as many as 30,000 to 50,000 inactive or abandoned hazardous waste sites existed, of which 1,200 to 2,000 presented serious public health risks. H.R. REP. NO. 1016, 96th CONG., 2D SESS. 17 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6120. In December 1984, EPA, which is charged with administering CERCLA, reported to Congress that between 130,000 and 378,000 sites may eventually have to be reviewed as potential candidates for government-initiated response actions under CERCLA. U.S. ENVIRONMENTAL PROTECTION AGENCY, EXTENT OF THE HAZARDOUS RELEASE PROBLEM AND FUTURE FUNDING NEEDS, CERCLA SECTION 301(a)(1)(C) STUDY--FINAL REPORT 5-3 (1984). More recently, EPA

"Superfund")[29] to finance waste site cleanups[30] and by imposing civil liability for the costs of cleanup and natural resources damage[31] on a wide range of "potentially responsible parties."[32]

## B. *Administrative/Legal and Funding Mechanisms for Cleanup of Waste Sites*

CERCLA requires the Environmental Protection Agency[33] (EPA) to compile a National Priority List (NPL) of hazardous

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officials and other analysts have put the total number of sites likely to require remediation in the range of 27,000 to more than 400,000. *GAO Finds 425,380 Potential Superfund Sites; Florio Hits EPA for Delays in Site Assessments*, 18 Env't Rep. (BNA) 2043 (January 22, 1988).

29. CERCLA established two funds to pay for site cleanup. Pub. L. No. 96-510, §§ 221, 232, 94 Stat. 2801, 2804 (1980). Known colloquially as "Superfund," the "Hazardous Substance Response Trust Fund" was reauthorized and renamed by the Superfund Amendments and Reauthorization Act (SARA) as the "Hazardous Substance Superfund." SARA, Pub. L. No. 99-499, §§ 4, 204, 100 Stat 1696 (1986) (codified in part at 26 U.S.C. §§ 59A, 4611-12, 4661-62, 4671-72, 9507 (1988), 42 U.S.C. § 9611(p) (1988)). Of the initial Superfund of $1.6 billion for the period from 1982 to 1986, 87.5% came from special taxes on petroleum and certain chemicals. 26 U.S.C. §§ 4612, 4661-62 (1982). 12.5% came from general revenue appropriations. *Id.* § 9631(b)(2). SARA increased the amount of monies in the Superfund and broadened the base from which they are collected: the $8.5 billion authorized over the period 1987 through 1991 will be collected from the following sources: tax on petroleum (32.5%); tax on feedstock chemicals (16.7%); a general "environmental tax" on corporations (29%); interest, recoveries and penalties (6.4%); and general revenues (14.7%). SARA, Pub. L. No. 99-499, §§ 511-517, 100 Stat. 1760-65, 1767, 1770, 1772 (1986) (codified at 26 U.S.C. §§ 59A, 4611-12, 4661-62, 4671-72, 9507 (1988). CERCLA also established another fund, the "Post-Closure Liability Trust Fund," which assumed the liability of owners and operators of hazardous waste disposal facilities which had been closed pursuant to RCRA regulations. CERCLA §§ 107(k), 111(j), 42 U.S.C. §§ 9607(k), 9611(j) (1982). This fund was terminated by SARA. SARA, Pub. L. No. 99-499, §514, 100 Stat. 1767 (1986).

30. The term "cleanup" as used in this comment refers to the containment, mitigation, abatement or elimination of the hazards and threats present at a hazardous waste site.

31. 42 U.S.C. §9607(a)(4)(C) (1988) (imposing liability for "injury to . . . or loss of natural resources").

32. *Id.* § 9607(a). *See infra* notes 55-58 and accompanying text (discussing who are responsible parties). The term "responsible parties" or "potentially responsible parties" as used in this comment refers to those "persons who would or might be liable" under § 107(a) of CERCLA, 42 U.S.C. § 9607(a) (1988). *See also infra* note 53 (CERCLA definition of "person").

33. CERCLA directs the President to fulfill certain responsibilities under the Act, including preparation of a priority list of hazardous waste sites needing remediation. *See infra* note 34 and accompanying text. However, the President delegated most of these tasks, including preparation of the priority list of sites, to EPA. Exec. Order No. 12,316, § 1(c), 46 Fed. Reg. 42,237 (1981). *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987) (revoking Exec. Order 12,316 and delegating duties and responsibilities under CERCLA as amended by SARA). EPA continues to be responsible for preparation of the priority list. *Id.* § 1(b)(1).

waste sites in need of remedial action.[34] Priorities are based on the relative risk or danger to public health or the environment from known or threatened releases.[35]

CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA),[36] provides an array of mechanisms to clean up sites on the NPL. EPA can prompt cleanup by executing a settlement agreement with responsible parties,[37] or by issuing an administrative order or obtaining a court order directing responsible parties to undertake specified remedial actions.[38] Alternatively, EPA itself can undertake remedial action financed by Superfund and may later sue any identifiable and solvent responsible party for reimbursement to Superfund.[39] Apart from EPA initiative, CERCLA authorizes private parties who clean up sites to recover costs from responsible parties[40] or from the Superfund.[41]

Courts have found congressional intent in the Act that responsible parties bear the principal burden for financing site response measures.[42] Public resources available for cleanup are

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34. 42 U.S.C. § 9605(a)(8)(B) (1988). The NPL is an element of the National Contingency Plan. *Id.* § 9605. *See* 54 Fed. Reg. 41025 (1989) (to be codified at 40 C.F.R. § 300, Appendix B) (the current NPL includes 948 sites).

35. 42 U.S.C. § 9605(8) (1988).

36. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

37. 42 U.S.C. §§ 9604(a), 9622 (1988). As enacted in 1980, CERCLA contained no provisions addressing settlements. SARA added provisions to encourage and facilitate voluntary settlement. 42 U.S.C. 9622 (1988). For example, the statute established a procedure for EPA to provide potentially responsible parties (PRPs) with information about a site and then allow a grace period for negotiations. *Id.* § 9622(e). In addition, SARA established a foundation for extensive litigation concerning contribution among uncooperative PRPs if they choose not to cooperate. *Id.* § 9613(f) (expressly providing for contribution actions). *See infra* notes 283-288 and accompanying text (discussing the benefits of settlement to both the public and private sectors). *See generally* Atkeson, Goldberg, Ellrod & Connors, *An Annotated Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 16 Envtl. L. Rep. 10360, 10407-08, 10410-12 (Envtl. L. Inst.) (Dec. 1986).

38. 42 U.S.C. § 9604(a) (1988).

39. *Id.* §§ 9607(a), 9611.

40. *Id.* §§ 9607(a)(4)(B), 9613(f).

41. *Id.* §§ 9611-9612.

42. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 848 (W.D. Mo. 1984), *aff'd in relevant part and rev'd in part on other grounds*, 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987); United States v. Ward, 618 F. Supp. 884, 892 (E.D.N.C. 1985); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983); Ohio *ex rel.*

quite limited relative to the immensity of the hazardous waste problem.[43] The total response costs[44] at the 2,000 sites expected to be listed on the NPL has been estimated at $50 to $100 billion.[45] At the current level of Superfund revenues ($8.5 billion

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Brown v. Georgeoff, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983). *See also infra* note 48 and accompanying text (citing legislative history).

43. J. Winston Porter, Assistant EPA Administrator for Solid Waste and Emergency Response during the Superfund reauthorization hearings, stated, "There is probably not enough money in the world to cleanup all of the sites permanently." *High Cost of Permanent Superfund Cleanups to Result in Interim Actions*, 17 Env't. Rep. 778 (BNA) (Sept. 26, 1986).

44. "Response costs" refers generally to money spent to respond to contamination at a hazardous waste site. More specifically, response costs are (1) all costs of removal or remedial action incurred by the United States government or a state that are not inconsistent with the National Contingency Plan (NCP); (2) any other necessary costs of response incurred by any other person consistent with the NCP; (3) damage for injury to, or destruction or loss of natural resources, including the reasonable costs of assessing such injury; and (4) the costs of health assessments or health effects study carried out pursuant to section 9604(i) of the Act. 42 U.S.C. § 9607(a)(3)(A)-(D) (1988). Removal costs include the costs of removing hazardous substances from a site deemed by EPA to be necessary to protect public health, welfare or the environment, including removal of hazardous substances from any contaminated natural resources, as well as the temporary or permanent relocation of residents. *Id.* § 9601(23). Remedial actions at the site include the costs of providing alternative drinking water supplies and restoring ground and surface water to a level that assures protection of public health. *Id.* § 9601(24). In addition, the courts have interpreted response costs to include a wide variety of expenses incurred in connection with implementing the Act. *See, e.g., Northeastern Pharmaceutical*, 579 F. Supp. at 850-52 (response costs include the government's litigation costs and attorneys' fees; salaries and expenses associated with the government's monitoring, assessing and evaluating the release of contaminants; expenses associated with the government's actions taken to prevent, minimize, or mitigate damage that might result from the release or threat of release of contaminants from a hazardous waste disposal site; prejudgment interest at the rate of nine percent a year, calculated from the date the complaint was filed under CERCLA; and all future costs of removal or remedial actions that are consistent with the NCP and incurred by the government in cleaning up a hazardous waste site). Moreover, on appeal, the Eighth Circuit reversed the district court's holding that response costs may not include site cleanup and related expenses incurred prior to the enactment of CERCLA. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 735 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987).

45. Comment, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L. J. 271, 281 (1987) [hereinafter *Deep Pockets*]. The author based his figures on EPA estimates of net costs to the federal government of $11.7 billion to $22.7 billion, which assumed that responsible parties would bear 40 to 60 percent of total response costs. *Id.* (citing U.S. ENVIRONMENTAL PROTECTION AGENCY, EXTENT OF THE HAZARDOUS RELEASE PROBLEM AND FUTURE FUNDING NEEDS, CERCLA SECTION 301(a)(1)(C) STUDY--FINAL REPORT 5-3 (1984)). Because EPA based these estimates on the original CERCLA cleanup standards, not on the more stringent standards adopted by SARA section 121, the author relied on statements made by EPA officials indicating that cleanup costs under SARA standards could be three to ten times the average cleanup cost under CERCLA to arrive at this cost range. *Id.* at 281-82 and n.45. *See also* U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 13 (1985) (OTA considers it likely that the cleanup costs for 1,800 NPL sites will exceed $100 billion over the next 50 years); COMING CLEAN, *supra* note 26, at 27 (the nation has spent only about one to two percent of what

for the period from 1987 to 1991),[46] if the full cost burden were to fall on the fund, it would take thirty to sixty years to finance response costs for the 2,000 NPL sites. Alternatively, if responsible parties bear forty to sixty percent of cleanup costs, at current funding levels it would require about half as long to remediate the 2,000 sites.

### *C. CERCLA's Liability Scheme*

With at least some idea of the formidable dimensions of the cleanup task,[47] Congress enacted CERCLA to expedite site remediation and to allocate the costs to those responsible for the risks posed by the inadequate disposal of hazardous waste.[48] To accomplish these ends, CERCLA imposed a far-reaching liability scheme which, it has been argued, was intended to find a party to assume liability in virtually every case.[49]

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ultimately might be spent by all parties to clean up chemically contaminated sites--now roughly estimated by OTA at $500 billion over 50 years).

46. SARA Title V, Superfund Revenue Act of 1986, Pub. L. No. 99-499, §§ 511-17, 100 Stat. 1760-1765, 1767, 1770, 1772 (1986) (codified at 26 U.S.C. §§ 59A, 4611-4612, 4661-4662, 4671-4672, 9507 (1988)).

47. "Congress and the American public became more aware of the magnitude and expense of the problems associated with inactive sites as the Love Canal and similar sites came to the forefront." United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 835 (W.D. Mo. 1984). *See also supra* notes 2, 26 and accompanying text (discussing impetus to adoption of CERCLA provided by discovery of extensive contamination of residences near Love Canal).

48. The Senate report on the original CERCLA bill reveals several objectives of the broad liability scheme: to ensure that those responsible for creating the hazardous waste problem bear the burden of remedying the problem, to ensure that the social cost of unsafe disposal practices is internalized by the industries that generate waste, to create incentives for safer behavior for those parties who possess the greatest knowledge about the risks associated with their wastes and who are in the best position to control disposal decisions, to spread cleanup costs among as many parties as possible, and to promote efficient resource allocation among industries. S. REP. No. 848, 96th Cong., 2d Sess. 12-15, 31-34 (1980). *But see infra* notes 321-323 and accompanying text (CERCLA's liability system does not necessarily operate primarily to further the ends of corrective justice, deterrence or restitution, but perhaps functions more to compensate the government for costs incurred in cleanups financed by Superfund).

49. Comment, *Toward an Optimal System of Successor Liability for Hazardous Waste Cleanup*, 6 STAN. ENVTL. L. J. 226, 232 (1987) [hereinafter *Successor Liability*] (noting that Superfund's supporters recognized that traditional common law theories would fail to generate funds needed for cleanup because the most culpable party, on whom the common law placed liability, is often insolvent or non-existent).

The liability provisions in CERCLA are among the most sketchy and ambiguous in an act roundly criticized for its vagueness.[50] Although developing CERCLA case law has resolved many of the uncertainties pertaining to the scope of CERCLA liability,[51] uncertainty remains with respect to the liability of a few categories of potentially responsible parties, among them parent corporations of subsidiary responsible parties.[52] To provide the context for the evaluation in Part V of the alternative approaches the courts have applied to the determination of parent corporation liability, this section examines the general statutory scheme of CERCLA liability and its interpretation by the courts.

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50. In considering the scope of liability under the Act, one court supported its observation that CERCLA was hastily and inadequately drafted by citing statements of two members of Congress as indicative of the attitude of the House of Representatives when confronted with the Senate compromise bill. Representative Gibbons stated:

> I am not happy with this bill, but I would be far sadder if we did not pass it. We must begin . . . . We have been working on this problem for a year, and the problem gets worse every day, and we have only got 2 days left in the legislative session.

United States v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1253 n.1 (S.D. Ill. 1984) (citation omitted). The court also noted that "Representative Harsha complained that the final version was vague and internally inconsistent to such an extent that the 'bill is not a superfund bill--it's a welfare and relief act for lawyers.'" *Id.* (citation omitted). *See* Note, *Developments in the Law*, *supra* note 3, at 1512 (discussing legislative history of the liability provisions). *See also supra* note 5 (courts' comments on the unhelpfulness of CERCLA's limited legislative history in construing the Act's vague provisions).

51. *See infra* notes 53-82 and accompanying text (discussing standards and scope of liability as construed by the courts).

52. Another important unresolved issue of CERCLA liability pertains to the liability of secured creditors. *See* United States v. Fleet Factors Corp., 901 F2d 1550, 1557 (11th Cir. 1990) (a secured creditor may incur CERCLA liability by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes), *cert. denied*, 111 S. Ct. 752 (1991); United States v. Mirabile, No. 84-2280, slip op. at 7 (E.D. Pa. Sept. 6, 1985) (mere financial ability to control waste disposal practices is not sufficient for imposition of liability).

### *1. Who May Be Liable*

CERCLA sets forth four categories of "persons"[53] who may be held liable for site response costs:[54] (1) Current owners and operators of a hazardous waste facility where there is a release or a threat of a release of hazardous substances;[55] (2) those who owned or operated the disposal facility at the time the leaking wastes were disposed of;[56] (3) generators of hazardous waste who arranged for disposal of waste that is leaking or threatening to leak;[57] or (4) those who accepted hazardous waste for transport to a facility from which there is a release or a threatened release.[58]

The statutory definitions of each category of potentially responsible parties are very broad,[59] and the courts have generally construed the definitions expansively.[60] For example, a lessee of

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53. CERCLA defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21) (1988).

54. *See supra* note 44 (expenses and other items included as response costs).

55. 42 U.S.C. § 9607(a)(1) (1988).

56. *Id.* § 9607(a)(2).

57. *Id.* § 9607(a)(3).

58. *Id.* § 9607(a)(4).

59. *See supra* notes 53, 55-58 and accompanying text (delineating the Act's categories of responsible parties). The definition of "owner or operator" under the Act is similarly broad:

> The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term 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 facility.

*Id.* §9601(20)(A) (1988).

60. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (holding a secured lender liable as an owner or operator notwithstanding an exemption for such lenders, noting that ambiguous statutory terms should be interpreted to favor liability to achieve CERCLA's remedial goals) *cert. denied*, 111 S. Ct. 752 (1991); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1380-81 (8th Cir. 1989) (construing broadly the scope of liability under section 107(a)(3) and noting that a liberal interpretation is consistent with CERCLA's overwhelmingly remedial statutory scheme); United States v. New Castle County, 727 F. Supp. 854, 864 (D.Del.

property has been held to be an "owner" when its sublessee operated a disposal facility on the property.[61] One court even held that a chemical firm that held title to a hazardous waste disposal site for one hour was not as a matter of law outside the reach of CERCLA's definition of responsible parties.[62] Current landowners are liable even if the toxic waste was disposed of before the landowner purchased the property.[63] Although neither legislative history nor the express language of CERCLA specifically provide for corporate officer liability, courts addressing the issue have had little difficulty in finding officers individually liable as operators under CERCLA.[64]

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1989) (noting that generally the cases have construed the term "operator" broadly).

61. United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1003 (D.S.C. 1984), *aff'd in part on other grounds, rev'd in part on other grounds sub nom.* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) *cert. denied,* 109 S. Ct. 3156 (1989).

62. United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,698, 20,699 (D.S.C. June 15, 1984) (court remanded for determination of the extent of defendant's control over the land, where defendant had acted as a conduit in a sale of the property on which the disposal site was based).

63. *See, e.g.,* New York v. Shore Realty Corp., 759 F.2d 1032, 1043-45 (2d Cir. 1985) (holding that a narrow definition of responsible parties, one that excluded successor owners of waste sites from liability, would too often place the only solvent parties connected with a waste site beyond the reach of CERCLA); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 577-80 (D. Md. 1986) (citing congressional intent as basis for narrowly construing the secured lender exemption, to hold a bank that purchased property at a foreclosure sale liable as an owner). *See also* 42 U.S.C. § 9601 (35)(A)-(B) (1988) (provision added by SARA which exonerates a buyer from liability if the buyer purchased without knowing that hazardous substances were present at the site following a good faith and diligent effort to determine whether such wastes were present). *But see* D. HAYES & C. MACKERRON, SUPERFUND II: A NEW MANDATE 29-30 (1987) (unlikely that many landowners will be able to satisfy evidentiary requirements of section 9601(35)(A)-(B)).

64. Courts generally have not pierced the corporate veil, but have instead relied on the plain meaning of the statutory terms "person" and "owner or operator," which they read as applying to officers. *See* United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985); Kelley *ex. rel.* Michigan Natural Resources Comm'n v. ARCO Indus. Corp., 723 F. Supp. 1214, 1217-20 (W.D. Mich. 1989); United States v. Northernaire Plating Co., 670 F. Supp. 742, 747 (W.D. Mich. 1987); United States v. Ward, 618 F. Supp. 884, 894 (E.D.N.C. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162, 190 (W.D. Mo. 1985); United States v. Mottolo, 605 F. Supp. 898, 913-14 (D.N.H. 1985); United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,698, 20,700 (D.S.C. June 15, 1984). *See generally* Comment, *Dissolving the Corporate Veil: Corporate Officer Liability for Response Costs Under the Comprehensive Environmental Response Compensation and Liability Act,* 17 TOL. L. REV. 923 (1986) [hereinafter Comment, *Corporate Officer Liability*]; Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What Are the Consequences?,* 38 MERCER L. REV. 677, 680, 686 (1987). In one case, however, the court held an individual disposal site owner-operator liable on multiple grounds, including derivative

### 2. *Standards and Scope of Liability*

CERCLA, as interpreted by the courts, imposes a standard of liability more sweeping than any the tort system has yet developed.[65] The courts have held that liability is strict,[66] retroactive,[67] and generally joint and several.[68] They have also

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liability from piercing the corporate veil. United States v. Mottolo, 695 F.Supp. 615, 623-24 (D.N.H. 1988) (finding that CERCLA's goal of corrective justice "would be frustrated if the mere act of incorporation were allowed to impede the recovery of response costs" and that "CERCLA places no importance on the corporate form[,]" citing "the absence of explicit statutory language addressing the effect of incorporation, the Act's strict liability scheme, and the broad and encompassing categories of potentially responsible parties . . ."). *See supra* notes 53 (definition of "person") and 59 (definition of "owner or operator") and accompanying text. *See also Northeastern Pharmaceutical*, 810 F.2d at 743 (holding that "Congress could have limited the statutory definition of 'person' but chose not to do so," and that "construction 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 disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme"). Many courts have avoided the general common law rule of limited liability applicable to corporate officers by applying a traditionally recognized exception: that a corporate officer is personally liable for corporate wrongful acts when the officer personally participates in the wrongful conduct. *See, e.g., Shore Realty*, 759 F.2d at 1052; *Northeastern Pharmaceutical*, 810 F.2d at 744; *Ward*, 618 F. Supp. at 894-95; *Conservation Chem.*, 619 F. Supp. at 187; United States v. Mottolo, 605 F. Supp. 898, 914 (D.N.H. 1985). However, in applying this exception, some courts have stretched the facts to support personal participation by the officer. *See, e.g., Ward*, 618 F. Supp. at 895 (finding that the personal participation requirement was met by a corporate president who had no knowledge of the illegal dumping but who had been personally involved in the decision to have a particular individual dispose of the hazardous waste); *Conservation Chem.*, 619 F. Supp. at 190 (finding the personal participation requirement satisfied by active participation by a corporate officer in the general management of a disposal facility); *ARCO Indus.* 723 F. Supp. at 1218 (predicating personal liability upon a corporate officer's authority to control the company's waste disposal practices, even in the absence of any active involvement or direct supervision of such activities). Holding corporate officers individually liable under CERCLA is particularly harsh in light of the Act's joint and several strict liability imposed retroactively on the basis of weak causation requirements: an individual who disposed of hazardous waste in full conformance with the then-applicable laws and regulations may alone bear the entire burden of extensive cleanup costs. *See* Comment, *Refining the Scoope of CERCLA's Veil-Piercing Remedy*, 6 STAN. ENVTL. L.J. 43, 69-75 (1986) [hereinafter *Refining the Scope*] (CERCLA's unprecedented features for imposing liability on individuals are inappropriately punitive).

65. Note, *Developments in the Law*, *supra* note 3, at 1542; Comment, *Deep Pocket*, *supra* note 45, at 298, 310-11.

66. *See infra* notes 70-73 and accompanying text (discussing the courts' holding that liability under CERCLA is strict).

67. *See infra* notes 76-78 and accompanying text (discussing the courts' holding that CERCLA liability is retroactive).

68. *See infra* notes 74-75 and accompanying text (discussing the courts' holding that liability under CERCLA may be joint and several).

interpreted CERCLA as imposing this liability without requiring definitive proof of causation.[69]

Except for very limited statutory defenses,[70] courts have consistently held that liability under CERCLA is strict.[71] While the statutory language contains no explicit standard of culpability,[72] the legislative history, though somewhat ambiguous,

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69. *See infra* notes 79-81 and accompanying text (discussing the courts' holding that CERCLA does not require definite proof of causation).

70. CERCLA section 107(b) states:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the dangers resulting therefrom were caused solely by:
>
> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of a third party other than an employee or agent of the defendant, or 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, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, 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; or (4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b) (1988). *See supra* note 63 (discussing "innocent purchaser" exemption added by SARA).

71. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985); United States v. Dickerson, 640 F. Supp. 448, 451 (D. Md. 1986); United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 843-44 (W.D. Mo. 1984) (rejecting defense of compliance with existing laws and exercising reasonable care at the time of disposal); United States v. Price, 557 F. Supp. 1103, 1113-14 (D.N.J. 1983) (pointing out that the due care defense would be meaningless without strict liability, that strict liability fits the goals of CERCLA to spread the costs and to force responsible parties to bear the cost, and that the fulfillment of these congressional goals was more likely to be effectuated if the defendants who allegedly contributed to the problem were held to a very stringent standard of liability).

72. CERCLA section 107(a) states simply that enumerated parties "shall be liable" for cleanup costs, leaving the standard of liability undefined. 42 U.S.C. § 9607(a) (1988). CERCLA section 101(32) provides that the standard of liability shall be that imposed under the Federal Water Pollution Control Act (FWPCA). *Id.* § 9601(32). However, the relevant language of the FWPCA mirrors that of CERCLA. *See* 33 U.S.C. § 1331 (1988) (FWPCA liability provision). Cases interpreting this provision have imposed strict liability. *See, e.g.*, United States v. LeBoeuf Bros. Towing Co., 621 F.2d 787, 789 (5th Cir. 1980); Steuart Transp. Co. v. Allied Towing Corp., 596

tends to support imposition of strict liability.[73] Similarly, in the absence of explicit statutory language but with some supporting legislative history,[74] courts have concluded that joint and several liability is appropriate under CERCLA when there is indivisible harm.[75]

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F.2d 609, 613 (4th Cir. 1979).

73. To secure sufficient votes for passage, CERCLA's sponsors deleted provisions in previous versions of the bill which explicitly set standards of strict liability and joint and several liability. Grad, *supra* note 20, at 19-22. A CERCLA sponsor, Senator Randolph, explained the compromise bill as follows:

> Unless otherwise provided in this act, the standard of liability is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act (33 U.S.C. § 1321). I understand this to be a standard of strict liability. It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law. An example is joint and several liability. Any reference to these terms have been deleted, and the liability of joint tort feasors will be determined under common or previous statutory law.

126 CONG. REC. 30,932 (1980).

74. Although Congress deleted a provision which would have held parties jointly and severally liable, this deletion has not been regarded as a rejection of that concept. *See id.* (remarks of Sen. Randolph indicating that the provision was deleted in order to leave the issue to be resolved by the courts through the common law of torts). However, in reauthorizing CERCLA by adopting SARA, Congress appears to have endorsed the imposition of joint and several liability where the harm is indivisible. H.R. REP. NO. 253(I), 99th Cong. 1st Sess. 58, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2840 (1986); H.R. REP. NO. 253 (III), 99th Cong. 1st Sess. 15, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3038; 132 CONG. REC. H9563 (daily ed. Oct. 8, 1986) (remarks of Rep. Dingell).

75. *See, e.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162, 214 (W.D. Mo. 1985); *Northeastern Pharmaceutical*, 579 F. Supp. at 844 (finding that "[a]lthough explicit reference to joint and several liability was deleted from the final enactment, . . . joint and several liability is at least permissible, if not mandated, under the facts of this case."); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983) (Congress deleted the joint and several liability provision in CERCLA to avoid creating a mandatory legislative standard that would be inappropriate in certain circumstances); United States v. Wade, 577 F. Supp. 1326, 1338 (E.D. Pa. 1983) (joint and several liability should be imposed upon responsible defendants, unless defendants establish that a reasonable basis exists for apportioning harm among them); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 994 (D.S.C. 1984). *But see* United States v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1255-57 (S.D. Ill. 1984) (a court may apportion liability even where the harm is indivisible); Allied Corp. v. Acme Solvents Reclaiming, Inc., 691 F. Supp. 1100, 1118 (N.D. Ill. 1988) (following the *A & F Materials* court's approach). Courts have almost invariably rejected defendants' arguments that harm could be divided, and thus liability apportioned, according to the relative volume of waste deposited at the site, since harm may be caused by the synergistic effects of the typical commingling at waste sites of a veritable potpourri of toxic fluids. *See* United States v. Monsanto Co., 858 F.2d 160, 172-73 (4th Cir. 1988) *cert. denied*, 109 S. Ct. 3156 (1989); O'Neil v. Picillo, 682 F.Supp. 706, 725 (D.R.I. 1988); United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987); *South Carolina Recycling*, 643 F. Supp. at 994-95; *Chem-*

Although CERCLA contains no explicit provision imposing retroactive liability, the Act's legislative history suggests that it should be so interpreted.[76] CERCLA was enacted to remedy environmental and public health hazards that had already been created.[77] Accordingly, courts have concluded that CERCLA allows imposition of liability on parties who disposed of hazardous substances before the effective date of the act.[78]

Courts have interpreted CERCLA as requiring only a very weak showing of causation to impose liability. Although the bill passed by the House of Representatives specified that parties could be held liable only if they had "caused or contributed to" a release of a hazardous substance,[79] the compromise bill adopted

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*Dyne*, 572 F. Supp. at 811. *But see* United States v. Ottati & Goss, Inc., 24 Env't Rep. Cas. 1152 (BNA) (D.N.H. 1986) (finding that the number of drums sent to a site by each generator constituted a reasonable basis for determining contribution to the harm). However, numerous courts have stated that volume, along with other factors, is relevant in apportioning damages in settlements or actions for contribution among responsible parties. *See, e.g.*, United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1045-46 (D.Mass. 1989), *aff'd.* 899 F.2d 79 (1st Cir. 1990); *Conservation Chem.*, 628 F. Supp. at 401; United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1905, 1910 (C.D. Cal. 1984).

76. *See supra* notes 2, 26 and accompanying text (discussing the impetus for enactment of CERCLA).

77. *See id.*

78. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Corp., Inc., 810 F.2d 726, 733, 737 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Shell Oil Co., 605 F. Supp. 1064, 1073 (D. Colo. 1985); State of Ohio *ex. rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1314 (N.D. Ohio 1983); United States v. A & F Materials Co., 578 F. Supp. 1249, 1257 (S.D. Ill. 1984); United States v. Price, 577 F. Supp. 1103, 112-13 (D.N.J. 1983); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1113 (D. Minn. 1982). Courts have rejected constitutional challenges to CERCLA's retroactivity under the due process, contract and takings clauses of the United States Constitution. *See Northeastern Pharmaceutical*, 810 F.2d at 733-34; United States v. South Carolina Recycling, Inc., 653 F. Supp. 984, 996-97 (D.S.C. 1984), *aff'd in relevant part sub nom.* United States v. Monsanto Co., 858 F.2d 160, 173-74 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989). *See generally* Note, *Developments in the Law*, *supra* note 3, at 1555-65 (discussing constitutional challenges to retroactive liability).

79. H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(1), 126 CONG. REC. 26,779 (1980). The committee report stated that:

> The Committee intends that the usual common law principles of causation, including those of proximate causation, should govern the determination of whether a defendant "caused or contributed" to a release or threatened release . . . . Thus, for instance, the mere act of generation or transportation of hazardous waste, or the mere existence of a generator's or transporter's waste in a site with respect to which cleanup costs are incurred would not, in and of itself, result in liability under section 3071.

eliminated this clause.[80] Most of the litigation on the causation issue has involved generators. The cases support the general proposition that for a producer of toxic waste to be liable under CERCLA all that is required is a showing that (1) the generator's waste was disposed of at the site, (2) hazardous substances present in the generator's waste are found at the site, and (3) there was a release or threat of release of any hazardous substance at the site causing the government to incur response costs.[81]

Together, the components of CERCLA's liability system function to extend liability not only to those parties directly responsible for the disposal of hazardous substances, but also to those with very remote connections to the site. The broad categories of potentially liable parties, weak causation requirements, and joint and several strict liability provisions tend to ensure that site response costs will be borne by a "responsible party" rather than by the Superfund.[82]

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H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 33 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6136.

80. *See* 126 CONG. REC. 31,969 (1980). *See also supra* note 72 and accompanying text (noting that the final version of CERCLA section 107 states simply that enumerated parties "shall be liable"); *supra* note 70 and accompanying text (noting that section 107 provides for very limited causation-based defenses).

81. *See* United States v. Wade, 577 F. Supp. 1326, 1332-34 (E.D. Pa. 1983) (rejecting the argument that in order for generators to be liable, the government must specifically prove that the hazardous material found at the site had its origins at the generator's plant and finding that to require the government to "fingerprint" each waste would "eviscerate" the statute and defeat congressional intent); *accord* United States v. Bliss, 667 F. Supp. 1298, 1309-10 (E.D. Mo. 1987); Violet v. Picillo, 638 F. Supp. 1283, 1291-93 (D.R.I. 1986); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 992-93 (D.S.C. 1984), *aff'd in relevant part sub nom.* United States v. Monsanto Co., 858 F.2d 160, 173-74 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989). Causation has been litigated in landowner liability cases as well. *See, e.g.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1152-56 (1st Cir. 1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985) (rejecting the argument that CERCLA required proof that the defendant landowner "caused" the potentially hazardous condition requiring cleanup).

82. *See infra* notes 292-336 and accompanying text (summmarizing the objectives furthered by CERCLA's liability scheme in connection with evaluation of alternative rules of decision to guide inquiries as to parent corporation liability under CERCLA).

## III. TRADITIONAL DOCTRINES OF PARENT CORPORATION LIABILITY UNDER STATE AND FEDERAL LAW

Neither explicitly addressed by CERCLA's text nor illuminated by legislative history are the circumstances under which a responsible party may be disregarded as a corporate entity and the responsible party's shareholders, either individuals or a parent corporation, may be held liable for site cleanup costs. To provide perspective for the consideration, in Part IV, of the different approaches taken to piercing the corporate veil or otherwise finding shareholders liable under CERCLA this part reviews the traditional corporate law doctrines which provide the basis for the piercing remedy and the manner in which the doctrines have been applied under federal and state law.

### *A. Rationale for the Tenet of Limited Liability*

The principle of limited liability of corporate shareholders remains a dominant characteristic of American corporate law.[83] Ordinarily, a shareholder's liability is limited to the amount of capital invested in or promised to the enterprise.[84] Beyond that, a corporate creditor has recourse only against the corporate entity incurring the liability, not against individual or corporate shareholders.[85]

Limited liability is based on the economic policy that shareholders should be encouraged to commit limited amounts of capital to an endeavor which might be too risky for direct individual involvement.[86] Although the significant role played by

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83. Baker v. Raymond Int'l, Inc., 656 F.2d 173, 179 (5th Cir. 1981).

84. *See* A. CONRAD, CORPORATIONS IN PERSPECTIVE § 270 (1976).

85. *See generally* H. BALLANTINE, CORPORATIONS, § 118, at 288 (rev. ed. 1946). "[A] corporation and its shareholders are not liable on each other's contracts. The immunity of the shareholders from corporate obligations is one of the most important incidents and advantages of the separate legal entity, and serves a useful purpose in business life." *Id.*

86. Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DENVER L.J. 1, 2 (1978). *See* Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 574-604 (1986) (describing the history and rationale of the development of limited liability in English common law and in the United States).

limited liability in the development of modern corporations and in the expansion of industry was generally conceded in the early part of this century,[87] a number of scholars in recent years have questioned the economic value and social utility of limited liability.[88] The necessity and appropriateness of limited liability has been subjected to especially pointed criticism when the doctrine serves to protect a parent corporation from liability for the obligations of its subsidiary.[89] One authority concludes that while limited liability serves valuable purposes for the ultimate investor by creating a more efficient economic system, most of these advantages are valid only when limited liability is interposed for protection of the ultimate investor.[90]

### *B. Common Law Formulations and Applications of the Doctrine of Piercing the Corporate Veil*

Notwithstanding the criticisms leveled at limited liability, the concept remains fundamental to American corporate law.[91] However, the doctrine is not absolute. In certain cases where the rule of limited liability would promote injustice among the parties, courts exercise their equity power to disregard the corporate entity and "pierce the corporate veil,"[92] holding individual or parent

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87. *See* Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929) ("no one would claim that the availability of limited liability played an insignificant part in the expansion of industry and in the growth of trade and commerce. It has had a potent influence"); Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 262-63 (1967) (the modern publicly held corporation with many small shareholders could not exist without limited liability).

88. *See* Blumberg, *supra* note 86, at 616-30; Meiners, Mofsky and Tollison, *Piercing the Veil of Limited Liability*, 4 DEL. J. CORP. L. 351, 352, 363 (1979); Landers, *A Unified Approach to Parent, Subsidiary, and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589, 617-28 (1975). *See generally* Halpern, Trebilock and Turnbull, *An Economic Analysis of Limited Liability in Corporation Law*, 30 U. TORONTO L.J. 117 (1980).

89. *See* Blumberg, *supra* note 86, at 616-30.

90. *Id.* at 575-76. Blumberg finds that limited liability raises serious concerns because it enables the enterprise to externalize its costs. *Id.* at 576.

91. Krendl & Krendl, *supra* note 86, at 2.

92. *See* H. BALLENTINE, *supra* note 85, § 122 at 292-93. "[T]he courts place limitations upon th[e] [separate corporate entity] privilege . . ." based on a "study of the just and reasonable limitations upon the exercise of the privilege of separate capacity under particular circumstances in view of its proper use and functions. If the separate corporate capacity is perverted to dishonest uses,

corporation shareholders personally liable for the debts of the corporate enterprise.[93]

Although the black letter rule of limited shareholder liability can be stated with precision, the same cannot be said with regard to the piercing doctrine.[94] Perhaps because disregarding the corporate fiction is an equitable remedy[95] the use of which is highly fact-specific, the courts have inconsistently and sometimes unclearly determined how and when to pierce the veil.[96] Case opinions in which shareholders have been found liable for corporate obligations are replete with unhelpful rhetoric and metaphors such as "mere instrumentality," "alter ego," "dummy," or "dry shell," which do little more than state conclusions.[97] As a consequence, formulations of the veil-piercing

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as to evade obligations or statutory restrictions, the courts will interpose to prevent the abuse." *Id.*

93. It should be noted that there are other legal remedies or theories aside from piercing the corporate veil which would achieve the same end of holding shareholders liable for the debts of the corporate entity. These include agency, fraud, estoppel, contract or quasi-contract theories such as unjust enrichment. Krendl & Krendl, *supra* note 86, at 3-6 and (discussing these alternative bases for relief). The distinction between agency theory and a piercing the corporate veil theory has posed particular difficulties for scholars and judges alike. *See id.* at 3 n.9 (citing Judge Learned Hand's "sensible distinction" in *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265, 267 (2d Cir. 1929), that express agency would not provide a remedy because the consensual element would be lacking, and that implied agency would be inappropriate because that would mean that the veil would be pierced in every situation); Note, *Liability of a Corporation for Acts of a Subsidiary or Affiliate*, 71 HARV. L. REV. 1122, 1123-24 (1958) [hereinafter *Liability of a Parent Corporation*]; Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 983-84 (1971); Downs, *Piercing the Corporate Veil -- Do Corporations Provide Limited Personal Liability?*, 53 UMKC L. REV. 174, 190-91 (1985) (distinction between instances when a shareholder controls a corporation so as to justify piercing its veil, and those in which a true agency relationship exists).

94. Note, *Liability of a Parent Corporation*, *supra* note 93, at 1123-24; Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 853-55 (1982) [hereinafter *Alter Ego Doctrine*].

95. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS, § 146, at 346 (3rd ed. 1983); 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.25, at 426 (rev. perm. ed. 1983).

96. Krendl & Krendl, *supra* note 86, at 7. *See* National Bond Fin. Co. v. General Motors Corp., 238 F. Supp. 248, 256 (W.D. Mo. 1964) (noting that the cases "simply lay down broad principles to guide the courts and the decision of each individual case rests almost completely upon the facts of that case"). *See generally* H. BALLENTINE, *supra* note 85, at 293. "There is no general formula for all cases such as 'alter ego' or 'instrumentality.' Each situation must be considered by the courts on its merits". *Id.*

97. *See* Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926). In *Berkey*, Justice Cardozo stated that the "whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphor. Metaphors in law are to be

doctrine vary among the states.[98] This variability, along with inconsistent application of the same rule within a given jurisdiction, has created difficulties for lawyers and their clients in predicting the outcome of challenges to the corporate entity.[99] Moreover, as discussed in the following section, the uncertainty is compounded in federal question cases such as those involving the interpretation of CERCLA because it is frequently unclear whether state law or a uniform federal rule of decision is to be used.[100]

Two somewhat different formulations of the piercing rule predominate in the case law. One, a two-prong test, is to a large extent a more generalized version of the second, a three-part inquiry.

### *1. The General Two-Prong Rule*

Under the more general formulation of the rule, two basic requirements must be satisfied to disregard the corporate entity. First, there must be such unity of interest and ownership that the separate personalities of the corporation and the shareholders no longer exist, and second, observance of the corporate form under the circumstances of the case would permit fraud or injustice.[101]

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narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Id. See also* Baker v. Raymond Int'l., Inc., 656 F.2d 173, 179 n.5 (5th Cir. 1981) (noting that "[t]hese gnomic phrases . . . describe results, but not the reasoning that leads to those results; they tell us nothing about the basis for imposition of liability"); H. HENN & J. ALEXANDER, *supra* note 95, § 146, at 344 and n.2 (observing that the "judicial opinions indulge in verbal characterizations, epithets and metaphors . . ."); H. BALLENTINE, *supra* note 85, at 293. "The figurative terminology and formulae as to disregard of fictions invoked by the judges often obscure the real issues . . . . There is no general formula for all cases such as 'alter ego' or 'instrumentality.'" *Id.*

98. 1 W. FLETCHER, *supra* note 95, § 41, at 388.

99. Downs, *supra* note 93, at 175. *See* Ballentine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, 15 (1925) (referring to this area of the law as a "legal quagmire"). *See also* Krendl & Krendl, *supra* note 86, at 7 (noting that the courts "reluctantly, inconsistently and sometimes unclearly determine how and when to pierce").

100. *See infra* notes 146-149 and accompanying text (discussing split of authority as to whether state law or federal common law should apply in federal question cases).

101. 1 W. FLETCHER, *supra* note 95, § 41.30, at 428. The general rule has also been stated in terms indicating that the corporation as a separate legal entity is a legal theory that exists for "convenience and to serve the ends of justice" and the courts "decline to recognize [the corporate entity] whenever recognition would . . . extend the principle of incorporation 'beyond its legitimate purposes and [would] produce injustices or inequitable consequences.'" DeWitt Truck Brokers, Inc.

The first prong may be satisfied by a showing that the shareholders dominate and control the corporation.[102] The second prong is less well-defined,[103] and allows courts to apply their equity powers flexibly, on a case-by-case basis, to do justice to injured creditors.[104]

### 2. *The Three-Prong Rule*

The other common formulation of the veil-piercing doctrine is a three-part test[105] which requires a showing of: (1) Control by the shareholders of the corporation, amounting to complete domination of finances, policy and business practice with respect to the transaction attacked such that the corporate entity as to this transaction had no separate will or existence of its own; and (2) such control was used to commit a fraud or wrong which (3) proximately caused plaintiff's injury.[106]

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v. W. Ray Flemming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976) (quoting Krivo Industrial Supply Co. v. National Distillery & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973)). An even more general formulation of the test used in some of the early cases dispensed, at least explicitly, with the first prong. It provided that the corporate entity will be disregarded when to hold otherwise would promote fraud, illegality or injustice or would defeat public policy. *See, e.g.*, United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (E.D. Wis. 1905).

102. Institute of Veterinary Pathology, Inc. v. California Health Laboratories, Inc., 116 Cal. App. 3d 111, 119, 172 Cal. Rptr. 74, 77-78 (1981); Note, *Alter Ego Doctrine*, *supra* note 94, at 854. *See infra* notes 107-112 and accompanying text (discussing the control prong in the three-part test).

103. Note, *Alter Ego Doctrine*, *supra* note 94, at 855.

104. Downs, *supra* note 102, at 175-76; Gillespie, *The Thin Corporate Line: Loss of Limited Liability Protection*, 45 N.D. L. REV. 363, 404-06 (1968).

105. Downs, *supra* note 93, at 190 (case law in Missouri demonstrates that the courts use a three-prong test: (1) shareholder must exercise actual control over the actions of a corporation; (2) the corporation must be used as a tool to promote fraud, injustice, or illegality; and (3) the misuse of the corporate structure must in fact cause the harm to the person seeking to pierce the corporate veil); 13A W. FLETCHER, CYCLOPEDIA OF PRIVATE CORPORATIONS § 6222, at 68 (rev. perm. ed. 1984). "[T]he three elements involved are: (1) control of the subsidiary corporation, (2) fraud or wrong of the parent corporation with respect to the creditor of the subsidiary or the person injured by such subsidiary, and (3) unjust loss or injury to the creditor or the person injured; and the basis for abrogating the normal immunity of stockholders in such cases is an abuse of the privilege to do business in a corporate form, or in other words, an abuse upon the law." *Id.*

106. Lowendahl v. Baltimore & Ohio R.R. 247 App. Div. 144, 157, 287 N.Y.S. 62, 76, (1936) *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936). *Lowendahl* is a leading case adopting the three-prong test, which was based on Frederick J. Powell's examination of the early cases. *See* F. POWELL, PARENT AND SUBSIDIARY CORPORATIONS (1931).

### *a. Control or Instrumentality*

To satisfy the essence of the first prong, the plaintiff must prove that the subsidiary or other subservient corporation was not operated in a legitimate fashion, but instead functioned under the domination and control of the parent corporation to serve the parent's purposes.[107] Such domination must be something substantially more than the control which would be exercised by any majority shareholder, otherwise every corporation would be automatically subject to having its veil pierced.[108] The cases typically cite a laundry list of some eleven factors which may indicate that the subsidiary is a mere instrumentality.[109] Although widely cited in support of piercing decisions, these factors have

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107. Krendl & Krendl, *supra* note 86, at 16. *See* H. BALLENTINE, *supra* note 85, § 136, at 313 (shareholder must control and manipulate the corporation for its own purposes); 2 W. FLETCHER, *supra* note 95, § 43, at 472-73 (stating that "[f]or the parent to be held liable for the subsidiary's acts this control must be actual, participatory and total").

108. Krendl & Krendl, *supra* note 86, at 16. *See* 13A W. FLETCHER, *supra* note 105, § 6222, at 68-69. According to Fletcher, "the exercise of some degree of supervision by a parent corporation over its wholly owned subsidiary is not sufficient in itself to render the subsidiary the parent's instrumentality or alter ego, where participation in the subsidiary's affairs does not amount to the domination of day-to-day business decisions. In other words, a showing of complete domination of the finances and business practices is necessary to sustain application of the instrumentality rule, and mere proof of a parent corporation's potential to control or dominate its subsidiary is insufficient." *Id. See also* Downs, *supra* note 93, at 192 (stating that in Missouri the type of control which is required by a court as a prerequisite to piercing is actual and pervasive, not merely potential or incomplete). *But see* Douglas & Shanks, *supra* note 87, at 204 (suggesting that if the parent has reserved to itself the right of direct interference in the subsidiary's affairs, it is fair to hold it liable).

109. *See, e.g.*, Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 161 (7th Cir. 1963); Bernardin, Inc. v. Midland Oil Corp., 520 F.2d 771, 775 (5th Cir. 1975). These eleven circumstances were taken from Powell and are as follows: (1) The parent corporation owns all or most of the capital stock of the subsidiary; (2) the parent and subsidiary corporations have common directors or officers; (3) the parent corporation finances the subsidiary; (4) the parent corporation subscribes to all of the capital stock of the subsidiary or otherwise causes its incorporation; (5) the subsidiary has grossly inadequate capital; (6) the parent corporation pays the salaries and other expenses or losses of the subsidiary; (7) the subsidiary has substantially no business except with the parent corporation, or no assets except the ones conveyed to it by the parent corporation; (8) in the papers of the parent corporation or in the statements of the officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own; (9) the parent corporation uses the property of the subsidiary as its own; (10) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary, but take their orders from the parent corporation in the latter's interest; and (11) the formal legal requirements of the subsidiary are not observed. F. POWELL, *supra* note 106, at 9.

also been criticized as being conclusory[110] and an unpatterned mingling of relevant and neutral factors, which have stymied constructive analysis of the field.[111] Accordingly, it has been suggested that it is preferable to consider these factors as indicia which need not be present to pierce, but which may tend to establish that the subsidiary is not really a separate and independent entity but a mere instrumentality of the parent.[112]

*b. Improper Purpose or Wrong*

As a general rule, the fact that one corporation holds controlling stock ownership and voting power in another, and even has directors and executive officers in common, will not alone be sufficient to impose liability upon the dominant corporation.[113] The critical element of most piercing cases, explicitly or implicitly, is the second prong of the piercing test: The controlling shareholder's use of control for such an improper purpose that equity requires the abrogation of limited immunity of the corporation's shareholders.[114] Wrongful exercise of this control can be classified into three principal categories:[115] violations of

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110. Krendl & Krendl, *supra* note 86, at 17.

111. Dobbyn, *A Practical Approach to Consistency in Veil-Piercing Cases*, 19 KAN. L. REV. 185, 188 (1971).

112. Krendl & Krendl, *supra* note 86, at 17.

113. H. BALLENTINE, *supra* note 85, § 137, at 314.

114. *See, e.g.*, National Bond Fin. Co. v. General Motors Corp., 238 F. Supp. 248, 258 (W.D. Mo. 1964) (refusing to pierce because although General Motors exercised total control over the dealership corporation, these actions were taken for the proper business purpose of protecting its investment), *aff'd*, 341 F.2d 1022 (8th Cir. 1965); May Dep't Stores Co. v. Union Elec. Light & Power, 341 Mo. 299, 310, 107 S.W.2d 41, 55 (1937). The court stated that "[m]en have the right to use legal forms which they believe to be helpful in accomplishing proper purposes. The question should not be merely 'instrumentality,' but 'instrumentality for what purpose.'" *Id. See also* Krendl & Krendl, *supra* note 86, at 18 (arguing that the use of a corporation as a mere instrumentality should not give third parties a license to pursue a controlling shareholder unless some actual fraud or other injurious act can be proven); 2 W. FLETCHER, *supra* note 95, § 41.20 at 413-14 (noting that the corporate entity will not be disregarded where there is no fraud or wrong to be avoided).

115. 1 W. FLETCHER, *supra* note 95, § 41.30, at 428, 430; Krendl & Krendl, *supra* note 86, at 28. Krendl and Krendl note that another type of improper purpose or factor which courts often mention is the failure of the corporation to engage in proper formalities (such as holding annual meetings and keeping minutes of meetings). *Id.* at 28 n.98. Piercing on this ground has been criticized as theoretically unsound. *See, e.g., id.*; Note, *Liability of a Parent Corporation*, *supra* note 93, at 1126; Downs, *supra* note 93, at 176-77, 196 (in tort cases, failure of corporation to comply

public policy including evasion of statutes;[116] misrepresentation;[117] and lack of economic substance.[118]

### *c. Relationship Between Injury and Defendant Shareholder's Actions in Controlling Corporation*

The third prong of the piercing rule, that the injury to the plaintiff was caused by or related to[119] the defendant

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with usual formalities has nothing to do with a claimant's inability to collect a judgment).

116. *See* United States v. Ira S. Bushey & Sons, Inc., 363 F. Supp. 110, 119 (D. Vt. 1973) (piercing the veil of some 40 subsidiaries, each of which owned a vessel, to enjoin the parent from failing to comply with regulations intended to prevent oil spills), *aff'd.* 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

117. *See* My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 614-15, 233 N.E.2d 748, 749-50 (1968) (where defendant's subsidiaries had purchased products from plaintiff, the court held the parent liable for the claims against its subsidiaries upon a showing by plaintiff that the affiliated corporations used a common name, operated out of the same office, and otherwise caused confusion to the parties dealing with them as to the identity of the responsible corporation).

118. This category encompasses a number of types of wrongs to a corporation's creditors. A principal example is undercapitalization, defined as setting up a new corporation with capital that is clearly inadequate for the needs of the business. *See* Minton v. Cavaney, 56 Cal. 2d 576, 579, 364 P.2d 473, 475, 15 Cal. Rptr. 641, 643 (1961) (holding that gross undercapitalization by itself is sufficient to disregard the corporate entity). Courts generally are more willing to pierce where inadequate capitalization is a factor and the plaintiff is a tort creditor. *See* Mull v. Colt Co., 31 F.R.D. 154, 164-65 (S.D.N.Y. 1962) (stating that "[c]ourts will not tolerate arrangements which throw all the risks on the public and which enable stockholders to reap profits while being insulated against losses"). Another type of wrong in this category is siphoning of the assets of the corporation by the controlling shareholder. *See Ira S. Bushey*, 363 F. Supp. at 112 (veil pierced where net profits of all subsidiaries remitted to parents through dividends). *See generally* Note, *Liability of a Parent Corporation*, *supra* note 93, at 1129 (discussing inadequate capitalization as the basis for liability). A related type of wrong occurs when a corporation is deliberately operated unprofitably or is established to do business exclusively with the dominant party, such that all of the profits of the transaction are reaped by the dominant party. *See* United States v. Reserve Mining Co., 380 F. Supp. 11, 17 (D. Minn. 1974), *aff'd. in relevant part* Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 534 (8th Cir. 1975). *See also* Bartle v. Home Owners Cooperative, Inc., 309 N.Y. 103, 107, 127 N.E. 2d 832, 834 (1955) (Van Vorhis, J., dissenting) (arguing that the defendant should be liable because it structured its subsidiary so that the subsidiary could not make a profit).

119. Krendl and Krendl argue that the *Lowendahl* formulation of the rule, which is put in terms of "wrongful acts resulting from the parent's domination being the proximate cause of plaintiff's loss" is too restrictive a rule. Krendl & Krendl, *supra* note 86, at 27 and n.93, 40-41 (citing cases in which courts have pierced where it may not have been possible to prove that the defendant's control directly caused plaintiff's injury, but in which "some knowing or cooperative effort between the related parties which results in unjust injury to the plaintiff" was shown). *But see* H. BALLENTINE, *supra* note 85, § 137, at 314 (stating that "[i]n order to hold a parent corporation or affiliate liable, special circumstances must be shown such as actual agency, estoppel, confusion of affairs, or such abuse of control that an unjust loss or injury will be suffered by the complainant as

shareholder's control of the corporation, is dispensed with in some courts' formulations of the piercing test.[120] However, commentators have argued that this element of the rule is both morally and logically correct, in that this element supports the strong policy of limited liability and offers some assurance that the plaintiff has standing to complain, thereby discouraging frivolous claims.[121]

### 3. *Flexible Application of the Piercing Rule*

Notwithstanding the preceding review of the general two and three prong rules, review of their application and the decisions in which the piercing remedy has been granted reveals that the "rules" are in fact not hard and fast ones.[122] Although the three-part rule[123] is solidly grounded in case law, the rule represents a composite of factors considered by courts.[124] Some courts rely on only one or two of the three factors.[125] Other courts seem to require greater or lesser showings of control, wrongdoing or causal

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a result of intervention or manipulation").

120. *See* FMC Fin. Corp. v. Murphree, 632 F.2d 413, 421-22 (5th Cir. 1980); Automotriz Del Golfo De Cal. S.A. De C.V. v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957). However, the second element of the two-prong test is usually stated in terms such as "circumstances must indicate that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." 1 W. FLETCHER, *supra* note 95, § 41.30, at 428. This prong thus would seem to implicitly incorporate the notion of some sort of causal relationship between the defendant controlling shareholder and the plaintiff's injury, since presumably justice would not require abrogation of limited corporate liability unless such a connection were established.

121. Krendl & Krendl, *supra* note 86, at 27-28.

122. *See* 2 W. FLETCHER, *supra* note 95, § 41.30, at 430-32. "No precise formula is available to predict when a court should disregard the corporate entity, each case being sui generis .... Some courts have followed a liberal policy of applying the alter ego doctrine when the equities of the situation call for its application rather than restricting the doctrine to the technical niceties depending upon pleading and procedure." *Id.*

123. *See supra* notes 105-106 and accompanying text (discussing the elements and origins of the three-prong rule).

124. 1 W. FLETCHER, *supra* note 95, § 41.30, at 430 (stating that the appearance and the importance of any single factor or combination of factors varies with the circumstances of each case).

125. *See infra* notes 129-131 and accompanying text (discussing cases in which courts relied on one or two of the three prongs). *See also supra* note 120 and accompanying text (decisions to pierce which omit explicit findings of a causal relationship between defendant shareholder and plaintiff's injury).

relationship, depending on policy considerations.[126] For example, because the policy of limited liability may be intended to protect only the ultimate investor,[127] a number of courts, at least implicitly, relax evidentiary requirements under the general three-part rule, or even apply a different test altogether, when the defendant shareholder is a corporation rather than an individual.[128]

Decisions to pierce relying primarily, if not solely, on the first prong of the test are not unprecedented.[129] Although this approach has been criticized,[130] it appears to be sanctioned in at least some formulations of the piercing rule.[131] Policy considerations may determine what degree of improper purpose by the shareholder of the corporation will be required to satisfy the second prong.[132] One commentator has observed that a very substantial breach of some important public policy by use of the subservient corporation may cause the veil to be pierced almost without regard to other factors.[133]

Considerations of policy and fairness are reflected in the courts' greater willingness to abrogate corporate limited liability in favor of a plaintiff seeking to hold a parent corporation, as

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126. *See infra* notes 132-133 and accompanying text (discussing the courts' consideration of substantive policy in applying the piercing doctrine).

127. *See supra* notes 86-90 and accompanying text (describing the rationale for limited liability and criticisms of it when applied to shield parent corporations).

128. *See infra* notes 134-139 and accompanying text (discussing how courts tend to be more willing to pierce the corporate veil when the defendant is a parent corporation as distinguished from an individual, ultimate investor).

129. *See* Gentry v. Credit Plan Corp., 528 S.W.2d 571, 573-75 (Tex. 1975); Chatterley v. Omnico, Inc., 26 Utah 2d 88, 485 P.2d 667, 670 (1971). *See generally* 1 W. FLETCHER, *supra* note 95, §43, at 472 (suggesting that satisfaction of the control prong, for example, by a finding that a corporation is a mere instrumentality, is sufficient grounds for disregarding the corporate entity).

130. *See* Downs, *supra* note 93, at 180 (arguing that "[i]t is difficult to accommodate the judicial focus on domination and control by one or a few shareholders with the legislative approval of such entities").

131. *See* 1 W. FLETCHER, *supra* note 95, § 43, at 472 (stating that "[a] very numerous and growing class of cases disregard the corporate entity where it is so organized and controlled, and its affairs are so conducted, that it is merely an instrumentality, agency, conduit or adjunct of another corporation"); H. HENN & J. ALEXANDER, *supra* note 95, § 147, at 353 (even absent illegitimate purposes, if business is not conducted on a corporate rather than a personal basis, courts have disregarded the corporate privilege of limited liability of closely-held corporations).

132. *See* Hamilton, *supra* note 93, at 1002, 1007-08; Krendl & Krendl, *supra* note 86, at 43.

133. Krendl & Krendl, *supra* note 86, at 47.

distinguished from an individual controlling shareholder, liable for an obligation.[134] Here the policy considerations are not limited to those of the underlying substantive law, but rather relate primarily to the specific purpose for which the corporation was formed, as well as to the general purposes for which the privilege of limited liability was originally created.[135] Courts may recognize that there is less economic or other policy justification for providing multiple-limited liablity insulation to a corporation that wishes to segregate high risk activities in a subsidiary than there would be for an individual shareholder or a group of individuals who wished to take advantage of the corporate limited liability feature.[136] While it may be economically necessary to provide limited liability as an inducement to obtain needed investment capital for new corporations, it is not clear that limited liability for subsidiary corporations is necessary to encourage existing corporations to enter into new and perhaps riskier businesses.[137] Moreover, allowing creditors to reach the assets of parent corporations does not create unlimited liability for any individual.[138] Courts piercing on this basis may be viewing the intertwined affairs of the separate corporations as evidence that the corporations constitute a single economic enterprise, the combined assets of which should be made available to satisfy creditors of each of the working units.[139]

Thus, the courts tend not to apply the three-part piercing rule, or any variation thereon, in a rigid or consistent manner. Satisfying the three-part test is largely a question of fact and not of law.[140] In addition, policy considerations, relating to both the substantive

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134. *See* Easterbrook & Fishel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 110-11 (1985); Hamilton, *supra* note 93, at 992; Krendl & Krendl, *supra* note 86, at 43-44.

135. *See supra* notes 86-90 and accompanying text (discussing the rationale for the doctrine of limited liability).

136. Krendl & Krendl, *supra* note 86, at 44.

137. *Id.*

138. Easterbrook & Fischel, *supra* note 134, at 111.

139. *See* Note, *Liability of a Parent Corporation*, *supra* note 93, at 1131. *See generally* Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 313 (1947) (arguing that where the corporate entity is challenged, its existence, extent and consequences may be determined by the actual existence and extent and operations of the underlying enterprise, which by these very qualities acquires an entity of its own).

140. Note, *Alter Ego Doctrine*, *supra* note 94, at 855.

underlying law and the nature and objectives of the corporate entity, figure prominently in the courts' applications of the equitable remedy of abrogating the privilege of limited corporate liability.[141]

### *C. Standards for Piercing the Veil in Federal Question Litigation*

The uncertainty as to the standards for parent corporation liability is compounded by a split of authority as to whether state law or federal common law should apply in federal question cases such as those involving CERCLA.[142] Moreover, even among courts deciding to apply federal common law, it is often unclear what rule of decision will be applied in any given case.[143]

Federal courts are authorized to formulate federal common law in cases arising under federal statutes.[144] When a federal statute includes guidelines for disregarding the corporate entity, courts must enforce the federal guidelines in lieu of conflicting state standards.[145] On the other hand, if the statute contains no express standard and the legislative history is silent on the point, courts must choose between adopting state law or federal common

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141. *See supra* notes 134-139 and accompanying text (discussing the courts' consideration of policy in applying the piercing remedy).

142. *See infra* notes 145-149 and accompanying text (discussing the factors courts consider in determining whether to apply state law).

143. *See infra* notes 150-160 and accompanying text (discussing factors the courts consider in adopting a rule of decision once a decision has been made to apply federal common law in a piercing inquiry).

144. United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979) (federal law governs questions involving the rights of the federal government under federal programs); Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943) (federal courts may develop federal common law to govern matters affecting the rights of the federal government). *See generally* Field, *Sources of the Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Friendly, *In Praise of Erie--And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-22 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

145. Anderson v. Abbott, 321 U.S. 349, 364-65 (1944) (refusing to apply Delaware alter ego law which would have insulated shareholders and instead piercing the veil of a corporation on the basis of federal statutory guidelines). *See* Note, *Alter Ego Doctrine*, *supra* note 94, at 856.

law.[146] If state law does not contradict the federal statute at issue, the federal courts will often apply the state law as the rule of decision.[147] Short of outright conflict between federal and state law, other courts balance the extent to which federal interests are better served by adopting a uniform federal rule against the relative strength of the state interest in having its rule applied.[148] Factors especially relevant in weighing state and federal interests include: (1) Whether application of state law would frustrate specific objectives of a federal program; (2) the need for national uniformity; and (3) the extent to which a federal rule would disrupt commercial relationships predicated on state law.[149]

Once a court has determined that a uniform federal rule of decision should be applied, the content of that rule must be ascertained. The federal common law formulation of the veil-piercing doctrine is at least as amorphous as state law.[150] Many federal courts simply apply the two-prong state common law

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146. Note, *Alter Ego Doctrine, supra* note 94, at 857-58. Those courts which routinely apply state law do so surmising that Congress presumably was aware of state law standards and could have preempted them. *Id.* This approach has been criticized on the grounds that such "silence . . . in federal legislation is no reason for limiting the reach of federal law [because] the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973). If federal courts fail to exercise this responsibility, application of federal law would vary among forums states. Note, *Alter Ego Doctrine, supra* note 94, at 858. "To prevent this subordination of federal law, most federal courts have not deferred to state law in the absence of express statutory standards; instead they have resolved corporate veil questions under federal common law." *Id.*

147. *See* 28 U.S.C. § 1652 (1988) (Rules of Decision Act); Note, *Alter Ego Doctrine, supra* note 94, at 859.

148. Georgia Power Co. v. Sanders, 617 F.2d 1112, 1118 (5th Cir. 1980); Southern Pacific Transportation Co. v. United States, 462 F. Supp. 1193, 1208 (E.D. Cal. 1978). The presumption under federal common law that state law should apply is particularly strong in fields traditionally regulated by the states, such as corporate law. Note, *Alter Ego Doctrine, supra* note 94, at 862. "According to the 'internal affairs doctrine' of corporate law, a corporation's internal affairs should be regulated by the law of the state of incorporation, but external affairs may be governed by other law, such as that of the forum." *Id.*

149. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979). *See* Comment, *Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?*, 13 PAC. L.J. 1245, 1249-50 (1982) (identifying additional factors considered by the courts).

150. Note, *Alter Ego Doctrine, supra* note 94, at 859-60.

doctrine: unity of interest and injustice in the particular situation.[151] Other courts have used an even more general formulation of the piercing rule allowing for the disregard of the corporate entity in the interests of public convenience, fairness and equity.[152]

Many courts and commentators have criticized the routine adoption by federal courts of the general state common law piercing rule because state law may be inadequate to enforce specific policies underlying federal statutes.[153] Accordingly, a number of courts have altered the traditional corporate law test by modifying the control/unity of interest and the improper purpose/inequity prongs to accommodate statutory objectives.[154]

The first prong of the test is modified to reflect the type and degree of control over a corporate defendant required by the policy of the applicable federal statute.[155] To prevent interference with federal statutory objectives, courts have found a lesser degree of control sufficient to disregard the corporate entity than would typically be required under the traditional doctrine. For example, courts have held the control prong to have been satisfied where control by the parent was exercised indirectly even in the absence of ownership.[156] Similarly, control has been presumed where the

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151. *See* DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 684-87 (4th Cir. 1976); Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 637-38 (8th Cir. 1975); G.M. Leasing Corp. v. United States, 514 F.2d 935, 939-40 (10th Cir. 1975); Delchamps, Inc. v. Borkin, 429 F.2d 417, 418-19 (5th Cir. 1970); Zubik v. Zubik, 384 F.2d 267, 272-75 (3d Cir. 1967). *See also supra* notes 101-104 and accompanying text (discussing the two-pronged piercing test).

152. *See* Taylor v. Standard Gas & Elec. Co., 306 U.S. 307, 322 (1939); Chicago, Milwaukee & St. P. Ry. v. Minneapolis Civic & Commerce Ass'n, 247 U.S. 490, 500-01 (1918); Capital Tel. Co. v. Fed. Communications Comm'n, 498 F.2d 734, 738 (D.C. Cir. 1974).

153. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979); Capital Tel. Co. v. Fed. Communications Comm'n., 498 F.2d 734, 738 (D.C. Cir. 1974); Bowater S.S. Co. v. Patterson, 303 F.2d 369, 372 (2d Cir. 1962), *cert. denied*, 371 U.S. 860 (1962). *See also* Note, *Alter Ego Doctrine*, *supra* note 94, at 864-65.

154. *See* Coca-Cola Co. v. Int'l Tel. & Tel. Corp., 201 U.S.P.Q. (BNA) 424 (N.D. Ga. 1978); Koscot Interplanetary, Inc., 86 F.T.C. 1106, 1153-55 (1975), *aff'd mem. sub nom.* Turner v. FTC 580 F.2d 701 (D.C. Cir. 1978); Note, *Alter Ego Doctrine*, *supra* note 94, at 866.

155. Note, *Alter Ego Doctrine*, *supra* note 94, at 866.

156. United States v. Cartwright, 632 F.2d 1290, 1293 (5th Cir. 1980); Establissement Tomis v. Shearson Hayden Stone, Inc., 459 F. Supp. 1355, 1366 n.13 (S.D.N.Y. 1978); Note, *Alter Ego Doctrine*, *supra* note 94, at 866-67.

parent knew of a federal violation and could have prevented it, or where the parent benefited from the violation.[157]

More significant is the refinement to the second and third prongs. Instead of requiring deliberate use of the corporate form for an improper purpose which caused the plaintiff injury,[158] these prongs are satisfied where recognizing the corporate entity would "defeat a legislative policy, whether that was the aim or only the result of the arrangement."[159] In determining whether to disregard the corporate entity under this approach, "federal courts will look 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."[160]

## IV. PARENT CORPORATION LIABLITY UNDER CERCLA: THE CASE LAW

In view of the vague language and ambiguous legislative history of CERCLA's liability provisions and the similarly nebulous formulations and applications of the piercing doctrine under state corporate and federal common law, it is not surprising that the courts' consideration of parent corporation liability under

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157. Cody v. Community Loan Corp. of Richmond County, 606 F.2d 499, 506 n.13 (5th Cir. 1979), *cert. denied*, 446 U.S. 988 (1980); P.F. Collier & Son Corp. v. Fed. Trade Comm'n, 427 F.2d 261, 270 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970); Note, *Alter Ego Doctrine*, *supra* note , at 867.

158. *See supra* notes 113-121 and accompanying text (discussing the second and third prongs of the traditional state common law piercing test).

159. Anderson v. Abbott, 321 U.S. 349, 363 (1944). The Court refused to apply the Delaware test for piercing the corporate veil because "no state may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy . . . which Congress has announced." *Id.* at 365. *See also* United States v. Pisani, 646 F.2d 83, 88-89 (3d Cir. 1981); United States v. Normandy House Nursing Home, Inc., 428 F. Supp. 421, 424-25 (D. Mass. 1977) (mere inability of corporations to pay warrants piercing, notwithstanding the absence of fault or inequities). *See generally* Comment, *supra* note 149, at 1254-55, 1257-62, 1266-69 (arguing that cases support the proposition that the corporate entity may be disregarded when an act by the corporation serves to undermine a substantial federal legislative purpose regardless of the existence of any wrongful conduct).

160. Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981) (citing Schenley Distillers Corp. v. United States, 326 U.S. 432, 437 (1946), Flink v. Paladini, 279 U.S. 59, 62 (1929)).

CERCLA has produced an inconsistent body of case law.[161] Some courts, emboldened by expansive interpretations of the term "owner or operator," have found parent corporations directly liable as owners or operators, obviating application of the piercing doctrine *per se*.[162] Other courts, faced with claims against parent corporations, have viewed the issue as one of whether the corporate privilege of limited liability should be abrogated.[163] Courts which have applied the piercing doctrine, as distinguished from those finding direct liability under the statute, have used widely varying approaches and criteria in their piercing decisions. Some have fashioned a federal rule of decision based on CERCLA's statutory objectives and policy framework.[164] Others have utilized either general federal common law or precedent within the circuit, which is essentially indistinguishable from traditional state corporate law doctrines.[165]

The case law on this issue is very recent, even in the context of CERCLA's relatively short legislative life. The earliest decision directly confronting parent corporation liability, *Idaho v. Bunker Hill Co.*,[166] was decided in 1986.[167] This part reviews the case

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161. As one court has observed, CERCLA's "inartful draftsmanship" makes the court's job of ascertaining the law's meaning "tougher and increases the chances that courts around the country will adopt differing approaches to major, national anti-pollution legislation." *In re* Acushnet River & New Bedford Harbor Proceedings *re* Alleged PCB Pollution, 675 F. Supp. 22, 26 n.2 (D. Mass. 1987).

162. *See infra* notes 168-224 and accompanying text (discussing cases holding parent corporations directly liable as owners or operators).

163. *See infra* notes 225-270 and accompanying text (discussing cases in which the courts have applied the piercing doctrine).

164. *See infra* notes 231-242 and accompanying text (discussing cases in which the courts have crafted a federal rule of decision based on CERCLA's goals).

165. *See infra* notes 243-270 and accompanying text (discussing cases in which the courts have applied traditional piercing doctrines without modification).

166. 635 F. Supp. 665 (D. Idaho 1986).

167. Prior to *Bunker Hill*, however, at least two courts indirectly confronted the issue of parent corporation liability under CERCLA by addressing the question of whether the court had personal jurisdiction over the parents of responsible party subsidiaries: *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 29 (E.D. Mo. 1985) (holding that the mere fact that a subsidiary does business within the state does not confer jurisdiction over its nonresident parent, even if the parent is the sole owner, because there is a presumption of corporate separateness that exists unless, from evidence presented, the parent so controls activities of subsidiary that the latter is only a shell for the former); and *United States v. Bliss*, 108 F.R.D. 127, 131-32 (E.D. Mo. 1985). Despite exercise of control by parent over subsidiary, the *Bliss* court declined to pierce the corporate veil to establish jurisdiction

law, considering in Section A the reasoning used by courts finding parent corporations directly liable under the statute and then, in Section B, examining the varying paths trial courts have taken in applying the piercing doctrine.

### *A. Finding Parent Corporations Directly Liable Under CERCLA:* Bunker Hill *and its Progeny*

In *Idaho v. Bunker Hill Co.*, Gulf Resources and Chemical Corporation (Gulf), the parent corporation of Bunker Hill Company (Bunker Hill), sought to interpose the corporate veil in a CERCLA action brought by the state of Idaho for recovery of mining waste site cleanup costs and associated natural resource damages.[168] By piercing the corporate veil, the district court found personal jurisidiction over Gulf, concluding that Gulf and Bunker Hill were so intertwined, and Gulf so controlled the management and operations of Bunker Hill, that subjecting Gulf to the court's jurisdiction would not offend due process.[169] To support its finding, the court pointed to a number of facts: In matters dealing with pollution problems, Bunker Hill was not able to spend more than $500 without Gulf's approval; Bunker Hill's authorized capital was a mere $1,100; Gulf received $27 million in dividends from Bunker Hill after the company's merger; and Gulf could overrule a transaction or decision regarding management made by Bunker Hill.[170]

In deciding whether Gulf could be held liable for cleanup costs at its subsidiary's facility, the court first stated that the same

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over the parent because the parent corporation neither ignored corporate separateness nor delved into the day-to-day operations of its subsidiary). *Id. Cf. infra* notes 169-170 and accompanying text (discussing the *Bunker Hill* court's use of a similar analysis to pierce the corporate veil first to establish personal jurisdiction over the parent and then as one basis of holding the parent liable for the response costs incurred due to its subsidiary's activities).

168. *Bunker Hill*, 635 F. Supp. at 671.

169. *Id.* at 670.

170. *Id.* The court also cited the following factors as supporting its exercise of personal jurisdiction over Gulf: (1) Gulf at times controlled a majority of Bunker Hill's board of directors; (2) Bunker Hill's tax returns were consolidated with Gulf's; and (3) all capital expenditures were to be approved by Gulf. *Id.*

factors and analysis which established the court's jurisdiction over Gulf supported a conclusion that Gulf was an owner or operator for purposes of CERCLA liability.[171] However, the court did not support its holding solely or even principally on the piercing-based analysis.[172] Instead, it cited the reasoning of *United States v. Northeastern Pharmaceutical & Chemical Co.*[173] as the basis for a new test to determine when a parent corporation becomes an owner or operator with respect to its subsidiary's facilities, thereby incurring liability under CERCLA.[174]

One foundation of the *Northeastern Pharmaceutical* trial court decision, which held two corporate officers and major shareholders personally and directly liable,[175] was the court's broad construction of the term "owner or operator."[176] The *Northeastern Pharmaceutical* court supported its liberal interpretation by finding congressional intent that "the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up."[177] The court found that the statute "literally" provided that "a person who owns an interest in a facility and is actively participating in its management can be held liable for the

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171. *Id.*

172. *See id.* at 671-72.

173. 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).

174. *Bunker Hill,* 635 F. Supp. at 671-72.

175. *Northeastern Pharmaceutical,* 579 F. Supp. at 847-50. It should be noted that although the trial court found two officer-shareholders of Northeastern Pharmaceutical liable as owners and operators, on appeal this basis for holding them liable was rejected. United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 743 (8th Cir. 1986). CERCLA liability attaches to owners or operators of facilities at which hazardous wastes are disposed of, not the facilities generating the waste, such as the Northeastern Pharmaceutical plant. *Id.* One of the two officer-shareholders had also been found liable by the trial court as a generator; this finding was affirmed on appeal. *Id.* at 743-44. *Bunker Hill,* which incorporated the *Northeastern Pharmaceutical* trial court's definition of "owner or operator" was decided after the trial court's decision was issued but prior to the appellate court's reversal. *See* United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 823 (W.D. Mo. 1984) (decided January 31, 1984); *Bunker Hill,* 635 F. Supp. at 666 (decided May 22, 1986); United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 726 (8th Cir. 1986) (decided December 31, 1986). The appellate court did not, however, review the trial court's definition of "owner or operator."

176. United States v. Northeastern Pharmaceutical & Chem. Co., 579 F.Supp. 823, 848-49 (W.D. Mo. 1984). *See also supra* note 59 and accompanying text (statutory definition of "owner or operator").

177. *Northeastern Pharmaceutical,* 579 F. Supp. at 848.

disposal of hazardous waste."[178] The *Northeastern Pharmaceutical* court also found prior judicial interpretations of "owner or operator" under the Federal Water Pollution Control Act persuasive.[179] Under this construction, an owner or operator is one who has the capacity to control pollution generating activities and to prevent and abate damage from those activities.[180]

After adopting the *Northeastern Pharmaceutical* court's definition of owner-operator as the test for determining when a

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178. *Id.* at 848. *Northeastern Pharmaceutical* was the first of many cases construing the exemption from liability, in the definition of "owner or operator," for a secured lender that does not participate in management, as giving rise to an inference that an individual who owns stock in a corporation and who actively participates in its management or, in some cases, merely has the capacity to control corporate operations can be held liable as an owner or operator. *See* New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (active participation standard); Quadion Corp. v. Mache, 738 F. Supp. 270, 274-75 (N.D. Ill. 1990) (authority to control and responsibility actually undertaken are among factors considered in ascertaining liability of shareholder); Kelley *ex rel.* Michigan Natural Resources Comm'n v. ARCO Indus. Corp., 723 F. Supp. 1214, 1218-20 (W.D. Mich. 1989) (capacity to control along with responsibility undertaken as a means of determining a shareholder's ability to prevent disposal problem); United States v. Conservation Chem. Co., 619 F. Supp. 162, 190 (W.D. Mo. 1985) (active participation); United States v. Mirabile, No. 84-2280, slip op. at 4-5 (E.D. Pa. June 6, 1985) (active participation); United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699, 20,700 (D.S.C. June 15, 1984) (control or authority over activities of a facility). *See also supra* note 59 (definition of "owner or operator").

179. *Northeastern Pharmaceutical*, 579 F. Supp. at 848-49. The *Northeastern Pharmaceutical* court adopted the interpretation of "owner or operator" given by the Fifth Circuit in *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972):

> The owner-operator of a vessel or a vacility [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has the capacity to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage.

*Id.* at 1127. *Accord*, Apex Oil Company v. United States, 530 F.2d 1291, 1293 (8th Cir. 1976). *See* 33 U.S.C. § 1321(a)(6) (1982) (definition of "owner or operator" under Federal Water Pollution Control Act).

180. *See supra* note 179 (stating the judicial construction of "owner or operator" under the Federal Water Pollution Control Act [hereinafter FWPCA]). The *Northeastern Pharmaceutical* court's adoption of the *Mobil Oil* definition of owner or operator has been criticized on the basis of the different purposes of the operative provisions in FWPCA and CERCLA, to which the definition was applied. Comment, *Corporate Officer Liability*, *supra* note 64, at 962-63. Specifically, it is argued that the broad construction given to "owner or operator" by the *Mobil* and *Apex* courts "operated to eliminate incongruities within the statute," whereas the issue of individual liability of corporate officers presented in *Northeastern Pharmaceutical* was not one of "resolving inconsistency in statutory language but rather of defining the scope of terms where sources of information upon which to base that scope are limited." *Id.*

parent corporation becomes an owner or operator with respect to a subsidiary's facilities,[181] the *Bunker Hill* court found Gulf liable as an owner or operator, noting that to hold otherwise would allow the corporate veil to frustrate congressional intent.[182] In support of this holding, the court noted that Gulf had the capacity to control hazardous waste disposal and releases and the capacity, if not total authority, to take steps to prevent and abate damage caused by such releases at Bunker Hill's facility.[183] The court also buttressed its holding by reiterating the factors relied upon to find personal jurisdiction over Gulf,[184] juxtaposing Bunker Hill's limited capitalization against Gulf's receipt of $27 million in dividends from Gulf's wholly owned subsidiary.[185] The court issued its own caveat regarding the use of the test, observing that "care must be taken so that 'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator."[186]

By incorporating a broad definition of owner or operator, the *Bunker Hill* court found a statutory basis for holding parent corporations liable without formally piercing the corporate veil, if the parent corporation has the "capacity to control" the subsidiary's waste disposal practices.[187] Although the facts of the case arguably provide the basis for piercing under either a federal common law test tailored to the policies of CERCLA[188] or a traditional corporate law test,[189] the court, perhaps averse to

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181. Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986).

182. *Id.*

183. *Id.*

184. *See supra* notes 169-170 and accompanying text (discussing the court's findings in support of its decision to pierce the veil to find personal jurisdiction over Gulf).

185. *Bunker Hill*, 635 F. Supp. at 672.

186. *Id.*

187. *Id.*

188. *See supra* notes 153-160 and accompanying text (discussing the courts' approach to crafting piercing tests in consideration of federal statutory objectives). *See also Bunker Hill*, 635 F. Supp. at 672 (citing the intent of Congress that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up).

189. *See supra* notes 101-141 and accompanying text (discussing the traditional two- and three-prong piercing test). *See also Bunker Hill*, 635 F. Supp. at 670-72 (citing factors indicating that Bunker Hill functioned under the domination, and for the purposes of, Gulf; suggesting that Bunker Hill was undercapitalized; and noting that Gulf was aware of Bunker Hill's waste disposal and toxic

abrogating limited shareholder liability under state law when not absolutely necessary,[190] chose instead to base its finding of liability upon its interpretation of the federal statute's textual provisions.[191]

At least four courts have followed the approach taken in *Bunker Hill*, albeit with some variations.[192] In *United States v. Nicolet, Inc.*,[193] the court for the Eastern District of Pennsylvania refused to dismiss an action against the parent corporation of a former operator of a Superfund site.[194] In an attempt to expedite disposition of the case, the court endorsed several alternative theories of liability set forth by the government,[195] including direct statutory liability[196] as well as liability derived from piercing the corporate veil.[197]

Two somewhat different theories of direct liability were adopted in *Nicolet*. The court first approved the *Bunker Hill* approach, which the court characterized as predicating liability upon familiarity with and capacity to control the subsidiary's waste

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releases and had the capacity to prevent and abate the damage, thereby arguably providing a basis to find a sufficient relationship between Gulf, the response costs incurred by the government, and the natural resource damages).

190. *See* 1 W. FLETCHER, *supra* note 95, § 41.30, at 429 (stating that the "power to pierce the corporate veil, though, is to be exercised 'reluctantly' and 'cautiously'").

191. *Bunker Hill*, 635 F. Supp. at 672.

192. *See infra* notes 193-224 and accompanying text. Although a fifth court cited generally to *Bunker Hill*, the opinion failed to articulate the basis for its holding a parent corporation, along with the executive officers of a family of closely held corporations, liable on the government's motion for summary judgment. *See* Vermont v. Staco, Inc., 684 F. Supp. 822, 825, 831 (D.Vt. 1988). The *Staco* court's only statement directly supporting parent corporation liability is that "[t]he defendant Chase Instruments Corporation owns all the stock of Staco." *Id.* at 831. This seems to imply that mere ownership is sufficient for liability to attach absent any participation, let alone pervasive control. However, the facts of the case, although not explicitly marshalled by the court in support of this particular holding, at least arguably provide the basis to find that Chase, through its executive officers, participated in the control and management of Staco. *See id.*

193. 712 F. Supp. 1193 (E.D. Pa. 1989).

194. *Id.* at 1200.

195. *Id.* at 1200-05.

196. *Id.* at 1202-05. *See infra* notes 198-202 and accompanying text (discussing the court's alternative rules for holding parent directly liable as owner or operator). The court also ruled that the parent corporation, T & N, could be held liable under CERCLA as an owner or operator on the grounds that it held the mortgage on the site of the subsidiary only if T & N participated in the managerial and operational aspects of the site. *Id.* at 1205.

197. *Id.* at 1200-02. *See infra* notes 231-235 and accompanying text (discussing the court's proposed federal rule of decision for piercing to hold a parent corporation liable under CERCLA).

disposal practices, and the parent's benefit from those practices.[198] The court also ruled that T & N, the parent corporation, could be held liable as an owner or operator under CERCLA if T & N directly participated in management of the subsidiary.[199] Citing cases holding individual shareholders liable if the shareholders actively participate in the management of a corporation,[200] the court noted that there is no basis under CERCLA to distinguish between the liability of an individual stockholder who actively participates in the management of a corporation and a corporate stockholder that so participates: both are included within the definition of "person" under CERCLA.[201] Accordingly, the court held that if an individual stockholder can be liable under CERCLA for the corporation's disposal of toxic waste, a corporation which holds stock in another corporation and actively participates in the other corporation's management can be held liable for cleanup costs incurred as a result of that corporation's disposal.[202]

Similarly, in *United States v. Kayser-Roth Corp.*[203] the First Circuit adopted the "active participation" standard to affirm the trial court's holding the parent corporation, Kayser-Roth, directly liable as an operator for the costs of cleaning up groundwater contamination caused by a spill of a hazardous waste at Kayser-Roth's subsidiary's textile manufacturing operation.[204] Although the trial court had also found the parent liable derivatively as an owner after piercing the corporate veil, the First Circuit, perhaps sharing the *Bunker Hill* court's apparent reluctance to exercise its

198. *Id.* at 1203-04.

199. *Id.* at 1203.

200. *Id.* at 1203. The court cited *United States v. Mirabile*, No. 84-2280, slip op. at 4-5 (E.D. Pa. Sept. 4, 1985) (courts have generally concluded that the exemption from liability (found in Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A)) implies that an individual who owns stock in a corporation and who actively participates in its management can be held liable for cleanup costs incurred as a result of improper disposal by the corporation). *See supra* note 178 and accompanying text (citing cases construing this exemption). *See also infra* note 366 and accompanying text (discussing cases finding individual shareholders liable as owners or operators).

201. *Nicolet*, 712 F. Supp. at 1203. *See supra* note 53 (definition of person under CERCLA).

202. *Id.*

203. 910 F.2d 24 (1st Cir. 1990) *cert. denied*, 111 S. Ct. 957 (1991).

204. *Id.* at 27-28.

equitable discretion to abrogate state corporate immunity, did not affirm or even consider this alternative basis of liability.[205] The First Circuit concluded that Congress had not intended to shield persons who are actively involved in the activities of a waste facility from liability as operators, regardless of corporate status.[206]

In reviewing the trial court's holding that Kayser-Roth was an operator of its subsidiary's facility, the First Circuit first cautioned that for a parent to be considered an operator "requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership" and at a minimum requires active involvement in the activities of the subsidiary.[207] The Court of Appeals found the record of Kayser-Roth's involvement in the activities of its subsidiary, Stamina Mills, to be more than sufficient to support liability as an operator.[208] The trial court had concluded that Kayser-Roth had exercised pervasive control over Stamina Mills,[209] citing the parent's total control over the subsidiary's finances, as indicated by restrictions on Stamina's budget, capital expenditures and real estate transactions.[210] Moreover, the trial court pointed to Kayser-Roth's

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205. *Id.* at 25.

206. *Id.* at 26-27. The court distinguished between liability as an "owner" and as an "operator." *Id. See supra* note 59 (definition of "owner or operator"). The court concluded that by using the conjunctive "or" in identifying the category of responsible parties of "owner or operator," Congress "implied that a person who is an operator is not protected from liability by the legal structure of ownership." *Kayser-Roth*, 910 F.2d at 26. The court's focus on whether Kayser-Roth's active participation in its subsidiary's affairs rose to the level of operating the subsidiary's facility distinguished the decision from that in *Joslyn Manufacturing Co. v. T.L. James & Co.*, Inc., 893 F.2d 80 (5th Cir. 1990) *cert. denied*, 111 S.Ct. 957 (1991). According to the *Kayser-Roth* court, the *Joslyn* court was concerned with owner rather than operator liability. *Kayser-Roth*, 910 F.2d at 27. *Cf. infra* notes 259-270 and accompanying text (discussion of the *Joslyn* conclusion that Congress did not intend that a parent corporation be held directly liable as an "owner or operator").

207. *Kayser-Roth*, 910 F.2d at 27.

208. *Id.* at 28.

209. United States v. Kayser-Roth Corp., 724 F. Supp. 15, 22-23 (D.R.I. 1989). After initially observing the distinction cited in *Nicolet* between the indicia of ownership/active participation and the capacity to control theories of direct liability, the trial court then confined its inquiry to the extent of the parent's exercise of control over the management and operations of the subsidiary. *Id.* at 22.

210. *Id.* The court also found significant the fact that Kayser-Roth had placed its personnel in almost all Stamina Mills' director and officer positions, "as a means of totally ensuring that Kayser-Roth's corporate policy was exactly implemented and precisely carried out." *Id.*

directive that the subsidiary's contacts with governmental agencies, including those dealing with environmental matters, be funneled directly through Kayser-Roth.[211] Thus, because Kayser-Roth exercised practically total control over the operations of its subsidiary, the Court of Appeals deemed Kayser-Roth an operator under CERCLA's liability scheme.[212]

In denying a defendant parent corporation's motion for summary judgment, the court for the Northern District of Illinois in *Rockwell International Corp. v. IU International Corp.*[213] not only held that the plaintiff Rockwell had identified sufficient evidence to support a finding that IU, the parent corporation, was an operator within the meaning of CERCLA, but also adopted a somewhat more conservative version of the *Bunker Hill* test.[214] The court cited conflicting language in *Northeastern Pharmaceutical* as to the nature of the "control" or "participation" test: A standard of active participation in the management is said to stem from a "literal reading" of CERCLA,[215] but the *Northeastern Pharmaceutical* court also suggested that defendant's capacity to control is sufficient to hold the defendant liable.[216] The *Rockwell* court declined to adopt the latter view, ruling that mere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach, and that actual exercise of control is essential to hold shareholders liable.[217] The court then cited various factors

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211. *Id.* Although generally eschewing the "capacity to control" theory of liability as set forth in *Bunker Hill*, the trial court in *Kayser-Roth* did point to the parent corporation's power to control the release or threat of release of the hazardous substance, and the parent's ultimate ability to prevent and abate damage. *Id.* The court also noted that when Stamina Mills was sued for an illegal waste water discharge, the final decision on settlement was made by Kayser-Roth's directors. *Id.* at 23.

212. United States v. Kayser-Roth Corp., 910 F.2d 24, 27-28 (1st Cir. 1990) *cert. denied*, 111 S. Ct. 957 (1991).

213. 702 F. Supp. 1384, 1390 (N.D. Ill. 1988).

214. *Id.*

215. *Id.* (quoting United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 579 F. Supp. 823, 848 (W.D. Mo. 1984)).

216. *Id.* (citing *Northeastern Pharmaceutical*, 579 F. Supp. at 849).

217. *Id.* The court relied on *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 656-57 (N.D. Ill. 1988) (holding that plaintiff's evidence that the defendant built the facility and had at most a right of access to the facility was insufficient to establish operator liability, and stating that "only those who actually operate or exercise control over the facility that creates an

demonstrating sufficient management participation and indicia of the actual exercise of control by the defendant IU Corporation to warrant a finding that IU was an operator under CERCLA.[218] IU hired or approved the hiring of certain corporate officers of the subsidiaries that owned and operated the facility, some of whom were also IU officers.[219] With respect to operations related to CERCLA liability, IU auditors suggested changes in certain procedures that directly affected the disposal of hazardous substances, and IU personnel reviewed requests by the subsidiary to purchase environmental protection equipment.[220] The court found this involvement to provide a sufficient basis for IU's direct liability as an operator.[221]

Thus, based on a broad construction of the term "owner or operator," a number of federal district courts, and the Court of Appeals for the First Circuit, have fashioned a variable test for holding a parent corporation directly liable under CERCLA for the response costs incurred at sites operated by the parent's subsidiary.[222] If the parent exercises actual control over the subsidiary's operations, particularly the subsidiary's waste disposal or environmental management practices,[223] or if the parent merely

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environmental risk can be held liable under CERCLA for the costs of reducing that risk").

218. *Rockwell*, 702 F. Supp. at 1390-91.

219. *Id.*

220. *Id.*

221. *Id. See also* Colorado v. Idarado Mining Co., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578 (D. Colo. April 29, 1987). Although citing the *Northeastern Pharmaceutical* "capacity to control" test for parent corporation liability, *Idarado* actually applies an "active participation" standard to hold a responsible party's parent corporation and an affiliated "sister" corporation liable as "owner and operator" and "operator," respectively. *Id.* at 20,578-79. In concluding that the parent exercised pervasive control, the court noted that the parent controlled its subsidiary's recruitment and reimbursement policies, negotiated and entered into contracts on Idarado's behalf, and participated in efforts to ameliorate the subsidiary's facility's environmental problems. *Id.* The sister corporation, formed for the purpose of providing the parent's subsidiaries with a steady supply of management and other employees, was held liable as an operator because the court found that the sister corporation was a *de facto* manager, involved directly in the day-to-day operations of the mine. *Id.* at 20,579.

222. *See supra* notes 168-221 and accompanying text.

223. *See supra* notes 199-202, 204, 206-212, 214-221 and accompanying text (discussing the trial courts' rulings in *Nicolet*, *Rockwell* and *Idarado* and the First Circuit's holding in *Kayser-Roth*).

has the capacity to control such activities,[224] the parent may be liable without a court formally piercing the subsidiary's veil.

### *B. Piercing the Corporate Veil to Hold Parent Corporations Liable Under CERCLA*

The trial courts in both *Nicolet* and *Kayser-Roth* not only held parent corporations directly liable under CERCLA as owners or operators,[225] but, in alternative rulings, endorsed piercing the corporate veil on the basis of a federal rule of decision designed to reflect CERCLA's policies in order to attach liability derivatively to the parent corporation of a responsible party.[226] In contrast, courts in two other cases, *In re Acushnet River and New Bedford Harbor Proceedings re Alleged PCB Pollution*[227] and *Joslyn Corporation v. T.L. James & Co.*,[228] declined to fashion a specific federal rule of decision for piercing the corporate veil under CERCLA based on the Act's policies.[229] Instead, these courts relied upon generalized federal substantive law and Fifth Circuit precedent, respectively, both of which are interchangeable with traditional state corporate law doctrine, as the basis to abrogate limited corporate liability.[230]

In considering the federal government's claim that T & N, the parent corporation in *Nicolet*, should be held liable under both Pennsylvania law and a proposed federal rule of decision for disregarding the corporate entity, the court first determined that

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224. *See supra* notes 174-191, 198, 209 and accompanying text (discussing the trial courts' rulings in *Bunker Hill*, *Nicolet*, and *Kayser-Roth*).

225. *See supra* notes 198-202, 209-211 and accompanying text (discussing the *Nicolet* and *Kayser-Roth* trial courts' rulings that parent corporations could be directly liable as owners or operators).

226. *See infra* notes 231-242 and accompanying text (discussing the *Nicolet* and *Kayser-Roth* trial courts' formulations of a federal rule of decision to govern piercing inquiries under CERCLA).

227. 675 F. Supp. 22 (D. Mass. 1987).

228. 696 F. Supp. 222 (W.D. La. 1988).

229. *See infra* notes 247-252, 266-268 and accompanying text (discussing the reasoning of the *Acushnet River* and *Joslyn* courts in refusing to relax or substantially alter the traditional test in applications under CERCLA).

230. *See infra* notes 250-258, 268-270 and accompanying text (discussing the *Acushnet River* and *Joslyn* courts' application of traditional piercing doctrine).

federal law controlled.[231] Based on the federal common law principle that the corporate entity should be disregarded "when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy" the court formulated a federal rule of decision applicable in CERCLA cases to determine when a corporate veil can be pierced.[232] The separate corporate existence of a corporation may be disregarded if the corporation has a substantial ownership interest in a subsidiary that is a potentially responsible party under CERCLA and if the corporation controls the subsidiary's management and operations.[233] The court's standard begs the question of what

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231. United States v. Nicolet, Inc., 712 F. Supp. 1193, 1201 (E.D. Pa. 1989). Citing well-established precedent that courts should fashion uniform federal rules of decision when a federal statute is silent as to the choice of law to be applied but overriding federal interests exist, the court found that the nature of the Superfund program required national uniformity, the application of state law would frustrate specific objectives of the federal program, and the application of federal laws would not disrupt commercial relationships predicated on state law. *Id.* at 1201-02 (citing the rule of United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29 (1979)). The court also pointed to the Third Circuit's finding in *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988), that CERCLA's meager legislative history indicates that Congress expected the courts to develop a federal common law to supplement the statute. *Nicolet*, 712 F. Supp. at 1201. In support of its conclusion that a uniform rule is necessary, the court reasoned that federal environmental protection programs are particularly demanding of national uniformity, and that Congress intended that neither the government's ability to fund the cleanup of hazardous waste sites nor liability under CERCLA should depend on the particular state in which a defendant happens to reside. *Id.* at 1201-02 (citing *In re* Acushnet River & New Bedford Harbor Proceedings *re* Alleged PCB Pollution, 675 F. Supp. 22, 31 (D. Mass. 1987)). The court did not, however, cite any support for the bare conclusions that a federal rule of decision would not disrupt commercial relations predicated on state law and that the application of state laws would frustrate CERCLA objectives. *Id.* at 1202. Indeed, the latter finding seems to conflict with the court's observation that there would likely be no practical difference whether the court looked to federal law or Pennsylvania law to decide the alter ego issue. *See id.* at 1201. *Cf. Acushnet River*, 675 F. Supp. at 31 (explaining that a uniform federal rule would not frustrate commercial relationships properly predicated on state law, since the issue of liability under CERCLA involves the rights of third parties external to the corporation, and that shareholders are entitled to rely on the law of the incorporating state "solely with regard to the internal affairs of the corporation").

232. *Nicolet*, 712 F. Supp. at 1202 (quoting American Bell Inc. v. Fed'n of Tel. Workers, 736 F.2d 879, 886 (3d Cir. 1984)).

233. *Id.* The court observed that "[s]uch a rule was adopted by the district court in *State of Idaho v. Bunker Hill Co.*, which held that 'a parent's involvement in the management and operations' of [a] subsidiary, which was subject to personal jurisdiction as a result, supported the conclusion that the parent 'was an owner or operator for purposes of CERCLA liability.'" *Id.* However, other courts and commentators have viewed the *Bunker Hill* holding as resting principally, if not exclusively, on direct liability under the court's interpretation of owner or operator, not on a piercing theory. *See* United States v. Kayser-Roth Corp., 724 F. Supp. 15, 22 (D.R.I. 1989); McMahon & Moertl, *The*

degree of control is sufficient to find the parent liable. The court did, however, find that T & N would be liable under its rule of decision if the government could prove that T & N, as the responsible party's majority shareholder: (1) actively participated in the management of the subsidiary's operations when asbestos was being disposed of at the site; (2) was familiar with the subsidiary's waste disposal practices and had the capacity to control the disposal and resultant releases and to abate damages from such releases; and (3) had benefitted from the subsidiary's waste disposal practices.[234] Thus, the federal rule of decision for piercing in CERCLA actions adopted by the Eastern District of Pennsylvania appears to be the operational equivalent of the First Circuit's test in *Kayser-Roth* to find direct liability as an operator under CERCLA without piercing.[235]

Like the *Nicolet* court, the trial court in *Kayser-Roth* found the parent not only directly liable, as an owner or operator under CERCLA, but also derivatively liable under an alternative theory based on piercing the subsidiary's corporate veil.[236] Unlike the court in *Nicolet*, however, the *Kayser-Roth* court did not articulate a specific federal rule of decision.[237] Instead, the *Kayser-Roth* court justified its decision to disregard the subsidiary as a corporate entity as necessary to avoid thwarting congressional purposes.[238] Specifically, the court noted that Congress intended that the federal government be given the tools necessary for a prompt and effective response to hazardous waste problems of national magnitude, and that those responsible for the problems caused by the disposal of hazardous waste bear the costs for remedying the harmful

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*Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T, No. 3, at 31 (1988). *See also supra* notes 168-191 and accompanying text (discussing the *Bunker Hill* holdings).

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

235. *See supra* notes 204-212 and accompanying text (discussing the *Kayser-Roth* court's adoption of an active participation standard to hold parent corporations directly liable as an operator).

236. United States v. Kayser-Roth Corp., 724 F. Supp. 15, 22-24 (D.R.I. 1989).

237. *Id.* at 23-24.

238. *Id.*

conditions they created.[239] The court stated that CERCLA places no special importance upon the corporate form.[240] The court apparently found Kayser-Roth's "overwhelming pervasive control" over its subsidiary a sufficient basis, in the interests of public convenience, fairness, and equity, to pierce the veil and hold the parent liable.[241] The court concluded that "any other result would provide too much solace to deliberate polluters, who would use this device as an escape."[242]

Other courts have viewed CERCLA in a different light, failing not only to find a basis under the statute to hold parent corporations directly liable, but also unable to ascertain the intent of Congress that generalized federal common law be supplanted by a unique federal rule of decision on piercing the corporate veil in order to further the purposes of CERCLA.[243] In *In re Acushnet River and New Bedford Harbor Proceedings re Alleged PCB*

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239. *Id.* So as not to frustrate these legislative purposes, the court held that "CERCLA must be afforded a liberal construction." *Id.* (citing Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) and New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985)).

240. *Id.* at 24. The court cited *United States v. Mottolo*, 695 F. Supp. 615 (D.N.H. 1988) in support of this proposition. The *Mottolo* court, in holding an individual sole shareholder liable after piercing the corporate veil, noted that 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." *Mottolo*, 695 F. Supp. at 624 (quoting Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986)). The *Mottolo* court further observed that:

> CERCLA's goal of ensuring that those responsible for problems caused by the disposal of chemical poisons bear the costs of remedying the harmful conditions they created would be frustrated if the mere act of incorporation were allowed to impede the recovery of response costs, for a nonincorporated violator could avoid liability simply by changing company structure. Furthermore, the absence of explicit statutory language addressing the effect of incorporation, the Act's strict liability scheme, and the broad and encompassing categories of potentially responsible parties ineluctably lead the Court to conclude that CERCLA places no importance on the corporate form.

*Id.*

241. *Kayser-Roth*, 724 F. Supp. at 24.

242. *Id.* The court chose to adopt a rule of decision based solely on the first prong of the traditional piercing doctrine, apparently as a prophylactic device to prevent misuse of the corporate form. *Id.*

243. *See infra* notes 247-252, 266-268 and accompanying text (discussing the *Acushnet River* and *Joslyn* courts' adherence to traditional piercing doctrine).

*Pollution*,[244] the relevant issue before the court for the District of Massachusetts was whether personal jurisdiction could be established over RTE Corporation by piercing the veil of RTE's subsidiary, Aerovox.[245] The court agreed with the federal government's argument that a uniform federal rule of decision ought to govern the piercing inquiry.[246] However, the court rejected the government's proposed rule of decision calling for piercing if the parent's contact with the subsidiary merely "transcends a pure investment relationship."[247] The court noted that the proposed rule was without support in policy or precedent, and that little more than electing the subsidiary's board of directors would be required to impose liability on a parent corporation.[248] Refusing to "further some unspoken congressional intent," the court found the government's proposed rule to be unauthorized by CERCLA.[249]

The *Acushnet River* court did not dispute that the policies embodied in a statute should affect the application of the piercing test.[250] The court did not, however, relax or dispense with the traditional requirements of pervasive control of the subsidiary and use of that control to effect a wrong, as have a number of

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244. 675 F. Supp. 22 (D. Mass. 1987).

245. *Id.* at 30.

246. *Id.* at 31. *See supra* note 231 and accompanying text (explaining basis for the court's choice of law decision).

247. *Acushnet River*, 675 F. Supp. at 32.

248. *Id.* (citing United States v. Bliss, 108 F.R.D. 127, 131-32 (E.D. Mo. 1985) and Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 28-30 (E.D. Mo. 1985) (both applying traditional veil piercing principles in refusing to disregard the corporate form in CERCLA actions)). The *Acushnet River* court also observed that it was difficult to see how the proposed rule would further the aims the government contended demand such a strict standard, since

> a corporation which wanted to reclaim and make productive a waste site could not do so without risking all its corporate assets if it appeared to be more than passively interested in the performance of its subsidiary. Patently, the sovereigns' rule would discourage investors and reduce the number of solvent parties from which the sovereign will be able to seek clean up costs and damages.

*Id.*

249. *Id.*

250. *Id.* (citing Anderson v. Abbott, 321 U.S. 349, 357 (1944)).

courts.[251] Instead, the court tailored its piercing inquiry by focusing on RTE's involvement in the subsidiary's waste management activities when the court assessed the degree of "control," and on the existence of "wrongdoing."[252]

In applying a focused piercing test, the court failed to find the requisite "inordinate level of integration and control" to justify the piercing remedy under CERCLA.[253] The court found that RTE respected the corporate separateness of Aerovox in significant ways.[254] With a net worth of $17 million, Aerovox could not be characterized as a "shell" corporation.[255] The parent was not siphoning funds from the subsidiary, since RTE had never paid itself a dividend out of Aerovox's earnings.[256] Aerovox arranged its own loans, developed its own budgets, and maintained its own financial records and accounts.[257] Cited as perhaps the most

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251. *See supra* notes 154-160 and accompanying text (discussing the courts' modification of traditional piercing standards to accommodate statutory objectives).

252. *Acushnet River*, 675 F. Supp. at 33-34. The key factors which would weigh in favor of piercing in *Acushnet River*, the court said, were "suggestions of pervasive control by RTE over Aerovox's hazardous waste disposal policies, or . . . an indication that RTE treats Aerovox as a mere instrumentality with regard to the hazardous waste of RTE." *Id.*

253. *Id.* at 34. The court noted that a centralized cash management system such as the one used by RTE was not the equivalent of intermingling funds, that quarterly and annual reports made to RTE did not represent an untoward intrusion by the owner into the corporate enterprise, that shareholder control of significant expenditures was not a disregard of corporate separateness, and that identifying the subsidiary's products with the name of the parent was a frequently used marketing strategy which did not imply a disrespect for separateness. *Id.* at 34-35. To the extent that Aerovox was integrated into or controlled by RTE, the relationship did not appear to the court to be at a level uncommon between parent and wholly owned subsidiary: "Although RTE no doubt influenced the philosophy and management of Aerovox, this is true of all majority shareholders, and RTE has not so extensively controlled Aerovox that Aerovox should be deemed its agent for purposes of acquiring personal jurisdiction." *Id.* at 35.

254. *Id.* at 34-35.

255. *Id.* at 35.

256. *Id.*

257. *Id.* The court rejected the government's argument that RTE must answer to Aerovox's CERCLA liability because a primary purpose of RTE in forming a subsidiary to purchase the assets of Aerovox Industries was to avoid liability for previous PCB contamination. *Id.* at 34. The court found the argument:

> . . . rather remarkable because it converts the very purpose for which the law enables investors to incorporate into an impermissible evil . . . . Avoiding liability through the corporate form, without more, is not a wrong that equity's hand must right. In addition, there must be evidence of undercapitalization, pervasive control, [or] fraud . . . . A rule such as the sovereigns propose here,

important factor by the court in declining to pierce Aerovox's corporate veil was the absence of any evidence suggesting that RTE used Aerovox to shield RTE from CERCLA liability which might otherwise arise out of the parent's operations.[258]

In *Joslyn Corporation v. T.L. James & Co.*,[259] the plaintiff, under an order to clean up the contaminated site of a wood treating operation, sought to pierce the corporate veil to hold the parent of the corporation whose assets the plaintiff had purchased liable as a former owner or operator.[260] In granting the defendant's motion for summary judgment, the trial court declined to follow the *Bunker Hill* line of cases finding direct liability.[261] Additionally, the court also found no triable issue of fact on the plaintiff's theory that James & Company, the parent, should be derivatively liable for its subsidiary's CERCLA liability.[262] In the first appellate court decision on parent corporation liability under CERCLA, the Fifth Circuit affirmed.[263]

In rejecting the theory that James Company could be liable directly as a former owner or operator under CERCLA, the Court of Appeals found no authority in CERCLA's text or legislative history to impose individual liability on corporate officers or direct liability on parent corporations.[264] The court constrained its analysis of the Act's liability provisions by common-law principles

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> which pierces the veil primarily because the investors went in with their eyes open, would protect only those too ignorant to see the risk of a particular enterprise. This Court cannot countenance a rule which punishes reasonable investigation of the risks inherent in business opportunities.

*Id.*

258. *Id.* The court observed that "there is no evidence that Aerovox is making some component vital to a RTE product line, the manufacture of which necessarily involves generating hazardous substances . . . . RTE has done nothing to decrease Aerovox's ability to satisfy any judgment that may enter in this action." *Id.*

259. 696 F. Supp. 222 (W.D. La. 1988), *aff'd.* 893 F.2d 80 (5th Cir. 1990), *cert denied*, 111 S. Ct. 957 (1991).

260. *Id.* at 223-224.

261. *Id.* at 226.

262. *Id.* at 232.

263. Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80, 81, 84 (5th Cir. 1990) *cert. denied*, 111 S. Ct. 957 (1991).

264. *Id.* at 82-83.

of corporate law, citing the absence of congressional directive to the contrary and refusing "to rewrite the language of the Act."[265]

The Court of Appeals affirmed the trial court's adoption of the Fifth Circuit's established general test for disregarding the corporate form: The dominant corporation must have controlled the subservient corporation and proximately caused the plaintiff harm through misuse of this control.[266] For purposes of piercing under CERCLA, the court did not modify the degree of control necessary for liability to attach under the general requirements of the first prong of the traditional piercing doctrine.[267] The court insisted that the corporate entity would be disregarded only if James & Company had exercised total domination of the subsidiary, Lincoln, such that Lincoln had no separate corporate interests of its own and functioned solely to achieve James' purposes, and if Lincoln was used as a sham to perpetrate a fraud.[268] The Court of Appeals affirmed the trial court's conclusion that Lincoln was not a mere

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265. *Id.* at 83. The court rejected the argument that congressional intent to hold those who profited from hazardous waste sites responsible for the cost of cleanup and to cleanup contaminated sites expeditiously provides the grounds to broadly construe CERCLA's liability provisions. *Id. Cf. supra* notes 60-64 and accompanying text (discussing cases finding persuasive the argument that congressional intent requires a liberal construction of liability under the Act). The *Joslyn* court pointed to a similarly restrictive construction of CERCLA's "owner or operator" definition by the Seventh Circuit in an action for contribution under CERCLA in which the latter court affirmed a summary judgment for a defendant supplier of chemicals, holding it was not an operator. *Joslyn*, 893 F.2d at 83 (citing Edward Hines Lumber Co. v. Vulcan Materials, 861 F.2d 155, 157-58 (7th Cir. 1988)). The court stated that "[t]o the point that courts could achieve 'more' of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but limits." *Id.* The *Joslyn* court also specifically rejected the *Northeastern Pharmaceutical* and *Bunker Hill* "control" test for liability under CERCLA's "owner or operator" language. *Id.* at 83. The court observed that "Congress is quite capable of creating statutes that hold shareholders or controlling entities laible for the acts of valid corporations." *Id.* The court cited the difference between the definition of "owner or operator" for facilities conveyed to state or local government by bankruptcy, tax delinquency or abandonment, which explicitly adopts a control test, with the definition of "owner or operator" for onshore or offshore facilities such as that at issue in *Joslyn*, in which no control test appears. *Id. Compare* 42 U.S.C. § 9601(20)(A)(ii) (1988) (no control test) *with* § 9601(20)(A)(iii) (1988) (control test).

266. *Id.* at 83 (citing United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986)).

267. *Id.*

268. *Id.* at 83-84 (citing *Jon-T Chemicals*, 768 F.2d at 691).

instrumentality of James.[269] Finding the record sufficient to support a conclusion that Lincoln operated independently of James, the Court of Appeals pointed in particular to the subsidiary's adherence to corporate formalities and the subsidiary's separate daily operations.[270]

### *C. Current State of the Law*

Courts faced with the question of parent corporation liability under CERCLA have disagreed both as to whether the statutory language provides that a parent may be held directly liable for its subsidiary's cleanup liability, and as to the standards to apply in piercing a subsidiary's corporate veil. The *Bunker Hill* line of cases stands for the proposition that a parent corporation that either actively participates in the management of the operations of a subsidiary, or perhaps even has merely the capacity to control such operations, may be held directly liable under an expansive

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269. *Id.* at 83. *See also* Joslyn Mfg Co. v. T.L. James & Co., 696 F. Supp. 222, 227 (W.D. La. 1988). According to the trial court, factors to be considered in determining whether the necessary degree of control has been exercised include whether: (1) the parent and the subsidiary have common stock ownership, common directors or officers, or common business departments; (2) the parent finances the subsidiary; (3) the parent caused the incorporation of the subsidiary; (4) the subsidiary operates with grossly inadequate capital; (5) the parent pays the salaries and other expenses of the subsidiary; (6) the subsidiary receives no business except that given to it by the parent; (7) the parent uses the subsidiary's property as its own; (8) the daily operations of the two corporations are not kept separate; and (9) the subsidiary does not observe the basic corporate formalities. *Id. Cf. supra* notes 109-112 and accompanying text (discussing common law "laundry list" of factors indicating control sufficient to justify piercing).

270. *Joslyn*, 893 F.2d at 83. Although Joslyn Co. pointed to six factors on the "laundry list" which supported piercing, the trial court was not persuaded. The trial court dismissed each as insignificant singly and when considered in totality, concluding that there was no triable issue of fact on the matter of control. Joslyn Mfg. Co. v. T.L. James & Co., 696 F. Supp. 222, 231 (W.D. La. 1988). For example, the court found the parent's 100% ownership of the subsidiary and the identity of directors of the two corporations to be insufficient to pierce the corporate veil. *Id.* The fact that James had made substantial loans to Lincoln, including the initial capitalization, was rebutted because these loans were repaid. *Id.* Although the court found Joslyn's allegation that James hired and fired Lincoln's executive officers to be "minimally indicative of control," such conduct was merely an incidental use of its power as controlling shareholder to elect officers and directors of the subsidiary. *Id.* The court also dismissed as "only marginally relevant" the facts that three of Lincoln's officers who were also officers of T.L. James & Company worked out of James Company's corporate offices and that Lincoln neither had a lease nor paid rent, noting that "they had to work somewhere." *Id.*

construction of CERCLA's definition of "owner or operator."[271] Other courts have declined to adopt such a broad interpretation of "owner or operator," restricting their inquiry to whether the parent corporation should be derivatively liable as a result of piercing the subsidiary's corporate veil.[272] Some courts have held parent corporations liable under both direct and derivative theories of liability.[273]

The courts which have considered whether to pierce the corporate veil have, without exception and apparently with little difficulty, opted to exercise their authority to develop federal common law to govern the piercing inquiry, instead of deferring to state law.[274] In so doing, they have generally concluded that CERCLA is a federal program that must be uniform in character throughout the nation,[275] that application of state law would frustrate specific objectives of the federal program,[276] and that a federal rule would not significantly disrupt commercial

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271. *See supra* notes 168-224 and accompanying text (discussing *Bunker Hill* and its progeny).

272. *See supra* notes 243-270 and accompanying text (discussing the *Acushnet River* and *Joslyn* courts' holdings).

273. *See supra* notes 225, 231-242 and accompanying text (discussing the *Nicolet* and *Kayser-Roth* trial court holdings).

274. *See supra* notes 231, 237-240, 246 and accompanying text (discussing the *Nicolet, Kayser-Roth,* and *Acushnet River* trial courts' holdings that federal law controlled).

275. *See supra* note 231 and accompanying text (discussing the *Nicolet* and *Acushnet River* courts' conclusions that formulation of a federal rule of decision was necessary). *See also* United States v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) (finding that there were "compelling reasons for the development of a uniform federal common law in the area of hazardous waste").

276. *See supra* note 231 and accompanying text (discussing the *Nicolet* and *Acushnet River* holdings). *See also* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809 (S.D. Ohio 1983). The *Chem-Dyne* court stated that:

> A liability standard which varies in the different forum states would undermine the policies of the statute by encouraging illegal dumping in states with lax liability laws .... There is no good reason why the United States' right to reimbursement should be subjected to the needless uncertainty and subsequent delay occasioned by diversified local disposition when this matter is appropriate for uniform national treatment.

*Id.*

relationships predicated on state law.[277] However, in attempting to fashion the content of a "uniform" federal rule of decision to guide the courts in considering parent corporation liability under CERCLA, the courts are in fact diametrically split.[278] Some courts have tailored the traditional piercing doctrine to reflect and accommodate the purposes of CERCLA by reducing the degree of control necessary to satisfy the first prong, and by dispensing with the second and third prongs' requirement that the parent use its control of the subsidiary for an improper purpose.[279] These courts also ruled that parents could be directly liable under CERCLA, and the key factors supporting this alternative basis of liability were generally the same under both theories: Active participation in the management of the subsidiary or capacity to control those operations, particularly the waste disposal activities.[280] In contrast, other courts have applied strict formulations of the traditional piercing rules, apparently finding no basis in CERCLA or the Act's legislative history indicating congressional intent to accord less deference to the fundamental principle of limited liability of the corporate entity.[281]

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277. *In re* Acushnet River & New Bedford Harbor Proceedings *re* Alleged PCB Pollution, 675 F. Supp. 22, 31 (D. Mass. 1987). The *Acushnet River* court stated that the "Court need not worry that a uniform federal rule would frustrate commercial relationships properly predicated on state law. The issue here involves the rights of third parties external to the corporation. Shareholders generally are entitled to rely on the law of the incorporating state solely with regards [sic] to the internal affairs of the corporation." *Id. Accord,* United States v. Nicolet, Inc. 712 F. Supp. 1193, 1202 (E.D. Pa. 1989).

278. *See supra* notes 232-242, 247-252, 266-268 and accompanying text (discussing the piercing tests used by the trial courts in *Nicolet, Kayser-Roth, Acushnet River* and by the trial and appellate courts in *Joslyn*).

279. *See supra* notes 232-234, 238-242 and accompanying text (discussing the *Nicolet* and *Kayser-Roth* trial courts' formulation of piercing standards).

280. *See supra* notes 198-202, 204-212, 232-235, 237-242 and accompanying text (discussing the alternative theories of liability of the courts in *Nicolet* and *Kayser-Roth*).

281. *See supra* notes 247-258, 266-270 and accompanying text (discussing the *Acushnet River* and *Joslyn* courts' application of traditional piercing standards).

## V. TOWARD A UNIFORM FEDERAL RULE OF DECISION GOVERNING PARENT CORPORATION LIABILITY UNDER CERCLA

The split among the federal courts as to the legal standards applicable to piercing the corporate veil in CERCLA cases promotes inconsistent and inequitable enforcement of CERCLA's liability scheme, increases the uncertainty faced by companies assessing their potential liabilities under the Act, and impedes expeditious cleanup of Superfund sites by deterring settlement and encouraging litigation. Part V of this Comment underscores the need for a truly uniform federal rule of decision to apply in piercing inquiries, briefly reviews the primary purposes of CERCLA and related factors which should be reflected in a uniform rule, evaluates the various formulations developed by the courts in terms of the extent to which they further the statutory objectives, and finally suggests a preferred approach.

### *A. The Need For a Uniform Federal Rule: Encouraging Settlement Agreements*

In addition to the fundamental jurisprudential reasons cited by the courts in opting to exercise their power to fashion federal common law under CERCLA,[282] resolution of conflicting rules of decision governing parent corporation liability would encourage settlement agreements among potentially responsible parties and the EPA. Given the huge backlog of sites on the National Priority List[283] as well as the substantial transaction costs entailed in CERCLA litigation,[284] Congress and the EPA have endeavored

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282. *See supra* notes 274-277 and accompanying text (discussing the courts' reasoning in deciding to exercise their power to formulate federal common law under CERCLA).

283. *See supra* note 28 and accompanying text (noting the number of sites currently on the NPL as well as potential NPL sites).

284. During congressional hearings on the administration's proposals for reauthorization of CERCLA, members of Congress and others expressed concern about the considerable legal and administrative expenses involved in the Superfund program. S. REP. NO. 11, 99th Cong., 1st Sess., at 54 (1985). Public and private sector transaction costs are estimated to be substantial. EPA projected that enforcement costs will account for 12% of all Superfund expenditures during the period from

to find ways to encourage more voluntary cleanups.[285] The objectives of CERCLA are achieved more effectively and efficiently if site cleanup agreements can be executed among the EPA and responsible parties.[286] If responsible parties undertake the cleanup, Superfund monies are preserved for other sites for which solvent responsible parties cannot be found. Also, because of federal contracting requirements and other factors, experience suggests that if EPA performs the cleanup, the cleanup will not only be more costly but will take considerably longer than if responsible parties perform the work.[287] While negotiations can be very resource-consuming for EPA, resolution of a case through

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1985 to 1995. *Insurance Issues and Superfund: Hearing Before the Senate Committee on Environment and Public Works*, 99th Cong., 1st Sess. 54-55 (1985). An insurance industry-commissioned study estimated, based on EPA's projected cost of $14.6 billion to clean up 1800 NPL sites, that total legal and other transaction costs of efforts to have potentially responsible parties pay for the cleanup could exceed $8 billion, of which $6.4 billion would be borne by the private sector. *Id.* at 118. *See id.* at 115-37 (summarizing the American Insurance Association-commissioned study).

235. CERCLA as enacted in 1980 contained virtually no language to guide or encourage voluntary settlement of EPA claims against potentially responsible parties for cleanup costs. Nonetheless, the court in one leading case on the standard of liability under CERCLA found congressional intent to "induce voluntary responses" to clean up contaminated sites. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983). On December 5, 1984 EPA issued an Interim CERCLA Settlement Policy. 50 Fed. Reg. 5034 (1985). The SARA Amendments to CERCLA basically affirmed the EPA policy and authorized a number of aids to settlement. *See* 42 U.S.C. § 9622 (1988) (SARA amendment). *See also* COMING CLEAN, *supra* note 26, at 6 (responsible parties are paying for over 50% of site studies and cleanups through voluntary settlements, and EPA wants to increase this contribution). *See generally* Atkeson, Goldberg, Ellrod & Connors, *supra* note 37, at 10335-36, 10373-74.

236. Rikleen, *Negotiating Superfund Settlement Agreements*, 10 B.C. ENVTL. AFF. L. REV. 697, 704-05 (1982-83). Potentially responsible parties also reap advantages from settling rather than litigating Superfund cases. *Id.* For example, settling avoids the potential application of a strict, joint and several liability standard in actual litigation and provides the benefit of participating in the decisions specifying the scope of its involvement in the site cleanup. *Id.* In addition, responsible parties will probably reduce their transaction costs by settling rather than incurring costs of preparing for Superfund cases which can take months. *Id.* Finally, a responsible party may reap public relations advantages by settling since the company can portray itself as the good corporate citizen that volunteered to solve an environmental problem. *Id. But cf.* COMING CLEAN, supra note 26, at 161-64 (suggesting that cleanup standards are compromised and less expensive technology is selected in cleanup settlement negotiations, resulting in considerable dollar savings for responsible parties but raising questions as to whether major follow-up cleanups will be necessary if the remedies selected prove ineffective).

237. Rikleen, *supra* note 286, at 704; Atkeson, Goldberg, Ellrod & Connors, *supra* note 37, at 10365.

settlement will invariably consume less time and money than if the case were actually litigated.[288]

However, conflict among the courts as to the construction of "owner or operator" and as to the content of a uniform federal piercing rule under CERCLA creates uncertainty as to the liability of the parent of an insolvent or dissolved potentially responsible party. This uncertainty is not conducive to consummating settlement agreements. Where a potentially responsible party believes it possesses a viable defense, the prospect of incurring liability for enormous site response costs[289] provides the party with a strong incentive to engage in time consuming and expensive litigation. When one or more parties choose to litigate, settlement becomes more difficult as other admittedly liable parties balk for fear of contributing more than their equitable share.[290] As a consequence, resources may be devoted to litigation instead of cleanup, and delay in cleanup extends the potential for environmental damages from toxic releases.

### *B. Federal Policies Advanced by CERCLA: Criteria for Evaluating Alternative Rules of Decision*

Courts and commentators have promoted fashioning federal rules of decision in veil-piercing inquiries in light of the policies underlying a particular federal statute, rather than relying on a generalized federal veil-piercing doctrine.[291] Accordingly, this section reviews CERCLA's principal policy objectives and other

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288. Rikleen, *supra* note 286, at 704. *But see* Comment, *Deep Pockets, supra* note 45, at 315 (large transaction costs are likely to be incurred regardless of whether the case is litigated or settled).

289. During the SARA hearings, EPA reported that the average site cleanup costs were $8.3 million. S. REP. No. 11, 99th Cong., 1st Sess. 2 (1985). Under SARA's more stringent cleanup standards, EPA estimated that average site response costs would increase to between $30 and $50 million. *High Cost of Permanent Superfund Cleanups to Result in Interim Actions, Porter Says*, 17 Envt. Rep. 778, 779 (BNA) (Sept. 26, 1986).

290. Comment, *Successor Liability, supra* note 49, at 234.

291. *See In re* Acushnet River & New Bedford Harbor Proceedings *re* Alleged PCB Pollution, 675 F. Supp. 22, 33 (D. Mass. 1987) ("it is . . . clear that the policies embodied in a statute should direct the veil piercing inquiry"); *Alter Ego Doctrine, supra* note 94, at 865 n.82 (citing cases). *See also supra* notes 153-160 and accompanying text (discussing how courts modify the traditional piercing tests to accommodate federal statutory objectives).

factors relevant to an assessment of which piercing rules, and which construction of "owner or operator" articulated by the courts, most closely promote these statutory aims.

### *1. Rapid Cleanup of Contaminated Sites*

The principal objective behind enactment of CERCLA was to expedite response to the nationwide threats posed by thousands of improperly managed hazardous waste sites that substantially endanger public health and the environment.[292] Many courts adopting expansive constructions of the Act's liability provisions have justified their rulings on the basis of congressional intent that as many toxic waste sites as possible be cleaned up as quickly as possible.[293]

### *2. Notions of Corrective Justice: Let the Polluter, or Someone Somehow Connected with the Polluter, Pay*

The second objective of CERCLA is to place the primary burden for cleaning up, or financing site response actions, on the parties that acted to create the hazards.[294] This "make the

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292. United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio) (citing 1980 U.S. CODE CONG. & ADMIN. NEWS 6119-20).

293. *See, e.g., id.* at 805, 808, 810 (joint and several liability); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1313-14 (N.D. Ohio 1983) (in holding transporters retroactively liable, the court observed that "the legislative history clearly indicates that Congress intended to clean up as many dumps as possible with Superfund"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112, 1118 (D. Minn. 1982) (justifying absolute liability subject only to limited statutory defenses by citing congressional intent "that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal").

294. *See, e.g.*, United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112, (D. Minn. 1982) (finding that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created"); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (finding that "the Act is intended to facilitate the prompt clean-up of hazardous waste dump sites and when possible to place the ultimate financial burden upon those responsible for the danger created by such sites"); United States v. Northeastern Pharmaceutical & Chem. Co, Inc., 579 F. Supp. 823, 848 (W.D. Mo. 1984) (finding that CERCLA "was designed to insure, so far as possible, that the parties responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up."); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983) (finding "little doubt that

polluter pay" approach is based on the principle of corrective justice, which is grounded in the idea that those who cause harm should pay for the harm.[295] Features of CERCLA's liability system, both as designed and as expansively interpreted by the courts, have, however, attenuated the link between liability under CERCLA and notions of fairness based on corrective justice. Liability under CERCLA does not depend on a finding that a defendant's act caused or contributed to the actual or threatened release of a hazardous substance from a waste site.[296] CERCLA's weak causation requirements, combined with its permitted imposition of joint and several liability on a broad range of parties,[297] can expose parties having only a tangential relation to acts which caused harm to the full financial burden of site response costs totalling millions of dollars.[298]

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Congress intended for those individuals who were responsible for creating the hazards from these wastes to bear the cost of the clean up").

295. Comment, *Deep Pockets, supra* note 45, at 306; *Developments in the Law, supra* note 3, at 1477; Note, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575, 593 (1983) [hereinafter *Tort Analysis and Toxic Waste Victim Compensation*].

296. *See supra* notes 79-81 and accompanying text (discussing the Act's weak causation requirements).

297. *See supra* notes 74-75 and accompanying text (discussing the courts' construction of the Act to permit joint and several liability).

298. *See supra* notes 44, 289 and accompanying text (discussing response cost components and average site cleanup costs). *See also* Klotz & Siakotos, *Lender Liability Under Federal and State Environmental Law: Of Deep Pockets, Debt Defeat and Deadbeats*, 92 COM. L.J. 275, 275-76 (1987) (setting forth five situations of extensive liability). Representative Stockman, an opponent of CERCLA's expansive liability standard, stated in a House debate:

> I would like to suggest to the Members of this House that some day down the road about a year from now they are going to receive a letter from a company in their district that has just received a $5 or $10 million liability suit from EPA that was triggered by nothing more than a decision of a GS-14 that some landfill, some disposal site somewhere, needed to be cleaned up and, as a result of an investigation that his office did, he found out that that company in your district contributed a few hundred pounds of waste to that site 30 years ago . . . .
>
> [And once EPA has] found that deep pocket, they will immediately go to court and sue that deep pocket . . . .

126 CONG. REC. 26,786 (1980).

### *3. Restitution: Preventing Unjust Enrichment*

Related to corrective justice is restitution, or preventing the unjust enrichment of those who have benefited from inadequate disposal of toxic waste. The Senate Report on the original CERCLA bill evidenced the intent that contributions from firms which had been "generically" associated with toxic waste in the past should be the primary source of funds for cleanup, since these firms profited from producing and using such substances.[299] Courts have been responsive to the restitution argument in interpreting liability under CERCLA. For example, the *Northeastern Pharmaceutical* court observed that "Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up."[300]

However, the restitution argument is weakened by the fact that parties currently paying for cleanup actually may have received little or no benefit from disposal practices which took place years ago. Such benefits may have gone to former employees in the form of higher wages, to former shareholders as dividends, or to former consumers in the form of lower prices.[301] But there is probably some continuity between past and present beneficiaries because if the company's past profits enabled it to prosper, the current owners, employees and business affiliates are likely better off as a result.[302] The Third Circuit in *Smith Land & Improvement Corp. v. Celotex Corp.*[303] relied on such continuity in holding that a

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299. S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980), *reprinted in* SEN. COMM. ON ENVIRONMENT & PUB. WORKS, 97th Cong., 2d Sess. 1, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980, at 320 [hereinafter LEGISLATIVE HISTORY].

300. United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 848 (W.D. Mo. 1984). *See* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983). The *Georgeoff* court cited EPA's argument that "society should not bear the cost of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dump site owner-operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibility for the present hazards to society that have been created . . . . [R]elieving industry of responsibility establishes a precedent seriously adverse to the public interest . . . ." *Id.* (citing SEN. REP. NO. 848, 96th Cong., 2d Sess. 98 (1980)).

301. Note, *Developments in the Law*, *supra* note 3, at 1542.

302. *Id.*

303. 851 F.2d 86 (3rd Cir. 1988).

successor corporation may be liable for asbestos waste cleanup costs.[304] The court found that benefits from the use of hazardous materials accrued to the original corporation as well as the original corporation's successors and their shareholders and inured only indirectly, if at all, to the general public.[305]

### 4. *Deterrence of Future Releases of Toxic Waste and Efficient Allocation of Resources Through Forced Internalization of Costs of Hazardous Waste Management*

CERCLA's legislative history, along with commentary, suggest that the Act's broad liability scheme was intended, and in fact operates, to create incentives for safer disposal of toxic waste and to promote efficient allocation of economic resources through forced internalization of waste management costs.[306] Strict

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304. *Id.* at 92.

305. *Id.* This court, along with some commentators, seems unmindful of the fact that the bulk of Superfund revenues is derived not from taxpayers generally, but from industry. *See* Note, *Developments in the Law*, *supra* note 3, at 1542. Under CERCLA as originally enacted, 87.5% of the $1.6 billion fund was to be raised by a tax on crude oil, imported petroleum products and basic chemicals, with the remaining 12.5% contributed from general revenues. 42 U.S.C. § 9631 (1982). Pursuant to the SARA amendments which increased the fund to $8.5 billion over five years, the funding base has been broadened considerably, although general revenues actually contribute proportionately somewhat more (14.7%) than under the original funding scheme. 26 U.S.C. §§ 59A, 4611-12, 4661-62, 4671-72, 9507 (1988); 42 U.S.C. § 9611(p) (1988). *See supra* note 29 (sources of tax revenues funding the Superfund). In approving a predecessor of the environmental tax ultimately enacted, the Senate Finance Committee stated that the Committee was "of the view that the cleanup of abandoned hazardous waste sites is a broad societal problem extending beyond the chemical and petroleum industries. Thus, the committee recommended a new excise tax on all manufacturing sectors of the economy." SEN. COMM. ON FINANCE, SUPERFUND REVENUE ACT OF 1985, S. REP. NO. 73, 99th Cong., 1st Sess. 13 (1985).

306. *See* S. REP. NO. 848, 96th Cong., 2d Sess. 34 (1980), *reprinted in* LEGISLATIVE HISTORY, *supra* note 299, at 341. The report on Senate Bill 1480, the Senate version of CERCLA, stated:

> In some of these cases the choice is not between an innocent victim and a careless defendant, but between two blameless parties. In such cases the costs should be borne by the one of the two innocent parties whose acts instigated or made the harm possible.
>
> The advantage of this approach is not only that it is fair, but that it will cause the economy to operate better. Strict liability is, in effect, a method of allocating resources through choice in the market place.
>
> The most desirable system of loss distribution is one in which the prices of goods accurately reflect their full costs to society. This therefore requires, first, that the cost of injuries be borne by the activities which caused them,

liability, it is argued, is an efficient means of encouraging the development of safer waste management practices.[307] Companies, aware that they will be liable for cleanup costs for any release with which they are associated, will invest in safer waste disposal methods.[308] Associated costs will be reflected in the prices of products creating toxic waste, causing consumers to reduce their purchase of such products, which in turn makes it "more likely that the market will attain an efficient balance between chemical consumption and safe disposal."[309]

As appealing as this justification for CERCLA's strict liability may be in theory, the operative effect of the cost internalization rationale is reduced by several factors. First, the primary deterrent for inadequate toxic waste handling and disposal is provided by the Resource Conservation and Recovery Act (RCRA) of 1976.[310] RCRA instituted a comprehensive, closed "cradle to grave" system for tracking hazardous waste, requiring the formal identification of waste as hazardous, the development of manifests to leave a paper trail tracking all shipments, and certification through a permit system that ensures that performance standards for safe treatment, storage and disposal are being met.[311] RCRA provides the

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> whether or not fault is involved, because, either way, the injury is a real cost of these activities. Second, it requires that among the several parties engaged in an enterprise the loss be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells . . . . [S]ocial and economic resources are more efficiently allocated when the actual costs of goods and services (including the losses they entail) are reflected in their prices to the consumer.

*Id.*

307. Note, *Developments in the Law*, *supra* note 3, at 1519-20.

308. *Id.*

309. *Id. See* White, *Economizing on the Sins of Our Past: Cleaning Up Our Hazardous Wastes*, 25 HOUS. L. REV. 899, 915-18 (1988) (explaining the economics of internalization and causation-based liability).

310. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991i (1988)).

311. *See generally*, F. ANDERSON, D. MANDELKER & A. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 12 (1984); J. QUARLES, FEDERAL REGULATION OF HAZARDOUS WASTES--A GUIDE TO RCRA (1982); R. FORTUNA & D. LENNETT, HAZARDOUS WASTE REGULATION--THE NEW ERA: AN ANALYSIS AND GUIDE TO RCRA AND THE 1984 AMENDMENTS (1987) (discussing RCRA).

government with significant enforcement powers subjecting generators, transporters, and site owners or operators who do not comply with the extensive regulations to injunctions, fines, and criminal penalties.[312] Although CERCLA applies to both active and inactive sites, CERCLA probably provides only an additional increment of deterrence to those who already are subject to RCRA enforcement actions.[313]

Secondly, CERCLA's deterrent effect is reduced by the possibility that corporate managers may not adequately incorporate future risks into their current decisionmaking processes.[314] Because managers may discount the possibility that the corporation may be held liable in the future or may find it difficult to establish the present value of future costs which might result from an adverse court decision, the threat of future CERCLA liability may not have any deterrent effect in practice.[315]

### 5. *Cost-spreading*

Legislative history indicates that CERCLA's broad liability scheme was intended to spread cleanup costs among as many parties as possible.[316] Yet, in practice, because the EPA can rely

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312. 42 U.S.C. § 6928(a) (1988) (authorizing the EPA, for violations of the statute or any implementing regulations, to issue compliance orders or to bring a civil action to force compliance); *id.* § 6928(d-e) (establishing criminal penalties for certain acts involving the transportation, storage, disposal or export of hazardous waste); *id.* § 6928(h) (giving EPA the power to order that corrective action be taken at any interim status facility form where there is or has been a release of hazardous waste); *id.* § 6973(a) (where hazardous waste presents an imminent and substantial threat to human health or the environment, the EPA has the authority to compel abatement of the hazard).

313. Comment, *Deep Pockets, supra* note 45, at 302.

314. *Id.* at 303. *See* Note, *Tort Analysis and Toxic Waste Victim Compensation, supra* note 295, at 600-04 (identifying several factors that defeat accurate cost-estimation and cost-internalization, and that in turn impede the consequent deterrent effect of liability for damage caused by toxic waste); Rabin, *Indeterminate Risk and Tort Reform: Comment on Calabresi and Klevorick*, 14 J. LEGAL STUD. 633, 639-40 (1985) (noting that corporate managers are subject to a wide variety of psychological and economic pitfalls in translating long-term risk projections into current management decisions, including tendencies to ignore the problems facing the next generation of corporate officers).

315. Comment, *Deep Pockets, supra* note 45, at 303.

316. *See supra* note 48 (citing legislative history indicating intent to spread costs). *See also* United States v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983) (noting cost-spreading as one of CERCLA's legislative aims and citing legislative history).

on joint and several liability and because multi-party litigation is expensive and complex, the government has little incentive to sue all potentially responsible parties at a site and hence focuses its resources on a few wealthy or highly visible defendants.[317] This incomplete enforcement by the EPA results in a liability "lottery" which forces the holder of the "winning" ticket to incur substantial costs to locate and implead other solvent responsible parties.[318] EPA's enforcement is also antithetical to other stated objectives of CERCLA's liability system, namely corrective justice, since parties bear the cleanup cost burdens for which they are not responsible,[319] and deterrence, because incomplete enforcement tends to insulate small companies from liability and force "deep pockets" to overinternalize the costs of waste disposal.[320]

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317. Note, *Developments in the Law, supra* note 3, at 1529. The government does not always sue all responsible parties. *See, e.g.*, United States v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1260-61 (S.D. Ill. 1984) (alleged waste generator not entitled to dismissal on ground government was aware of numerous parties who disposed of hazardous waste at a site but who were not joined as defendants); Colorado v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985) (defendants noted that EPA had failed to join some 200 to 500 persons with ownership interests in the land on which the release had occurred).

318. White, *supra* note 309, at 913; Note, *Developments in the Law, supra* note 3, at 1530. Obstacles to effective contribution by all responsible parties include the following: many of the smaller responsible parties may have become judgment-proof; impleaded parties are liable only for their apportioned share of the damages and hence liability for shares of absent parties, as well as for the transaction costs of impleading other responsible parties, which can run into the millions of dollars, must be borne by the original defendants. *Id.* at 1531-32.

319. White, *supra* note 309, at 913. "The methodology for allocating these [cleanup] costs is such that any firm who has been connected with any amount of disposal of hazardous wastes is, in effect, holding a lottery ticket that potentially represents millions of dollars of liabilities to the firm for the cleanup of wastes unrelated to its own activities." *Id. See also* Note, *Developments in the Law, supra* note 3, at 1530 (observing that "[j]oint and several liability may prove unfair when it forces certain parties to pay for cleaning up releases to which they did not contribute and from which they derived no past financial benefit"). "[T]he driving force behind CERCLA cleanup actions is the government's power to threaten an individual defendant with overwhelming liability for what other waste disposers have done." *Id.* at 1513.

320. Note, *Developments in the Law, supra* note 3, at 1530-31. The authors of the Note argue that joint and several liability leads to both overdeterrence and underdeterrence of unsafe waste disposal rather than to a uniform incentive for safe behavior, because the incomplete enforcement mechanism largely shields small companies from liability and forces wealthy companies to overinternalize the costs of waste disposal. *Id.* Companies that escape liability do not bear the costs of their unsafe waste disposal and their products are underpriced and overproduced. *Id.* Conversely, companies held jointly and severally liable pay more than their share of cleanup costs and their products are overpriced and underproduced. *Id.* "The result is to shift production away from the only producers that might alter their behavior in response to the threat of CERCLA liability." *Id.* at 1531.

### *6. Revenue Raising to Finance Site Cleanup*

Although not a stated or explicitly intended statutory objective of CERCLA, in practice the various components of the Act's expansive liability provisions function less to serve the objectives of corrective justice, restitution, deterrence, or cost-spreading than to function as a financing mechanism.[321] This mechanism shifts the costs of cleaning up hazardous waste sites to parties with some connection, however remote, to those sites.[322] The Chairman of the Senate Committee on Environment and Public Works, during the Superfund reauthorization hearings, expressed this view in observing that "[t]he theory underlying Superfund's liability scheme was, and is, that government should obtain the full costs of cleanup from those it targets for enforcement . . . ."[323]

Courts, in liberally interpreting CERCLA's liability provisions, have responded to statements in the legislative history indicating Congress' awareness that the $1.6 billion Superfund would not provide sufficient funds to clean up all existing dump sites posing public health and environmental risks.[324] Courts have consistently rejected constitutional arguments against CERCLA's broad imposition of liability, reasoning that the need to control the hazardous waste problem justifies an essentially ad hoc imposition

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321. *See* Comment, *Deep Pockets, supra* note 45, at 311 (arguing CERCLA liability is more like a revenue collection measure than a common law liability system and that its major function is to compensate the government).

322. *Id.*

323. 132 CONG. REC. S14903 (daily ed. Oct. 3, 1986) (remarks of Senator Stafford).

324. *See, e.g.*, Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1313 (N.D. Ohio 1983) (citing Congress' awareness that the costs of the cleanup it envisioned would greatly exceed the amount of the Superfund and its intent to clean up as many dumps as possible with the Superfund in selecting a construction of the statute that will most fully implement the Congressional intent); United States v. Wade, 577 F. Supp. 1326, 1336 (E.D. Pa. 1983) (stating that "[t]he [$]1.6 billion Superfund has been repeatedly acknowledged as an inadequate response to the immense cost of cleaning up existing hazardous waste sites"). *But see* Moskowitz & Hoyt, *Enforcement of CERCLA Against Innocent Owners of Property*, 19 LOY. L.A.L. REV. 1171, 1174 (1986) (arguing that the courts, "[m]otivated by a desire to provide a broad financial base for cleaning up inactive waste sites, . . . have extended liability beyond that envisioned by Congress").

of liability on solvent parties with some connection to disposal sites.[325]

### *7. Importance Given By CERCLA to the Corporate Form*

Another consideration given by federal courts in fashioning rules of decision to guide veil-piercing inquiries in federal question cases is the extent to which a statute places importance on the corporate form.[326] Although neither CERCLA nor its legislative history expressly addresses this point, the Act defines those parties who may be liable in such a way as to indicate that Congress intended not to accord the corporate entity as much protection as under traditional state corporate law doctrine. Specifically, CERCLA defines "owner or operator" in part as "any person owning or operating" a facility,[327] and "person" in all-encompassing terms.[328] Indeed, courts have held managing shareholders and parent corporations liable based on their reading of the plain meaning of these definitions.[329] Moreover, at least one court has concluded, in holding a site owner and operator personally liable notwithstanding the individual's incorporation to escape potential personal liability, that CERCLA's silence regarding the effect of incorporation, the Act's strict liability standard, and the broad categories of potentially responsible parties "ineluctably lead the Court to the conclusion that CERCLA places no importance on the corporate form."[330] This conclusion was

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325. Comment, *Successor Liability, supra* note 49, at 229 n.11 (citing United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1337-42 (S.D. Ind. 1982) and United States v. Price, 557 F. Supp. 1103 (D.N.J. 1983)).

326. *See, e.g.*, Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981) (noting that when federal courts look at the purpose of a federal statute to determine whether the statute places importance on the corporate form, the inquiry "usually gives less respect to the corporate form than does the strict common law alter ego doctrine").

327. 42 U.S.C. § 9601(20)(A)(ii) (1988).

328. *See supra* note 53 (definition of "person").

329. *See supra* notes 174-224, and *infra* note 366 and accompanying text (discussing cases holding parent corporations and individual shareholders liable as owners or operators).

330. United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988). The court concluded that "the expressed beneficial legislative goals underlying CERCLA, the derogation of those goals which would result were the Court to place significance on [defendant's] incorporation, and the identity of ownership and modality of operation between the old and the new business entities provide ample

reiterated without elaboration by the trial court in *United States v. Kayser Roth Corp.* in holding a parent corporation liable.[331]

### *8. Other Principles of Statutory Interpretation Relevant to Formulation of a Uniform Federal Rule of Decision*

In addition to the specific objectives furthered by CERCLA, three general principles of statutory interpretation are relevant to the formulation of a uniform federal rule of decision to guide questions of parent corporation liability under CERCLA. The first calls for a consistent, harmonious interpretation of the various provisions of a statute, since a statute is passed as a whole and not in sections, and is derived from a general purpose and intent.[332] The second relevant general principle is that statutes enacted for the protection of public health are to be given an extremely liberal construction to maximize the accomplishment of their objectives.[333] The third applicable general rule of statutory

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basis for the Court to hold as a matter of law that the difference in legal entities may be here disregarded insofar as CERCLA § 107 liability is concerned." *Id.*

331. 724 F. Supp. 15, 24 (D.R.I. 1989). This statement was made in connection with the court's holding Kayser-Roth liable as an owner under a piercing the corporate veil theory. This basis for liability was not reviewed by the First Circuit, which affirmed the trial court's alternative basis for holding Kayser-Roth liable directly as an operator. *See* United States v. Kayser-Roth Corp., 910 F.2d 24, 25-28 (1st Cir. 1990). *See also supra* notes 203-212, 236-242 and accompanying text (discussing *Kayser-Roth*).

332. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 46.05, at 90 (4th ed. 1984).

333. 3 *id.* § 71.02, at 517. Protection of public health was a foremost objective of CERCLA. *See* S. REP. NO. 848, 96th Cong., 2d Sess. 2 (1980) (report on one of the three bills which culminated in CERCLA's adoption included an extensive statement of the problems of hazardous waste sites, including contamination of surface water and groundwater and consequent damage to public water supplies, the imposition of threats to public health resulting from such contamination). In adopting SARA, Congress increased CERCLA's emphasis on protecting public health by adding a broad directive to give primary attention to those releases which the President believes may present a public health threat. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in 42 U.S.C. §9604(a)(1) (1988). *See* 3 SUTHERLAND, *supra* note 332, § 60.01, at 55 (a liberal construction "is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction").

construction is that remedial statutes are liberally construed to advance the remedy.[334]

These principles, taken together, have found their application in the courts' virtually consistent liberal and expansive interpretations of the liability provisions of CERCLA. The use of these principles is exemplified by the court's finding in *United States v. Reilly Tar and Chemical Corp.*[335] that, to achieve congressional objectives of a prompt response to hazardous waste disposal problems and of placing the cleanup cost burden on those responsible, CERCLA "should not be narrowly interpreted . . . to limit the liability of those responsible for cleanup costs beyond the limits expressly provided."[336]

### C. *Evaluation of Alternative Rules of Decision*

The case law has generated three basic approaches to determine the circumstances under which parent corporations will be found liable as owners or operators under CERCLA. These may be categorized as: (1) Capacity to control the activities of the subsidiary, which in its broadest sense amounts to strict liability for parent corporations; (2) the generalized federal common law piercing test; and (3) substantial ownership interest and exercise of control of (or active participation in) the operations of the subsidiary. This section reviews each alternative approach and concludes that the last-mentioned formulation is the most consistent

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334. 3 SUTHERLAND, *supra* note 332, §60.01, at 55. This principle was applied by the Third Circuit in *Smith Land* in holding a successor corporation liable under CERCLA section 107(a)(1), title 42 United States Code section 9607(a)(1): "The Act views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition." Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3rd Cir. 1988). *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (goal of CERCLA is "overwhelmingly remedial"), *cert. denied*, 111 S. Ct. 752 (1991); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (as CERCLA is a remedial statute, the court is "obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes").

335. 546 F. Supp. 1100 (D. Minn. 1982).

336. *Id.* at 1112. *See also Fleet Factors*, 901 F.2d at 1557 ("ambiguous statutory terms should be construed to favor liability"); New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) ("[w]e will not interpret section 9607(a) in any way that apparently frustrates the statute's goal, in the absence of a specific congressional intent otherwise").

with the objectives advanced by CERCLA's liability scheme, as interpreted by the courts.

### 1. Capacity to Control the Subsidiary: Strict Liability of Parent Corporations

The *Bunker Hill* court, in its test for determining parent corporation liability as an owner or operator under CERCLA for cleanup costs associated with the insolvent subsidiary's operations, suggested that mere capacity to control the hazardous waste disposal activities of its subsidiary is sufficient to establish liability.[337] Interpreted broadly, this test would amount to a rule of strict liability for parent corporations. Several commentators have also recommended categorical liability for parent corporations as the preferred federal rule of decision under CERCLA.[338] While such an approach would furnish the certainty of a bright-line rule and would advance a few of the objectives of CERCLA's liability system, this standard falls short when considered against the full range of the aims of the statute's liability scheme.

*Bunker Hill* held that a parent corporation will be liable if the parent had: (1) The capacity to discover a release; (2) the power to control the subsidiary's release; and (3) the capacity to prevent and abate the damage.[339] Since Corporation A, as the controlling shareholder of Corporation B, inherently has the power to dictate the management and operations of Corporation B, broadly construed the *Bunker Hill* test is simply a rule of strict liability. Although the *Bunker Hill* court relied on specific findings to show that Gulf in fact exercised control of Bunker Hill's finances and that Gulf reaped considerable financial benefit from Bunker Hill's operations,[340] the test adopted, if applied literally, imposes strict liability. It should be noted, however, that the court apparently did

337. Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986).

338. *See, e.g.*, Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 998, 1002-03 (1986); Comment, *Refining the Scope*, *supra* note 64, at 52-60.

339. *Bunker Hill*, 635 F. Supp. at 672.

340. *Id.*

not intend to frame such a sweeping rule. The court cautioned that "in adopting the above test, care must be taken so that 'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator."[341] Despite this caveat, at least two courts have read the *Bunker Hill* test literally and refused to adopt the test.[342]

Commentators have cited economic analysis to both justify and criticize a rule of strict liability of parent corporations. Such a standard, it is argued, would internalize the risks of setting up subsidiary corporations to perform hazardous waste disposal activities, reduce the exposure of involuntary creditors to the risk of releases of hazardous waste, and reduce enforcement costs.[343] Other commentators argue that the social loss from reducing investment in certain types of projects as a consequence of seriously modifying limited liability might far exceed the gains from reduction in the "moral hazard" of limited liability--that is, the incentive created by limited liability to transfer the cost of risky activities to creditors.[344]

Of the three alternatives, strict liability of parent corporations would maximize the revenue raising objective of CERCLA's liability system since strict liability would assure the availability of deep pockets to fund cleanups at sites operated by insolvent

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341. *Id.*

342. *See* United States v. New Castle County, 727 F. Supp. 854, 866 (D. Del. 1989); Rockwell International Corp. v. IU International Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988). The *New Castle County* court stated that "mere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach" and that "the entity [or person sought to be strapped with liability] must actually exercise control." *New Castle County*, 727 F. Supp. at 866 (quoting *Rockwell*, 702 F. Supp. at 1390). *See also supra* notes 213-221 and accompanying text (discussing the *Rockwell* decision). *But cf.* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) (holding that a secured creditor may be liable on the basis of its participation "in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes"), *cert. denied*, 111 S. Ct. 752 (1991).

343. *See* Note, *supra* note 338, at 988-98. It is argued *inter alia* that the investment rationale does not support allowing limited liability for parent corporations because corporations are not risk-averse in their investment strategies, that allowing limited liability for parent corporations has the effect of subsidizing inefficient investment in hazardous waste disposal activities, and that parent corporations make good risk-bearers. *Id.*

344. Easterbrook & Fischel, *supra* note 134, at 104. The authors also argue that categorical liability for parent corporations would give unaffiliated firms a competitive advantage, which in turn would not benefit victims of torts because larger firms are apt to carry more insurance. *Id.* at 111.

responsible parties, thereby preventing depletion of Superfund and providing for rapid cleanup of more contaminated sites. Yet, as even its advocates concede, the strict liability alternative would do so only by imposing liability arbitrarily.[345] Such a consequence would be antithetical to the objectives of corrective justice and restitution, since parties who neither were responsible nor benefitted from hazardous waste disposal would be made liable.[346] Similarly, strict liability of parent corporations would exacerbate the present tendency of the federal government to target enforcement efforts on large, high-visibility deep pockets, to the detriment of CERCLA's cost-spreading aim.

Finally, although several courts have held that CERCLA places little importance on the corporate form,[347] it is doubtful whether even those courts would find grounds in the Act's text or legislative history to support the complete abrogation of so fundamental a tenet of American law as limited liability for corporate shareholders. Numerous courts have interpreted the definition of "owner or operator"[348] as requiring active participation by a shareholder for liability to attach under section 107 of CERCLA.[349] Hence, the alternative of strict liability for parent corporations is unlikely to be accommodated harmoniously and consistently within CERCLA's existing liability framework,[350] and the widespread adoption by the federal courts

345. Comment, *Refining the Scope, supra* note 64, at 55.

346. *See id.* at 55, n.72.

347. *See supra* notes 330-331 and accompanying text (discussing the *Mottolo* and *Kayser-Roth* trial courts' findings).

348. *See* 42 U.S.C. § 9601(20)(A) (1988) (definition of owner or operator).

349. *See, e.g.*, United States v. New Castle County, 727 F. Supp. 854, 866 (D. Del. 1989); Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384, 1390 (N.D. Ill. 1988); United States v. Mirabile, No. 84-2280, slip op. at 7 (E.D. Pa. September 4, 1985). *See also* 42 U.S.C. § 9607(a)(1)-(2) (1988) (CERCLA section 107(a)(1)-(2) liability of current and former owners or operators).

350. *See supra* note 342 and accompanying text (discussing the refusal of two courts to adopt a strict liability standard) and *infra* note 351 and accompanying text (discussing other courts' refusal to read into CERCLA any congressional intent to disregard the corporate form).

of a strict liability standard for parent corporations of responsible parties is improbable absent a statutory amendment.[351]

### 2. *The Generalized Federal Common Law Piercing Test*

In *Acushnet River* and *Joslyn*, the courts declined to fashion a specific federal rule of decision to guide piercing inquiries under CERCLA, relying instead on general federal standards for disregarding the corporate entity.[352] These courts found insufficient congressional intent in the Act and its legislative history to disregard the firmly entrenched doctrine of limited liability for shareholders.[353]

In so concluding, the *Acushnet River* and *Joslyn* courts failed to acknowledge the strong, albeit somewhat inconsistent, federal policies undergirding CERCLA's liability scheme.[354] They also

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351. *See In re* Acushnet River & New Bedford Harbor Proceedings *re* Alleged PCB Pollution, 675 F. Supp. 22, 32 (D. Mass. 1987). The *Acushnet River* court stated that:

> [A] court should [not] summarily disregard the corporate fiction under the guise of furthering some unspoken congressional intent. If a change so fundamental as to impose CERCLA liability on parent corporations for no reason other than the fact that they did not ignore the performance of their subsidiary is to come at all, it must come from the Congress, not the courts. What the sovereigns request here is not the development of federal common law, but an amendment to the statute.

*Id. See also* Joslyn Manufacturing Co. v. T.L. James & Co., 893 F.2d 80, 82-83 (5th Cir. 1990). The *Joslyn* court stated that:

> Joslyn asks this court to rewrite the language of the Act significantly and hold parents directly liable for their subsidiaries' activities. To do so would dramatically alter traditional concepts of corporation law. The "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." Any bold rewriting of corporation law in this area is best left to Congress.

*Id.* (citation omitted). *See also* Comment, *Refining the Scope*, *supra* note 64, at 75 n.189 (advocating absolute liability of parent corporations under CERCLA, but acknowledging that congressional action, in the form of a "comment," would be needed to effect this result).

352. *See supra* notes 243-252 and 260-268 and accompanying text (discussing the *Acushnet River* and *Joslyn* courts' piercing tests).

353. *Acushnet River*, 675 F. Supp. at 32; *Joslyn*, 696 F. Supp. at 226.

354. *See supra* notes 292-336 and accompanying text (discussing the legislative goals of CERCLA).

neglected to heed the Supreme Court's directive that "the interposition of a corporation will not be allowed to defeat legislative policy, whether that was the aim or only the result of the arrangement."[355]

By insisting on total[356] or inordinate[357] domination of the subsidiary by the parent and deliberate use of this control to cause harm to a plaintiff as conditions of piercing the veil,[358] these courts are erecting impediments to the achievement of the aims of CERCLA's liability scheme of rapid site cleanup, corrective justice, restitution, deterrence, cost-spreading and revenue raising.[359] Moreover, their rule of decision is inconsistent with applicable principles of statutory interpretation calling for harmonious and liberal construction of remedial, health-based statutes.[360] This alternative rule of decision frustrates explicit congressional intent that those responsible for creating hazardous waste problems pay for the cleanup of the problems.[361] This rule would shield corporations which actively participated in the management of their subsidiaries and benefitted from that involvement. By thus impeding the aims of corrective justice and restitution, the *Joslyn/Acushnet* rule also interferes significantly with the goals of revenue raising to finance rapid site cleanup, since the rule essentially forecloses liability of an entire class of solvent, responsible parties.[362] The Superfund would be depleted more

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355. Anderson v. Abbott, 321 U.S. 349, 363 (1944).

356. *Joslyn*, 893 F.2d at 83-84.

357. *Acushnet River*, 675 F. Supp. at 34.

358. *Joslyn*, 893 F.2d at 83-84; *Acushnet River*, 675 F. Supp. at 33, 35.

359. *See supra* notes 292-325 and accompanying text (discussing these objectives which Congress sought to advance through CERCLA).

360. *See supra* notes 332-336 and accompanying text (discussing these principles of statutory interpretation).

361. *See supra* notes 48, 294 and accompanying text (discussing legislative intent that those responsible for the problems created by improper disposal of hazardous waste pay for the remediation of the resulting damage).

362. *See* United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 848-49 (W.D. Mo. 1984). In adopting an expansive definition of "owner or operator," the *Northeastern Pharmaceutical* court stated that "[a] more restrictive interpretation would frustrate congressional purpose by exempting from the operation of the Act a large class of persons who are uniquely qualified to assume the burden imposed by it." *Id. See also supra* note 175 (noting that the Eighth Circuit did not review the *Northeastern Pharmaceutical* trial court's definition of "owner

rapidly,[363] and the goal of cost-spreading among responsible parties would be frustrated since other responsible parties are likely to be jointly and severally liable.[364] In addition, any deterrent effect of CERCLA would be minimized under this rule, since, unless the parent deliberately used a subsidiary to escape CERCLA liability, a subsidiary could abandon an enterprise, sell off its assets, and remain a judgment-proof corporate shell without having liability attach to the parent, even if the parent actively participated

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or operator").

363. To the extent that parent corporations who should be held liable as responsible parties are not held liable, and to the extent that their shares of cleanup costs are not borne by remaining responsible parties under joint and several liability, the Superfund will bear the cost. This would act as an insurance-type remedy to spread the burden of cleanup costs to a broader base. *See supra* note 29 (soures of tax and other revenues which fund the Superfund). *But c.f. infra* note 364 and accompanying text (to the extent that other responsible parties absorb the responsible but non-liable parent's share because liability is joint and several, the goal of cost-spreading is frustrated). Shifting the bulk of the financial burden from a relatively small group of industrial corporations who are viewed as "responsible parties" to a broader base revenue source has been advocated on equity and efficiency grounds. *See, e.g.*, Comment, *Deep Pockets, supra* note 45, at 332-44. Since disposal sites which conformed with all applicable regulations in the past now pose substantial risks to public health and the environment, it may be argued that the most equitable way of financing the cleanup is to spread the risk and the financial burden among a large group. *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS 24 (5th ed. 1984) (discussing the risk-spreading rationale). In addition, since the benefits, in the form of cost savings, of inadequate disposal of hazardous waste did not accrue solely to the petrochemical industry but rather also to workers, consumers and past shareholders, the equity argument for broadening the revenue base for Superfund is strengthened. Congress, in broadening the base of taxpayers contributing to the Superfund by adopting in SARA an "environmental tax" on corporations, responded to these arguments. As the Senate Finance Committee reported in recommending an early version of this tax, "[T]he Committee is of the view that the cleanup of abandoned hazardous waste sites is a broad societal problem extending beyond the chemical and petroleum industries. Thus, the committee recommended a new excise tax on all manufacturing sectors of the economy." SENATE COMM. ON FINANCE, SUPERFUND REVENUE ACT OF 1985, S. REP. NO. 73, 99th Cong. 1st Sess. 13 (1985). However, opposition by the Reagan administration to financing Superfund through a broad-based tax almost caused a pocket veto of SARA. *See* Atkeson, Goldberg, Ellrod & O'Connors, *supra* note 37, at 10,366-70. As to efficiency arguments for funding site cleanups from a broad revenue base, at least one commentator has argued that funding derived exclusively through a system of taxation would avoid enormous and unnecessary transaction costs entailed in the current complex system of apportioning site response and other liability. Comment, *Deep Pockets, supra* note 45, at 332-44. *See also supra* note 284 (discussing transaction costs). Although substituting a tax-based financing mechanism for CERCLA's existing liability system might achieve a number of the goals of the current liability scheme, evaluation of this alternative is beyond the scope of this Comment.

364. *See supra* notes 71-73 and accompanying text (discussing joint and several liability under CERCLA); *supra* notes 316-320 and accompanying text (discussing the legislative objective of cost-spreading among responsible parties).

in the operation of the subsidiary and reaped benefits from those activities.[365]

Moreover, the *Joslyn/Acushnet* rule of decision is inconsistent with an extensive body of case law holding personally liable individual shareholders who actively participate in management of a responsible party's operations.[366] Since much of this case law predated enactment of SARA, Congress' failure to amend the statute to preclude such liability can be viewed as implicitly endorsing a rule that individual shareholders who participate in the operations of a responsible party may be held personally liable under CERCLA.[367] As the *Nicolet* court observed, in relying on this case law to find that a parent corporation may be directly liable,[368] "[t]here is, of course, no basis, under CERCLA, to distinguish between the liability of an individual stockholder who actively participates in the management of a corporation and a corporate stockholder which so participates."[369] Indeed, given the courts' generally greater willingness to abrogate corporate limited liability to hold a parent corporation liable as compared to an individual controlling shareholder,[370] the *Joslyn/Acushnet* rule is not only inharmonious with the prevailing construction of CERCLA's liability provisions but also contrary to the general

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365. *See* Comment, *Successor Liability, supra* note 49, at 232 n.17 (noting that the "disappearance" of potentially responsible parties often arises from corporate transactions).

366. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 847-48, (W.D. Mo. 1984), *aff'd in relevant part, rev'd on other grounds*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied* 484 U.S. 848 (1987); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985); Kelley *ex rel.* Michigan Natural Resources Comm'n v. ARCO Indus. Corp., 723 F. Supp. 1214, 1217-20 (W.D. Mich. 1989); United States v. Mottolo, 605 F. Supp. 898, 913-14 (D.N.H. 1985); United States v. Mirabile, No. 84-2280, slip op. at 7 (E.D. Pa. September 4, 1985).

367. *See id.* (citing cases, decided before passage of SARA in 1986, holding individual shareholders personally liable).

368. *See supra* notes 199-202 and accompanying text (discussing the *Nicolet* court's ruling that a parent corporation that directly participates in the management of a subsidiary may be directly liable as an owner or operator).

369. United States v. Nicolet, Inc., 712 F. Supp. 1193, 1203 (E.D. Pa. 1989).

370. *See supra* notes 134-139 and accompanying text (noting that courts are more inclined to pierce the corporate veil to abrogate the limited liability of corporations as distinguished from individuals).

purposes for which the privilege of limited liability was created.[371]

*3. Exercise of Control*

A third alternative rule of decision, requiring that a parent corporation actually exercise control over the management and operations of a subsidiary responsible party if the parent is to be derivatively liable under CERCLA, was most succinctly postulated by the *Nicolet* court. The court held the parent's separate corporate existence may be disregarded, and alternatively that the parent may be held liable as an operator, if it had a substantial financial or ownership interest in a subsidiary which is a potentially responsible party under CERCLA, and if the parent exercised control over the management and operations of the subsidiary.[372] The essence of this rule has also been adopted by the First Circuit in *United States v. Kayser-Roth Corp.*[373] and by the Northern District of Illinois in *Rockwell International Corp. v. IU International Corp.*[374] Of the three alternatives examined, this approach to determining parent corporation liability is most consistent with CERCLA's objectives and scheme of liability as interpreted by the courts.

By requiring the exercise of actual control over the subsidiary's operations, as distinguished from the mere capacity to control, this test furthers CERCLA's aim of corrective justice. Parent corporations which have been actively involved in the operations of their subsidiaries can be characterized as truly "responsible" parties in a way that parents, simply by virtue of their financial control, cannot.[375]

The proposed rule of decision does not, however, specify the requisite degree of control which must be exercised for liability to

371. *See id.* (noting that courts may be more willing to abrogate the limited liability of a corporation when another corporation, and not an individual shareholder, will then be held liable, because the economic and other policy rationales for limited liability are not as clearly served.)

372. *Nicolet*, 712 F. Supp. at 1202-03. *But see id.* at 1203-04 (stating that the parent may be liable alternatively under the capacity to control standard).

373. 910 F.2d 24, 27 (1st Cir. 1990).

374. 702 F. Supp. 1384, 1390 (N.D. Ill. 1988).

375. *See id.*

attach to a parent corporation. While the proposed rule does not provide the certainty of a bright-line test, as would a rule of strict liability, the rule offers the countervailing advantage of being far less arbitrary in its application and results.[376] A flexible rule of decision enabling a court to consider the particular facts of a case is consistent with, if not essential to, the equitable remedy of disregarding the corporate entity.[377]

As to the type and indicators of control over a subsidiary that might be requisite for CERCLA liability to attach to a parent, two factors are offered as sufficient but not necessary conditions. First, control should be deemed sufficient if the parent has exercised substantial control over management and operational decisions relating to waste disposal and environmental control.[378] Several courts have focused their inquiries on evidence of parent corporation control of operational and investment decisions in their subsidiaries' waste management and related environmental matters.[379] Second, if a parent corporation has reaped substantial financial benefit from its responsible party subsidiary, sufficient control may be rebuttably presumed.[380] Such a result is compelled by the combination of CERCLA's restitution and

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376. *See supra* note 345 and accompanying text (noting that even advocates of strict liability for parent corporations of responsible parties acknowledge that such a rule would impose liability arbitrarily).

377. *See supra* notes 95-96 and accompanying text (noting that whether the piercing test is met is a question of fact and not of law). *See also* Quadion Corp. v. Mache, 738 F. Supp. 270, 275 (N.D. Ill. 1990) (in considering whether a shareholder of a closely held corporation is liable as an operator, the test is "heavily fact-specific, requiring an evaluation of the totality of the situation") (quoting Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1544 (W.D. Mich. 1989)); United States v. New Castle County, 727 F. Supp. 854, 869 (D. Del. 1989) (in considering whether to impose liability as an operator, court must consider the "totality of circumstances" based upon the "unique factual situation presented").

378. *See* Note, *Alter Ego Doctrine*, *supra* note 94, at 866 (the "control" prong of the alter ego test should be modified under federal common law to reflect the policy of the applicable federal statute, for example, in an antitrust case the court should focus on evidence tending to show control of pricing and distribution decisions).

379. *See supra* notes 211, 220 (discussing the *Kayser-Roth* and *Rockwell* courts' focus on the parent corporations' control of their subsidiaries' environmental management practices).

380. Note, *Alter Ego Doctrine*, *supra* note 94, at 867.

corrective justice aims[381] and the Act's strict liability framework.[382]

However, neither direct control of a subsidiary's pollution control activities nor actual profit from the subsidiary's operation should be necessary preconditions of parent corporation liability under CERCLA. If other indicia of actual exercise of substantial control of the subsidiary's operation can be proven, liability should not be precluded. Any other result would have the inequitable result of rewarding firms which ignored the environmental operations of their subsidiaries but otherwise exercised pervasive control, or which, for other reasons, simply failed to turn a profit from their investment in a subsidiary operation.

Where neither control of environmental matters nor substantial financial benefit can be shown, the threshold level of contact between the parent and subsidiary for liability to attach to the parent should be something more than merely exceeding a "pure investment relationship," a standard which the *Acushnet River* court rejected.[383] On the other hand, requiring complete domination and control under the traditional piercing doctrine[384] is not consistent with the minimal emphasis CERCLA places on the corporate form,[385] nor with the Act's preeminent objective of rapid cleanup of contaminated sites financed by those with some connection to the site.[386] The decision of what level of control is sufficient for liability to attach to a parent of a responsible party must be left to the courts' discretion in exercising their equitable powers, based on the facts of each case and the Supreme Court's

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381. *See supra* notes 48, 294, 299 and accompanying text (discussing CERCLA's foundation in the objectives of corrective justice and restitution). *See also supra* note 177 and accompanying text (*Northeastern Pharmaceutical* court's finding that Congress has determined that those who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up).

382. *See supra* notes 70-73 and accompanying text (discussing strict liability under the Act).

383. *In re* Acushnet River & New Bedford Harbor Proceedings *re* Alleged PCB Pollution, 675 F. Supp. 22, 31-32 (D. Mass 1987).

384. *See supra* note 108 and accompanying text (level of control required to pierce should be substantially more than that which could be exercised by any majority shareholder).

385. *See supra* notes 330-331 and accompanying text (discussing cases finding that CERCLA places little emphasis on the corporate form).

386. *See supra* notes 292-295 and accompanying text (discussing CERCLA's preeminent objective of expeditious cleanup of contaminated sites by those connected to the site).

directive that the corporate fiction not be allowed to interfere with the attainment of congressional objectives.[387]

Conspicuously absent from the proposed rule of decision are the second and third prongs of the traditional piercing test, namely that the control of the subsidiary be used by the parent wrongfully or for an improper purpose and that the plaintiff's injury be clearly related to the parent's control.[388] However, there is ample precedent for disregarding the corporate fiction on the basis of the control prong alone, not only in applications of the piercing doctrine in causes of action based on contract and tort,[389] but especially in actions under federal statutes.[390] Moreover, in the more general formulation of the piercing doctrine,[391] the second prong requires merely that "if the acts are treated as those of the corporation alone, an inequitable result will follow."[392]

A rule of decision requiring that the parent's control of the subsidiary be used to evade a statutory duty under CERCLA would be patently inconsistent with the Act's aims and scheme of liability. Liability under CERCLA is imposed retroactively and without fault, for the purpose of remedying environmental hazards created by companies which may have managed their wastes in full compliance with existing law. To require a parent to have used its subsidiary intentionally to evade a statutory duty would effectively exempt all parent corporations from liability for the costs of cleanup of their responsible party subsidiary's inadequate waste management practices, regardless of the extent to which they may have exercised pervasive control of or profited from those practices. Such an outcome would clearly and significantly frustrate

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387. Anderson v. Abbott, 321 U.S. 349, 363 (1944).

388. *See supra* notes 113-121 and accompanying text (discussing the second and third prongs of the traditional piercing test).

389. *See supra* notes 122-141 (under traditional piercing inquiries, the test is applied flexibly and there is precedent for piercing solely on the basis of the first prong).

390. *See supra* notes 153-160 and accompanying text (criteria for piercing, including the threshold degree of control, under federal common law are tailored to the policies undergirding the applicable statute).

391. *See supra* notes 101-104 and accompanying text (discussing the two-prong test).

392. Automotriz Del Golfo De Cal. S.A. De C.V. v. Resnick, 47 Cal. 2d 792, 796, 306 P.2d 1, 3 (1957).

CERCLA's objectives of corrective justice, restitution, cost-spreading, and financing rapid cleanup of contaminated sites. Moreover, such a result would not be countenanced by the Supreme Court's mandate that interposition of the corporate form "not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement."[393]

Finally, the proposed rule of decision is consistent with the large majority of district and appellate courts' tests for direct liability of a shareholder as an owner or operator under CERCLA section 107.[394] Specifically, that test premises liability of a shareholder[395] on the active participation or control over the activities of a facility at which hazardous wastes are generated or

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393. Anderson v. Abbott, 321 U.S. 349, 363 (1944) (citing cases).

394. *See supra* note 366 and accompanying text (discussing the case law on liability of individual shareholders as owners or operators). This proposed rule is also consistent with the EPA Enforcement Division's policy on the liability of corporate shareholders. Memorandum, Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, to Assistant Administrator for Solid Waste and Emergency Response, Associate Enforcement Counsel for Waste, Regional Administrators, and Regional Counsels, June 13, 1984.

395. The courts have not yet defined the boundaries of the word "owner" in sections 107(a)(1) and 107(a)(2). *See* Comment, *Refining the Scope, supra* note 64, at 51. The case law on individual shareholder liability under CERCLA, which also predicates liability on active management participation, suggests that at least some courts will interpret the term "owner" expansively, extending liability to encompass not only those having controlling interest in facilities, but also those which have virtually any ownership interest in a facility. *See* United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 579 F. Supp. 823, 848 (W.D. Mo. 1984) (stating that "[t]he statute literally reads that a person who owns interest in a facility and is actively participating in its management can be held liable for the disposal of hazardous waste"); United States v. Mirabile, No. 84-2280, slip op. at 4-5 (E.D. Pa. Sept. 4, 1985) (stating that "an individual who owns stock in a corporation and who actively participates in its management can be held liable for cleanup costs incurred as a result of improper disposal by the corporation"); United States v. McGraw-Edison Co., 718 F. Supp. 154, 156-158 (W.D.N.Y. 1989) (rejecting contention that because defendant was a minority (49%) shareholder of a responsible party defendant could not as a matter of law be held liable as an "owner" under section 107). Accordingly, it is not clear whether sections 107(a)(1) and 107(a)(2) exempt from liability a corporation which is not a majority shareholder in another corporation but which owns enough stock to have *de facto* control of the second corporation. *See* Comment, *Refining the Scope, supra* note 64, at 51 n.50 (noting that a corporation may have *de facto* control of a large, publicly-traded corporation by owning as little as 25 to 30 percent of the corporation's common stock (citing P. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS, APP. § 22.02.1 at 425 (1985)).

disposed of.[396] Adoption of the proposed rule of decision would thus promote consistency, equity and predictability within CERCLA's liability scheme.

## VI. CONCLUSION

CERCLA's vaguely drafted liability provisions, as expansively interpreted by the courts to impose joint and several strict liability without proof of causation, tend to serve the somewhat incompatible ends of providing funds for the rapid cleanup of abandoned hazardous waste sites, corrective justice, restitution and deterrence. One of the few remaining unresolved issues under CERCLA's liability scheme is the legal standard under which the corporate entity of an insolvent responsible party will be disregarded to hold a parent corporation liable for site cleanup and related costs. The courts which have addressed this issue in recent years have held that a uniform federal rule of decision should be crafted to guide such inquiries. However, following in a long tradition of inconsistent and unclear applications of various versions of the piercing doctrine under state common law and federal statutory law, the courts have been far from consistent in their various formulations of a "uniform" rule. The courts have articulated tests predicating liability on mere capacity to control the operations of a subsidiary, on traditional piercing doctrine requiring the parent's total domination and control of the subsidiary and the purposeful use of that control to perpetrate a wrong, and on the actual exercise of control by a parent of a subsidiary's operations.

The general objectives compelling development of a uniform federal rule to guide piercing inquiries, coupled with the need for a predictable piercing test which will provide incentives to settlement of CERCLA liability matters to expedite efficient site cleanup, call for the federal courts to resolve conflicting approaches to piercing inquiries, particularly since Congress is unlikely to act soon to decide the issue. The courts should be guided in their

396. *See supra* note 366 and accompanying text (discussing the case law on liability of individual shareholders as owners or operators).

choice of a truly uniform rule by the purposes advanced by CERCLA's liability scheme.

Evaluation of the alternative rules advanced by the courts to date supports the conclusion that neither strict liability for parent corporations nor the application of the traditional two- or three-prong piercing test is consonant with most of the objectives served by CERCLA's system of liability. Rather, a test which requires the actual exercise of control over the operation of a subsidiary responsible party most closely conforms to the important statutory aims of CERCLA.

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