Towards Respect for Corporate Separateness in Defining the Reach of CERCLA Liability

John J. Little
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I. INTRODUCTION

In the ten years since its enactment, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) has given rise to a host of thorny problems left to the federal courts for resolution. To a large extent, these problems have their roots in the lame duck status of the Congress that enacted CERCLA, the multiple compromises struck in Congress's search for acceptable language, and the dearth of legislative debate and history surrounding its enactment. Chief among these problems is CERCLA's reach, as the courts increasingly struggle to discover the lengths to which the liabilities created by CERCLA extend. In the course of this effort, the courts have taken a haphazard approach, often mangling the language of the statute and at times importing common law notions of liability, while at other times wholly discarding those same notions.

Defining the reach of CERCLA liability creates particular difficulty when courts must referee the clash between the language of the statute and the realities of corporate existence. The statute remains silent, for example, concerning the extent of a parent corporation's liability for the activities of a present or former subsidiary. A search for language addressing successor liability is similarly doomed, as is any effort to locate statutory guidance concerning whether and under what circumstances courts may hold individ-

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2. "CERCLA was rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting." Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983).

3. The final version of CERCLA "was enacted as a 'last minute compromise' between three competing bills." Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986). CERCLA "was an eleventh hour compromise." New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985).

4. "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history." Dedham Water Co., 805 F.2d at 1080 (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)). "CERCLA's legislative history is shrouded with mystery . . . ." Id. at 1081.
ual directors, officers, and employees personally liable for corporate activities. In addressing these situations, the courts continue to reach widely disparate results. Many discard the principles of corporate separateness and impose CERCLA liability directly upon parent corporations and corporate individuals, despite the absence of any statutory or common law basis. Generally, these courts rely upon factually specific analyses and CERCLA's scant legislative history and perceived purposes to justify this result. In contrast, other courts staunchly defend corporate separateness and employ only traditional common law notions to define the extent to which CERCLA liability exists beyond the language of the statute. The result, unfortunately, is that uncertainty concerning CERCLA liability pervades the business world and clutters the courts. Efforts to predict when courts will or will not impose liability in a corporate context result in little more than a roll of the dice.

This article examines some of the leading cases that address the extent to which courts should impose CERCLA liability in various corporate contexts. The article suggests that, in order to enhance predictability and efficiency and better serve the language of the statute, courts must reject the factually intensive and policy driven approach used by many jurisdictions. The article urges the courts to adopt a single approach that protects corporate separateness in all contexts and that limits CERCLA liability to the plain meaning of the statute, unless one of the traditional methods of avoiding that separateness applies.

II. THE STATUTORY SCHEME

At first glance, the liability scheme created by CERCLA seems straightforward. CERCLA creates liability for the clean-up of contaminated property when the following four elements are established:

1. The contaminated property or site is a facility;
2. A release or threatened release of a hazardous substance from the site has occurred;
3. Response costs have been incurred as a result of the release or threatened release; and
4. The party to be held liable falls within one of the four classes of responsible persons described in section 9607(a) of CERCLA.5

While there has been considerable litigation concerning the contours of the first three elements,6 they are easily established in most cases. As for the

6. See, e.g., Amoco Oil Co., 889 F.2d at 669-72 (establishing that gas emanating from disposed radionuclides and disposal of radioactive waste on the property constitutes a release, and that security measures and site investigation cause one to incur recoverable response costs); Vermont v. Staco, Inc., F. Supp. 822, 832-34 (D. Vt. 1988) (discussing the meaning of release and construing the term broadly to include "any environmental presence of a hazardous substance originating from a known industrial, manufacturing, or storage facility"); and United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) (addressing the meaning of facility and construing the term broadly to include "virtually any place at which hazardous wastes have been dumped, or
fourth element, CERCLA appears to define the parties upon which it imposes liability in relatively clear, unambiguous terms. Section 9607(a) defines the four classes of potentially liable persons as:

1. the owner and operator of a facility,
2. any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of,
3. any person who by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances owned or possessed by such person, and
4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or such threatened release which causes the incurrence of response costs, of a hazardous substance.

Thus, for any given contaminated facility, it seems clear that CERCLA imposes liability upon the person(s) that currently own(s) or operate(s) the facility, the person(s) that owned or operated the facility at the time or times it became contaminated, the person(s) that generated the substances that contaminated the facility, and the person(s) that transported those contaminating substances to the facility.

This apparent clarity disappears when courts, faced with contaminated sites and no readily identifiable, solvent person capable of shouldering clean-up costs, seek to determine who is liable. (quoting United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985)).


9. For purposes of 42 U.S.C. § 9607(a)(1)-(2), owner or operator is defined circularly as a person "owning or operating such facility." Id. § 9601(20)(A)(ii). Excluded from the definition of "owner or operator" is "a person, who, without participating in the management of a facility, holds indicia of ownership primarily to protect his security interest in the facility." Id. § 9601(20)(A)(iii). This exception was intended to protect secured creditors. In response to Congressional pressure and recent decisions concerning this exception, the Environmental Protection Agency issued its "EPA Draft Proposal Defining Lender Liability Issues Under the Secured Creditor Exemption of CERCLA" (Sept. 14, 1990). [Current Developments] Env't. Rep. (BNA) 1162-67 (October 12, 1990). An examination of secured creditor liability is beyond the scope of this article.

10. Persons liable under this subsection are commonly referred to as generators.

11. Persons liable under this subsection are commonly referred to as transporters.

12. 42 U.S.C. § 9607(a)(1)-(4) (1988). At least one court has concluded that the language of § 9607(a) is clear enough to prohibit judicial extension of the four classes created by the statute:

Congress was not, however, ambiguous with regard to which persons could be liable under CERCLA. Congress explicitly set forth four categories of potentially responsible parties. Even if CERCLA was hastily assembled . . . , Congress must still be satisfied with the four categories since no changes were made to the basic structure of CERCLA during the 1986 amendments. Anspec Co. v. Johnson Controls, Inc., 734 F. Supp. 793, 795 (E.D. Mich. 1989) (declining to impose liability upon corporate successors to owner and operator of facility), reversed — F.2d — (1991) (available in Westlaw at 1991 WL 294) (interpreting word "corporation" to include successors).
up responsibility, wrestle with the meaning of terms such as person, owner, operator, and the like. Most courts that have addressed issues of corporate separateness have done so in the process of determining whether to hold accountable an allegedly responsible party that is not clearly within one of the four classes defined by section 9607(a).

III. CONTEXTS IN WHICH LIABILITY ARISES

These issues arise in three distinct but related contexts in which the statute remains silent. In one context, courts consider whether individuals associated with a corporate entity as officers, directors, employees or stockholders personally are liable for activities that establish corporate liability under CERCLA. In another, courts examine the liability, if any, of corporate successors to entities liable under CERCLA. Finally, courts must determine the extent to which corporate parents are responsible for the CERCLA liability of present or former subsidiaries. Unfortunately, courts considering these issues have reached divergent conclusions and have shown varying degrees of concern for traditional notions of corporate separateness in each context. Moreover, the deference paid to corporate separateness has varied considerably depending upon which of the three contexts the court addresses.

A. Individual Liability

Corporate separateness generally receives the least consideration by courts attempting to determine the personal liability of individuals associated with a corporation for the corporation's CERCLA liability. One court recognized that courts often, without hesitation, hold corporate individuals personally liable pursuant to CERCLA.13 On that basis, the court concluded that:

CERCLA's statutory scheme varies the configuration of traditional corporate principles which prevent individual liability absent a conclusion that an individual engaged in procedural irregularities justifying a court in "piercing the corporate veil" or that an individual has had close, active involvement or direct supervision in the events leading to the alleged tortious harm.14

Traditionally, an individual associated with a corporation avoids liability for the acts of the corporation absent proof, for officers, directors and employees, of the individual's personal involvement in the activities giving rise to the liability or, absent proof, for shareholders, that the factual circumstances justify disregarding the corporation's separate existence by piercing the corporate veil to reach the shareholders.15 The analysis of several courts


15. See Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978) (discussing tradi-
notwithstanding, nothing in the language of CERCLA indicates that Congress intended to alter this traditional rule. Nevertheless, courts began to discard or ignore the traditional rule early in their attempts to apply CERCLA to situations involving corporate individuals.

In United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO), for example, the court began its analysis of the alleged liability of two corporate officers by focusing upon the inclusion of both individuals and corporations in the statutory definition of a person and noting that the definition did not exclude corporate officers and employees. Building upon that observation, the court concluded that it should not create such an exclusion and that, in a given case, a court could impose liability directly upon both a corporation and its officers.

From this questionable exercise in construction, the court found one of the officers individually liable because of his actual knowledge of, direct supervision of, and responsibility for the transportation and disposal of the plant’s hazardous substances. This result is hardly surprising; indeed, it is no different than the result that a court would reach under a traditional approach, given the individual officer’s personal involvement in the activity giving rise to the corporate liability. The NEPACCO court also went beyond the traditional rule, however, stating that the critical factor in the imposition of CERCLA liability was the officer’s authority to control the movement and disposal of the plant’s hazardous substances. On this basis, the court proceeded to impose liability on a second corporate officer, the president, not because of his actual involvement in the activities giving rise to liability, but because his position gave him ultimate control over the disposal of the plant’s hazardous substances. Thus, the NEPACCO court ignored traditional liability rules applicable to corporate officers and eliminated the need for personal involvement in the corporation’s wrongful activity.

In addition, the NEPACCO decision is noteworthy because the court’s
analysis of the corporate officers' liability did not consider whether to impose the corporation's liability upon the officers in a derivative sense, because of their individual activity, as it would have under a common law approach. Instead, the NEPACCO court imposed liability upon these officers directly and personally, finding, for example, one of the officers personally liable under CERCLA as a generator because he organized the transportation and disposal of the plant's hazardous substances. Thus, NEPACCO established the notion that courts could hold corporate officers personally and directly liable under CERCLA as a result of their participation in or authority over activities giving rise to corporate CERCLA liability.

The court in New York v. Shore Realty Corp. similarly went beyond the traditional rule to impose liability upon an individual who was both the sole shareholder and an officer of a corporation owning contaminated property. In Shore Realty, the individual created the corporation for the purpose of purchasing and operating the property at issue. The Shore Realty court, noting that New York courts reluctantly disregard the corporate form, refused to pierce the corporate veil to reach this individual. It concluded, nevertheless, that he was liable directly as an operator—despite the contemporaneous existence of the corporate operator—because of his personal involvement in the corporation's activity. In reaching this result, the court relied upon a tortured reading of the secured creditor exemption. Specifically, the Shore Realty court reasoned that the language of the exemption, which excludes from liability as owner or operator one who holds indicia of ownership to protect a security interest while failing to participate in the management of the facility, implied the imposition of liability on an owning shareholder who also manages the corporation. This view, which equates indicia of ownership to protect a security interest with stock ownership, plainly is incorrect. Nothing in the statute or legislative history indicates that the secured creditor exemption intended to address stock ownership; therefore, the exemption can and should remain limited to secured creditors.

23. Id. at 744.
24. 759 F.2d 1032 (2d Cir. 1985).
25. Id. at 1038. At least one court has suggested that, if done lawfully and not fraudulently, such activity should be encouraged by respecting corporate separateness and not discouraged by disregarding it. See In re Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 32 (D. Mass. 1987).
26. Shore Realty Corp., 759 F.2d at 1052.
28. Shore Realty Corp. 759 F.2d at 1052.
Shore Realty, like NEPACCO, adopts the view that courts may hold corporate individuals directly liable for activities conducted on behalf of the corporation without reference to the traditional rules governing such liability. Moreover, by considering whether to pierce the corporate veil, Shore Realty implies that, in addition to this direct liability, corporate individuals might also remain derivatively liable for a corporation's CERCLA liability under a traditional, common law test.  

A number of other courts similarly have held individuals directly liable for corporate activities without addressing the traditional rules for transferring corporate liabilities to individual officers, directors, and employees. More recently, at least one court went even further in its departure from traditional standards for imposing upon individuals direct responsibility for corporate liabilities. In several decisions, the district court for the Western District of Michigan announced a "prevention test" for determining when to hold an individual officer, director, employee, or stockholder directly liable for corporate activity giving rise to CERCLA liability. The court in these cases acknowledged that CERCLA provides neither standards nor explicit directions as to whether a court may hold a corporate officer liable. The court, however, then relied upon Shore Realty, NEPACCO, and similar decisions to disregard traditional corporate law and conclude that, in this judicially created absence of traditional corporate principles, a court may hold an individual personally liable for unlawful hazardous waste practices. The factually intensive prevention test focuses upon "whether the individual in the close corporation could have prevented or significantly abated the hazardous waste discharge."  

These prevention test cases recognized the disregard of procedural formal-
ities associated with piercing the corporate veil and differ from a review of the individual’s personal knowledge, direct supervision, or active participation, found in a traditional tort analysis.\textsuperscript{36} Under the prevention test, a corporate individual’s power or authority to prevent the waste problem is critical to a finding of liability.\textsuperscript{37}

Widespread acceptance of this prevention test\textsuperscript{38} would make it possible for CERCLA liability to attach to corporate officers merely because of their status as officers.\textsuperscript{39} It is difficult to imagine a corporate president, majority stockholder, or plant manager without sufficient ability to prevent or abate waste disposal or handle practices or both that result in CERCLA liability. Nothing in the language of CERCLA or in its legislative history indicates any Congressional desire to depart so drastically from traditional notions of imposing liability for corporate activities upon individuals.

\textit{B. Successor Liability}

CERCLA also remains silent concerning whether a court may hold a corporation responsible for the CERCLA liability of its predecessor and, if so, the standards that govern that liability.\textsuperscript{40} In cases addressing the liability of corporate individuals, courts have filled a similar void by disregarding traditional common law notions of corporate liability. Where the liability of successor corporations is at issue, the courts reach the opposite result. In these cases, the courts almost uniformly look to traditional notions of successor liability in attempting to determine CERCLA’s reach.

The leading case in this area is \textit{Smith Land & Improvement Corp. v. Celotex Corp.}\textsuperscript{41} In \textit{Smith Land}, a land purchaser performed an EPA-mandated clean up of asbestos waste and sought contribution from the corporate successors to the entity responsible for the disposal of that waste. Although the \textit{Smith Land} court recognized that CERCLA did not address successor liability, the court concluded that the concerns that led to the common law principles of successor liability equally applied to CERCLA liability.\textsuperscript{42} The court concluded that requiring the application of traditional successor liabil-

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\footnote{36. \textit{Thomas Solvent Co.}, 727 F. Supp. at 1544, 1562; \textit{Arco Indus. Corp.}, 723 F. Supp. at 1220.}

\footnote{37. \textit{Id.}}

\footnote{38. At least one additional court has adopted the prevention test and applied it to the liability of a shareholder of a liable corporation. \textit{Quadion Corp. v. Mache}, 738 F. Supp. 270 (N.D. Ill. 1990).}

\footnote{39. In announcing the prevention test, the court in these cases expressly denied that “mere status as a corporate officer or director” would be enough to support liability. \textit{Thomas Solvent Co.}, 727 F. Supp. at 1544, 1562; \textit{Arco Indus. Corp.}, 723 F. Supp. at 1220. It is difficult to see how this could be true in practice.}


\footnote{41. \textit{Id.} It is important to note, however, that \textit{Smith Land} did not address the extent to which corporate CERCLA liability survives when a liable corporation sells its assets to another. Instead, the court limited itself to mergers and consolidations, through which predecessor liabilities traditionally survive. \textit{Id.} at 91.}

\footnote{42. \textit{Id.} at 91.}
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CERCLA LIABILITY

ity concepts appropriately followed the legislation’s intent. The court went on to express its desire for a uniform federal common law of successor liability while noting that, with few exceptions, the issue remained academic because of the general agreement among states concerning the principles of successor liability.

Most other courts addressing corporate successor liability under CERCLA have adopted the analysis of Smith Land. These courts generally determine the identity of the person liable pursuant to the language of the statute and proceed to analyze whether to impose liability on any corporate successors to that person by applying traditional common law principles. In the process, the courts also address the one question left open by Smith Land: the liability of a corporate successor that purchases assets from a liable entity. Courts, almost uniformly, use the common law test applicable to asset purchasers to determine the existence of CERCLA liability. Under this test, a corporation acquiring the assets of another does not acquire the corresponding liabilities unless one of the following four exceptions applies:

1. The successor expressly or impliedly assumes the liabilities,
2. The transaction is a de facto merger or consolidation,
3. The successor is a mere continuation of the predecessor, or
4. The transaction is a fraudulent effort to avoid the predecessor’s liabilities.

The Delaware district court in United States v. Chrysler Corporation recently applied the foregoing test in an unreported decision. The Chrysler court found that the defendant assumed responsibility for its predecessor’s CERCLA liability under the first exception. The result itself is not particularly noteworthy; however, the court rejected the United States’ argument.

43. Id. at 92.
44. Id.
46. See supra note 34.
49. Id.
that the defendant was liable under an expanded view of the continuation theory, which was apparently the primary argument made by the government. 50

As one would expect, not all courts confronting the issue of successor liability have reached the conclusions articulated in Smith Land. At least one court, for example, rejected Smith Land and refused to find that corporate successors could be held responsible, even derivatively, for a predecessor's CERCLA liability. 51 Another court purported to follow Smith Land while, in the manner of the courts addressing corporate individual liability, proceeding to rewrite traditional successor liability principles in light of its view of CERCLA's remedial purpose. 52 Specifically, this court concluded that a relaxed version of the "mere continuation" exception should apply in CERCLA cases. 53 Under this test, dubbed "substantial continuity," the court considered a number of factually-intensive factors to conclude that the defendant was liable for the CERCLA problems of its predecessors.

Despite the exceptions discussed above, the courts generally have applied common law successor liability principles in defining CERCLA's reach. As a result, these courts have adopted an approach to this issue that is radically different from that used by courts addressing individual liability. As CERCLA and its legislative history are silent as to both forms of liability, these disparate approaches are difficult to reconcile or justify.

C. Parent Corporation Liability

CERCLA once again is silent concerning the liability, if any, Congress intended parent corporations to bear for the hazardous waste indiscretions of their present and former subsidiaries. Unlike the courts addressing individual liability or successor liability, courts considering this issue have not even approached a consensus. 54 To the contrary, the results cover the spec-

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50. This result is particularly significant since the court rebuffed the government's contention that, in light of the purposes of the statute, the common law "continuation" exception should be broadened in favor of finding liability. Id.; see infra notes 52-53 and accompanying text (discussing Distler decision in which common law test is relaxed in this manner); see also Frost, supra note 45 at 905-08 (discussing government efforts to expand CERCLA liability for successors).

51. Anspec Co. v. Johnson Controls, Inc., 734 F. Supp. 793 (E.D. Mich. 1989). The Anspec Court found no ambiguity in the description of the parties that were liable under CERCLA; accordingly, while the court agreed that successor liability was desirable, it concluded that it was not entitled to develop a federal common law interpreting these unambiguous provisions. Id. The Sixth Circuit recently reversed the district court's ruling, finding that under traditional rules of statutory construction successors could be liable under CERCLA. Anspec Co. v. Johnson Controls, Inc., — F.2d — (6th Cir. 1990) (available on Westlaw at 1991 WL 291).

52. United States v. Distler, 741 F. Supp. 637, 640 (W.D. Ky. 1990). The court in Distler said initially that it agreed with Smith Land that common law rules for successor liability would control. Id. It then agreed with the government that a broader test was appropriate. Id. at 643.

53. Id. This test is similar to the position urged by the United States and rejected by the court in Chrysler. See supra note 48. A similarly relaxed version of the "mere continuation" exception recently was rejected in Sylvester Bros. Dev. Co. v. Burlington N. R.R., 1990 U.S. Dist. Lexis 15115 (D. Minn. Sept. 11, 1990) (granting summary judgment to successor).

54. As discussed above, courts addressing individual liability generally have ignored com-
CERCLA LIABILITY

trum, with some courts rejecting common law corporate separateness while others embrace it.

On one hand, a number of courts have adopted an analysis akin to that employed in the corporate individuals cases. These cases typically pay little attention to traditional tests used to pierce the corporate veil and reach the parent, opting instead for the conclusion that the parent can be, and typically is, directly liable as an owner or operator, despite the existence of an intervening subsidiary. Other courts, including the Fifth Circuit, have refused to reject traditional corporate separateness and have held that a parent can be liable for a subsidiary’s CERCLA problems only if the corporate veil is pierced. In doing so, these courts have taken an approach akin to that found in corporate successor cases.

*Idaho v. Bunker Hill Co.* is one of the leading cases in the former group. *Bunker Hill* concerned whether a non-resident parent corporation was subject to jurisdiction as a result of, and could be liable under CERCLA for, the activities of its resident subsidiary. The court first addressed the jurisdiction issue, concluding that the parent’s involvement with its subsidiary established sufficient contacts to exercise jurisdiction. Turning to the liability issue, the court concluded, without further analysis, that the parent was either an owner or an operator based upon the same facts used to establish jurisdiction. Relying upon *NEPACCO*, the court proceeded to find, without mentioning the corporate veil standard, that the parent company was an owner or operator, and therefore directly liable under CERCLA, because it was intimately familiar with its subsidiary’s hazardous waste practices and “could control” those practices.

The *Bunker Hill* court thus adopted an approach to parent company lia-

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58. Id. at 670-71. In many respects, this jurisdictional analysis was superfluous because the court also found, as an alternative basis for jurisdiction, that the parent was collaterally estopped to deny the existence of jurisdiction based upon the outcome of a prior action involving personal injuries allegedly caused by pollution. Id.

59. Id. at 671.


61. 635 F. Supp. at 673. Although not characterized as such, the court’s discussion of *NEPACCO* appears to be an alternative basis for the conclusion reached through the jurisdictional analysis.
bility similar to the approach used in NEPACCO and the prevention test cases. First, the court wholly ignored the traditionally applied tests—here, piercing the corporate veil—for determining if the parent should be accountable for the subsidiary's liability. Indeed, as in NEPACCO, the subsidiary's liability seems irrelevant to the Bunker Hill court because it found the parent directly liable under the statute. Second, the focus of the court's inquiry in Bunker Hill was the parent's capacity to control and not its actual involvement in the liability-causing activities. Like the prevention test, it is difficult to conceive of a parent corporation that could escape liability if the inquiry centers upon its capacity to control its subsidiary.

Rockwell International Corp. v. IU International Corp. also falls within the former group; however, the Rockwell court approached the issue with a slightly different analysis. Rockwell rejected the notion that a parent corporation should be liable simply because it had the ability to control its subsidiary; instead, the court required that the parent "actually exercise control." Having announced what appeared to be a test recognizing traditional notions of corporate separateness, the Rockwell court indicated that a routine level of involvement in its subsidiary's activity was enough to show that a parent in fact "actually exercised control." Thus, the Rockwell decision stands for the proposition that a parent may be liable under CERCLA based upon far less involvement with its subsidiary than traditional principles would require.

United States v. Kayser-Roth Corp. took a third approach in reaching a result that falls squarely within the Bunker Hill/Rockwell camp. In Kayser-Roth, the First Circuit concluded that a parent company could be held liable as an operator under a standard different than if the parent was alleged to be

62. Like the courts in the "prevention test" cases, the Bunker Hill court claims "that 'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator." Id. at 672. It is likely, however, that practical application of the court's "capacity to control" test will render this claim little more than wishful thinking. Cf. Quadion Corp. v. Mache, 738 F. Supp. 270 (N.D. Ill. 1990) (applying prevention test to corporate shareholder).


64. "Mere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach." Id. at 1390.

65. Id. This test is noteworthy for the additional reason that it is strikingly similar to the test recently announced by the EPA for defining when a secured creditor participates in the management of a facility and thereby loses the benefit of the secured creditor exemption of § 9601(20)(A). See supra note 9. In this proposed rule, the EPA rejected the test announced in United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990), which focused upon the capacity of a lender to influence operations and not the lender's actual conduct.

66. The Rockwell court cited the following to support its conclusion that the parent controlled its subsidiary: it hired or approved the hiring of certain subsidiary officers; it determined the duties of those officers; the officers operated the facility at issue; the parent established procedures for the facility and monitored the subsidiary's compliance; parent company auditors and accountants reviewed the subsidiary and requests made by it; and, the parent had publicly said it operated the facility. Rockwell, 702 F. Supp. at 1390-91.

67. See also Mobay Corp. v. Allied-Signal, Inc. — F. Supp. — (D.N.J. 1991) (available on Westlaw at 1991 WL 389), in which the court announced a test for a parent's "operator" liability under CERCLA that does not require the level of proof needed in a strict veil-piercing test.

68. 910 F.2d 24 (1st Cir. 1990).
CERCLA LIABILITY

an owner.\textsuperscript{69} Thus, while the court conceded that corporate status was relevant to determine owner liability,\textsuperscript{70} it concluded that active involvement in the affairs of a subsidiary was sufficient to impose operator liability upon a parent.\textsuperscript{71}

Among other things,\textsuperscript{72} Kayser-Roth is noteworthy because its analysis of the purported difference in owner and operator liability was wholly unnecessary. The district court opinion being reviewed in Kayser-Roth analyzed the parent company's liability under a number of theories, including a traditional corporate veil approach.\textsuperscript{73} Under that analysis, the district court concluded that the subsidiary's "veil should be pierced."\textsuperscript{74} Accordingly, the First Circuit did not have to reach its conclusions regarding the purported difference between owner and operator liability; it could have affirmed based upon traditional corporate veil principles.\textsuperscript{75}

In re Acushnet River & New Bedford Harbor Proceedings\textsuperscript{76} was one of the earliest cases to reject the approach taken by the Bunker Hill line of cases, opting instead to apply traditional corporate separateness principles to a parent's alleged liability. In Acushnet River, the United States and the Commonwealth of Massachusetts urged the court to disregard a parent's separate existence if it found that the parent's contact with its subsidiary went beyond a "pure investment relationship."\textsuperscript{77} The court's reasoning in rejecting that position is instructive. It first noted that the rule proposed by the government would discourage solvent parties from investing in the acquisition and cleanup of contaminated properties or businesses.\textsuperscript{78} More importantly, the

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\item[69] Id. at 26-27.
\item[70] Id. at 26. The Kayser-Roth court specifically declined to address the possible liability of the parent as an owner. Id. at 28 n.11. The Rockwell court also analyzed parent company liability only as an operator; however, that court indicated that it would be necessary to pierce the corporate veil to impose liability upon the parent as an "owner". Rockwell, 702 F. Supp. at 1390.
\item[71] The court declined to address the exact standard necessary to find a parent liable as an operator, based upon the district court's conclusion that the parent "exerted practical total influence and control." Kayser-Roth, 910 F.2d at 27.
\item[72] Kayser-Roth appears to stand for the proposition that, while there can be only one owner of a facility at any given time, there can be any number of operators. This view is analogous to the NEPACCO view that an individual can operate a facility at the same time his or her employer does. See United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).
\item[74] 724 F. Supp. at 24.
\item[75] The same could be said for the district court which indicated that a parent could be held directly liable, as an operator, or indirectly liable under traditional corporate principles. Id. at 22-24. When it attempted to apply this dual method of finding liability, the court applied essentially the same factors to both "types" of liability. Accordingly, its analysis of direct liability was unnecessary.
\item[77] Id. at 31-32.
\item[78] Under traditional principles, a corporation which wants to put a waste site or past generation site to productive use can do so by creating a well capitalized, non-fraudulent, separate corporate subsidiary. The ability to work through the subsidiary justifies the initial investment, which will delimit the extent of the risk. Under the sovereigns' proposed rule, a corporation which wanted to reclaim and make productive a waste site could not do so without risking all its
\end{footnotes}
court stressed that "[n]o matter how important the policies underlying CERCLA, it still remains true that 'limited liability is the rule, not the exception.'" Because the court saw no evidence of a Congressional intent to change this rule, it opted to follow the rule of limited liability. The court in Acushnet River proceeded to apply a traditional analysis to the parent's alleged CERCLA liability. Based upon that traditional analysis, the court refused to disregard the parent's corporate separateness.

In Joslyn Manufacturing Co. v. T. L. James & Co., the Fifth Circuit similarly refused to disregard a parent company's separate existence in order to impose upon it a subsidiary's CERCLA liability. The court noted that CERCLA does not include parent companies within its definition of owner or operator and that nothing in the legislative history indicated an intent to substantially alter a "basic tenet of corporation law." Like the Acushnet River court, the Fifth Circuit in Joslyn stated that any "bold rewriting of corporation law in this area is best left to Congress." Having reached this conclusion, Joslyn then affirmed the district court's decision that the parent's corporate separateness should not be disregarded.

79. Id. (citation omitted).
80. The court stated: "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." Id.
81. In this analysis, the general inquiry is whether the corporate entity should be disregarded "in the interests of public convenience, fairness and equity." In re Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 33 (D. Mass. 1987). Acushnet River identified the following factors as a part of that inquiry:

1. inadequate capitalization
2. extensive or pervasive control
3. intermingling of properties or accounts
4. failure to observe formality and separateness
5. siphoning of funds
6. absence of corporate records
7. nonfunctioning officers and directors.

Id.
82. Id. at 35.
83. 893 F.2d 80 (5th Cir. 1990).
84. Id. at 82. In this regard, the analysis in Joslyn is exactly the opposite of that used in NEPACCO, where the court viewed the failure expressly to exclude corporate officers and directors as an indication that they were to be included. United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).
85. Joslyn, 893 F.2d at 83. The court also made two critical observations. First, it noted that, in the absence of a Congressional directive to the contrary, it should abide by common law principles. Id. Second, the court observed that Congress had in the past, when it so desired, made shareholders, parents and the like liable for the activities of otherwise valid corporations. Id. (citing the "control" test found in CERCLA at 42 U.S.C. § 9601(20)(A)(ii)).
87. 893 F.2d at 83. It is worth noting that, in Joslyn, the United States had urged adoption of a standard only slightly more deferential than the "pure investment" position urged in Acushnet River. Before the 5th Circuit, the United States contended that under CERCLA the corporate veil should be pierced where:

A. The financial resources of the subsidiary are not adequate to pay the CERCLA re-
CERCLA LIABILITY

Bunker Hill, Rockwell and Kayser-Roth, while analytically different in some respects, all stand for an analysis of CERCLA liability that parallels the analysis used in the NEPACCO and Shore Realty line of cases. In these cases, corporate separateness routinely is disregarded or ignored, and liability is imposed directly upon entities or individuals that did not formally own or operate a facility or transport or generate any waste. Acushnet River and Joslyn, on the other hand, take the opposite approach and, like the successor cases, refuse to impose CERCLA liability unless they find an entity liable under the plain language of the statute and a traditional common law basis for transferring that entity's liability to another.

IV. THE BETTER ALTERNATIVE: A SINGLE APPROACH

The disparate approaches taken by the courts in these various corporate contexts might spark little more than academic interest were it not for the uncertainty they create in the business community. Lawyers in a variety of practice areas are asked routinely to give advice concerning the potential CERCLA liability that clients may face as a result of engaging in what were heretofore common business practices. Too often, the response must urge excessive caution in the face of decisions imposing liability upon corporate officers based upon their authority and upon parent corporations for doing little more than reading the yearly reports of their subsidiaries. The uncertainty caused by these disparate positions, in all likelihood, deters beneficial economic activity. Adoption of a single approach to defining CERCLA liability in the corporate context, even one that expands the reach of that liability, would likely be beneficial if it helped remove that uncertainty.

Of the two approaches developed by the courts, the analysis of the NEPACCO, Shore Realty, Kayser-Roth group cannot withstand scrutiny and response costs for which it is liable . . . , or [it] is otherwise not available to pay those costs . . . ; and

B. The subsidiary performs a function of economic importance to the enterprise of the parent or the parent participates directly in the management of the subsidiary.

Brief for the United States as Amicus Curiae at 47 (emphasis in original), Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F.2d 80 (5th Cir. 1990). As a practical matter, it is unlikely that any parent corporation could escape liability under this standard because the parent would not be pursued if the subsidiary could pay; moreover, it is difficult to imagine a subsidiary that would not "perform a function of economic importance" to the parent.

88. That is, a formal owner, operator, generator, or transporter.
90. In this regard, the speculation of the Acushnet River court is increasingly becoming a fact. See supra note 77. For a discussion of the burdens created by CERCLA and the courts' inability to articulate a unified role in a related context, see Comment, Insureds Versus Insurers: Litigating Comprehensive General Liability Policy Coverage in the CERCLA Arena—A Losing Battle for Both Sides, 43 Sw. L.J. 969, 992-95 (1990) (authored by Debi L. Davis).
should be rejected by future courts. First, those cases routinely tout the underlying purpose and policies of CERCLA as the basis for the expansive views they adopt.\textsuperscript{91} While these purposes and policies may be laudable, nothing in the statute or its legislative history suggests that Congress intended to subvert or substantially alter well-settled common law principles of corporation law to achieve them.\textsuperscript{92} Second, many of the cases blindly rely upon the questionable statutory interpretations articulated in \textit{Shore Realty} and \textit{NEPACCO} without analysis. As demonstrated above, those early interpretations are flawed. Finally, the usually fact-intensive approach used in these cases provides little guidance to the business community concerning the type of conduct that will subject one to CERCLA liability; therefore, it does little to enhance predictability and reduce uncertainty. Indeed, it is only if these cases are extended further and liability is imposed upon all corporate parents, successors, and individuals, merely because of their status as such, that uncertainty can be eliminated. That Congress did not intend such a wholesale abandonment of corporate principles is apparent.

The approach used in the successor cases, \textit{Acushnet River} and \textit{Joslyn}, on the other hand, does withstand scrutiny, would serve to reduce uncertainty, and should be adopted uniformly by the courts. This approach generally requires proof, first, that a person is liable under CERCLA because it formally owned or operated a facility or generated or transported waste. Thereafter, the analysis shifts to the possible liability of other individuals or entities related or associated in some way with the liable person — usually as parents, successors, or officers and directors — using traditional corporate liability principles. CERCLA liability of the original person is imposed upon the associated party only when these traditional principles have been satisfied.

This latter approach is superior for several reasons. First, it does not require a conclusion that Congress silently intended to rewrite corporate law in the CERCLA area; to the contrary, it reinforces long held beliefs in the importance of traditional corporate principles.\textsuperscript{93} This approach also comports with the notion that the sweeping changes implied by \textit{NEPACCO} and \textit{Kayser-Roth} must be explicit.\textsuperscript{94} Second, this approach does not rely upon

\textsuperscript{91} E.g., United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 743 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987) (claiming that failure to hold corporate individuals liable would create "enormous, and clearly unintended loophole"); New York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d Cir. 1985) (refusing to interpret CERCLA in a way that "frustrates the statute's goals"); United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (adopting the approach taken in \textit{Shore Realty}).


\textsuperscript{93} Traditional principles of corporate separateness have long been recognized and protected by the courts. See Baker v. Raymond Int'l, Inc., 656 F.2d 173, 179 (5th Cir. 1981) ("principal of limited liability remains a dominant characteristic of American corporation law"); cert. denied, 456 U.S. 983 (1982); Krivo Indus. Supply Co. v. National Distillers and Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973)("[t]he corporate form . . . is not lightly disregarded"); modified, 490 F.2d 916 (5th Cir. 1974).

\textsuperscript{94} Cf. Midlantic Nat'l Bank v. New Jersey, 474 U.S. 494, 501 (1986) ("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 strained or erroneous readings of CERCLA’s language. To the contrary, it adopts relatively straightforward readings of such vital terms as owner, operator, and person by reading them against a traditional corporate backdrop.

This approach is also preferable because it will decrease the uncertainty generated by the disparate approaches presently in use. Businesses and their lawyers generally are familiar with and able to predict, with relative confidence, the type of conduct that will cause a corporate individual to become liable for actions taken on behalf of the corporation or that will cause a court to disregard a subsidiary’s separate existence to reach the parent. By transferring these same corporate liability principles, without expansion, into the analysis of CERCLA liability, the courts can tap this existing familiarity and enable businessmen and counsel to better appreciate and predict the likely consequences of their corporate conduct.

Finally, uniform adoption of this approach will not hinder efforts to promote CERCLA’s remedial purpose; indeed, it may well promote Congressional goals. A review of the cases that adopt the expansive view of CERCLA liability in the name of CERCLA’s purpose confirms this view. In NEPACCO for example, at least one of the corporate officers was found liable under a traditional corporate analysis.95 The Shore Realty court also found that the individual allegedly liable in that case specifically directed, sanctioned, and actively participated in the corporation’s activities creating CERCLA liability.96 Based upon this finding, it is probable that the court would have imposed liability under traditional principles governing corporate officers despite its refusal to pierce the veil. Similarly, the Kayser-Roth court imposed liability upon the corporate parent based upon common law principles.97 Most other courts using an expansive approach to liability would arrive at the same conclusions by employing a traditional analysis.98

Adopting a traditional approach to extending CERCLA’s liability may further promote the goals of the act by enabling businesses to invest in contaminated properties or activities using hazardous substances without risking corporate suicide.99 Presently, any corporation attempting to clean and make use of a site contaminated by hazardous substances, even through a legitimate subsidiary, risks financial collapse, as does the attorney advising such corporation. Adopting an approach that encourages private entities to undertake cleanups by allowing them legitimately to limit the risk involved in the enterprise could well promote CERCLA’s aim to fund cleanups,

95. NEPACCO, 810 F.2d at 744.
98. See Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222, 232 (W.D. La. 1988), aff’d, 893 F.2d 80 (5th Cir. 1990) (noting that, while it rejected the analysis of Shore Realty, NEPACCO, and other cases, the court would have reached the same result in at least some cases by applying the common law rule holding corporate officers liable for conduct in which they personally participate).
99. See supra notes 77, 86.
wherever possible, through private funds, leaving federal funds for those instances where little or no private funding can be found.

V. CONCLUSION

Since the enactment of CERCLA, courts have struggled to reconcile the Act and its goals with the long-standing body of corporate law that recognizes corporate separateness and, in most cases, limits liability. The result of this struggle has been uncertainty regarding the types of corporate conduct that will cause CERCLA liability to arise. That uncertainty can be alleviated only by the adoption of a single approach to the clash of CERCLA and corporate principles.

One option available to the courts is the expansive view of CERCLA liability articulated by the courts in NEPACCO, Shore Realty, and Kayser-Roth. Under the analysis used in these decisions, uncertainty could be eliminated by expanding CERCLA liability until it reaches corporate individuals, parents, and successors, merely because of their status. Such an expansion is unsupported by the language of CERCLA, its scant legislative history, and traditional notions of statutory interpretation.

A better option is the uniform adoption of the analysis of the successor cases, Acushnet River and Joslyn. A court proceeding under these standards first must determine whether any persons expressly liable under the terms of the statute exist — an easily accomplished task in most cases. Thereafter, the court can examine whether that person's statutory liability can be imposed, under traditional corporate law principles, upon any individuals or entities associated with the liable person. Because this approach employs traditional, familiar legal concepts, it would reduce the uncertainty currently surrounding this area and allow business to predict better the CERCLA consequences of their conduct.