1991

Liability of Officers, Directors and Stockholders under CERCLA: The Case for Adopting State Law

Richard G. Dennis

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Business Organizations Law Commons, and the Environmental Law Commons

Recommended Citation

Available at: http://digitalcommons.law.villanova.edu/vlr/vol36/iss6/2

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
LIABILITY OF OFFICERS, DIRECTORS AND STOCKHOLDERS UNDER CERCLA: THE CASE FOR ADOPTING STATE LAW

RICHARD G. DENNIS*

TABLE OF CONTENTS

I. INTRODUCTION ...................................... 1369

II. THE CERCLA LIABILITY RULES AND THE TRADITIONAL COMMON LAW RULES: HOW THEY DIFFER ............ 1370
   A. The CERCLA Rules of Liability .................... 1375
      1. Direct Liability ................................ 1377
         a. Capacity to Control .......................... 1378
         b. Statutory Liability .......................... 1390
         c. Indicia of Ownership ........................ 1398
      2. Indirect Liability: Disregarding the Corporate Entity 1400
         a. Ownership Interest and Control .......... 1400
         b. Public Convenience, Fairness and Equity . 1404
         c. Business Conduit .......................... 1408
   B. Traditional Common Law Rules of Liability .......... 1410
      1. Direct Liability ................................ 1411
         a. Federal Law .................................. 1411
         b. State Law .................................... 1413
      2. Indirect Liability: Disregarding the Corporate Entity 1418
         a. Federal Law .................................. 1419
            i. The Seymour Rule ......................... 1419
            ii. The DeWitt Rule .......................... 1420
            iii. The Milwaukee Refrigerator Rule ....... 1421
            iv. The Jon-T Rule ............................ 1421
            v. The Zubik Rule ............................. 1422
         b. State Law .................................... 1424
   C. Distinguishing CERCLA Liability Rules from Traditional Common Law .......................... 1433
      1. Direct Liability ................................ 1433
      2. Indirect Liability: Disregarding the Corporate Entity 1436

* Attorney, Weil, Gotshal & Manges, Houston, Texas. A.B. 1974, Rutgers College; J.D. 1983, University of California, Los Angeles. I would like to thank Michael Kessler, Patrick Bullard, Tim Moore and Annemargaret Connolly for their helpful comments.
   A. Is There a Need for Uniformity? .................. 1444
      1. Did Congress Intend that the Federal Statute or Program Be Applied Uniformly? ................. 1446
      2. What Effects Will Diversity of State Law Have on Federal Rights? .................................. 1449
      3. What Effects Will Diversity of State Law Have on Operations of the Federal Statute or Program? ... 1455
         a. Is a Uniform Federal Rule Essential to Carry Out the Mandate of the Federal Statute or Program? .................. 1456
         b. Is a Uniform Federal Rule Required by the Nature of the Transactions Contemplated by the Federal Statute or Program? .................. 1459
      4. Are the Federal Courts Able to Handle the Statute or Program Uniformly? .................. 1463
   B. Will State Law Frustrate Specific Objectives of the Federal Statute or Program? .................. 1467
      1. What Are the Objectives? .......................... 1468
      2. Are the Objectives Really Federal? .................. 1479
      3. Are the Federal Objectives Really Frustrated? ......... 1484
         a. Is the Frustration Too Remote or Speculative? ............. 1485
         b. Does Adoption of State Law Frustrate Federal Objectives or Merely Create a Small Burden? .................. 1489
         c. Can the United States Protect Itself? .................. 1497
   C. Will the Adoption of a Uniform Federal Rule Disrupt Commercial Relationships? .................. 1502

IV. Conclusion ........................................ 1511
UNDER the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), liability is strict, joint and several. CERCLA has been interpreted by some courts as imposing liability on officers, directors and stockholders of responsible corporations to an extent not usually seen in other areas of the law. Arguments to justify the relaxation in CERCLA litigation of the historic limits on the liability of officers, directors and stockholders try to illustrate that these limits, which have evolved over years of corporate law, are outdated in this era of astronomical environmental cleanup costs, and that the existing common law exceptions to the general rule of limited liability are inadequate to prevent the frustration of congressional objectives that underlie CERCLA. In place of the traditional rules of limited liability, certain federal courts have substituted new rules of liability. The new rules are far more aggressive than the traditional rules in reaching beyond responsible corporations to the individuals or corporations who own or manage them. The courts that have created the new and aggressive rules have entertained little doubt as to the legitimacy of their right to create such rules. To balance properly the federal and state interests involved, however, a more thorough treatment is required than has been displayed thus far in the CERCLA cases. The general thesis of this Article is that the objectives of Congress can and should be

3. Id. at 844-45 (noting that joint and several liability may be imposed under CERCLA pursuant to either statutory or common law); United States v. A & F Materials Co., 578 F. Supp. 1249, 1252-57 (S.D. Ill. 1984) (stating that Congress intended for courts to determine scope of liability under CERCLA, and absence of express statutory authority for imposing joint and several liability does not preclude such liability); United States v. Chem-Dyne Corp. 572 F. Supp. 802, 810 (S.D. Ohio 1983) (explaining that although CERCLA does not expressly provide for joint and several liability, it may nevertheless be imposed in certain circumstances).
4. For a comparison of common law liability to liability under CERCLA, see infra notes 274-300 and accompanying text.
5. For one commentator's arguments against limiting corporate liability, see infra notes 497-98 and accompanying text.
met without the disruption that would result if the traditional rules of limited liability were eroded.

Part II of this Article examines the rules of liability developed in the CERCLA cases and compares them to the traditional federal and state common law on the subject. This part demonstrates that the cases introducing the new rules have largely misread or ignored existing precedent and doctrine. A survey of the traditional federal and state law of direct liability and piercing the corporate veil reveals just how far from the traditional law these new rules have strayed. Specifically, the new CERCLA rules eliminate a number of safeguards for officers, directors and stockholders that have evolved in the traditional law over the years.

Part III examines whether federal courts should have a role in making this change in the law. The three-part test articulated in United States v. Kimbell Foods, Inc. 6 is applied to determine whether federal courts should adopt existing state law rules of decision to develop the federal law, or whether new uniform federal law is required. The Article concludes that the federal courts should adopt state law rules of liability for officers, directors and stockholders to determine liability under CERCLA.

II. THE CERCLA LIABILITY RULES AND THE TRADITIONAL COMMON LAW RULES: HOW THEY DIFFER

CERCLA was enacted in 1980 in the waning days of the Ninety-Sixth Congress in order to address the nationwide problem of cleaning up hazardous substance disposal sites. 7 Liability under CERCLA is strict, joint and several. 8 The statute identifies four targets of liability:

(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged

---

7. For a discussion of the unusual circumstances under which the Congress approved the legislation, see Grad, A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982). For a discussion of the purposes and objectives of CERCLA, see infra notes 458-75 and accompanying text.
8. For a discussion of joint and several liability under CERCLA, see supra notes 2-3 and accompanying text.
with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, 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 a threatened release which causes the incurrence of response costs . . . .

The statute defines "owner or operator" to mean any person owning, operating, or, in the case of vessels, chartering, a facility or vessel, but excludes from the definition any 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." The term "person" is in turn defined 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."

Persons falling into any of the four enumerated categories of "covered persons" are liable for the cleanup costs and damages, including certain expenses of the United States and others, together with interest. Only three statutory defenses to liability are permitted: acts of God; acts of war; and acts or omissions of a third party, under certain limited conditions.

9. CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988). The statute defines broadly the term "facility" to include, among other things, buildings, equipment, wells, ponds, landfills, motor vehicles and aircraft, as well as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." Id. § 101(9), 42 U.S.C. § 9601(9).


12. Id. § 107(a), 42 U.S.C. § 9607(a). CERCLA specifies that the covered persons shall be liable for "all costs of removal or remedial action incurred by the United States Government"; "any other necessary costs of response incurred by any other person"; "damages for injury to, destruction of, or loss of natural resources"; and "the costs of [certain statutorily authorized] health assessment or health effects study[ies]." Id. Interest on such amounts accrues from the later of the date of the expenditure or the date payment of the amount is demanded in writing. Id.

13. Id. § 107(b), 42 U.S.C. § 9607(b). The defense for acts or omissions of a third party applies generally where the defendant has taken due care and precaution with respect to the hazardous substances and the foreseeable actions of
The President of the United States and his designees are given broad authority to act in response to a threatened or actual release of hazardous substances into the environment. The cleanup may be carried out by the responsible parties with the consent of the President, or the federal government may act either alone or in concert with the state in which the facility is located. The statute contains numerous provisions relating to the cooperation between federal and state governments in the removal or remediation of hazardous substances, particularly with respect to apportioning costs.

CERCLA also created a source of money, commonly known as the “Superfund,” to pay for the costs of cleaning up hazardous substances. The defense does not apply to acts and omissions of employees or agents of the defendant, nor does it apply to third parties whose acts or omissions occurred in connection with a contractual relationship with the defendant. “Contractual relationship” includes, among other things, “deeds or other instruments transferring titles or possession,” unless the defendant took title after the release occurred, and can show either that he did not know and had no reason to know of the hazardous substance release or that he acquired the facility by certain specified involuntary transfers.

The third party. Id. § 107(b)(3), 42 U.S.C. § 9607(b)(3). The defense does not apply to acts and omissions of employees or agents of the defendant, nor does it apply to third parties whose acts or omissions occurred in connection with a contractual relationship with the defendant. Id. “Contractual relationship” includes, among other things, “deeds or other instruments transferring titles or possession,” unless the defendant took title after the release occurred, and can show either that he did not know and had no reason to know of the hazardous substance release or that he acquired the facility by certain specified involuntary transfers. Id. § 101(35)(A), 42 U.S.C. § 9601(35)(A).

14. See id. § 104. 42 U.S.C. § 9604. The statute authorizes the President to “act . . . to remove or arrange for the removal of, and provide for remedial action” relating to the released substance. Id. § 104(a)(1), 42 U.S.C. 9604(a)(1).

15. Id. § 104(a), (d), 42 U.S.C. § 9604(a), (d). The President may authorize the owner, operator or any other responsible person to “carry out the action” if he determines they will do so “properly and promptly.” Id. § 104(a)(1), 42 U.S.C. 9604(a)(1). Finally, the President may enter into a contract or cooperative agreement with any state or political subdivision, enabling such entity to carry out any action authorized under § 104. Id. § 104(d)(1)(A), 42 U.S.C. § 9604(d)(1)(A).

16. Id. § 104(c), 42 U.S.C. § 9604(c). Before the President commits the resources of the United States for remedial actions (other than emergency actions), he is required to obtain certain assurances from the state in which the release has occurred. The state must assure the President that it will provide: future maintenance of the necessary removal and remedial actions; an acceptable disposal facility for the hazardous substances; and payment of a portion of the costs equal to 10% of the costs of the remedial action, or, if the release occurred at a facility that is operated by the state or any of its political subdivisions, 50% (or more) of any amounts spent in response to such release. Id. § 104(c)(3), 42 U.S.C. § 9604(c)(3). In certain instances, the President is required to grant the state a credit, against the state’s share of the costs, for amounts expended by the state. Id. § 104(c)(5), 42 U.S.C. § 9604(c)(5). In addition, state standards for the cleanup of hazardous substances or other pollutants or contaminants may be used in some circumstances in lieu of federal standards. See id. § 121(d), 42 U.S.C. § 9621(d). Other examples of federal and state cooperation include provisions relating to the restoration, rehabilitation, replacement or acquisition of natural resources, id. § 111(f), 42 U.S.C. 9611(f), and provisions relating to state participation in planning and selecting remedial action on federal facilities. Id. § 120(f), 42 U.S.C. § 9620(f).
substances.\textsuperscript{17} The Superfund is funded mostly by excise taxes on certain crude oil, petroleum products and chemicals, an "environmental tax" on certain corporate income, and amounts recovered under CERCLA and other enforcement actions.\textsuperscript{18} The Superfund may be used for payment of costs incurred by both the United States and other authorized persons in responding to hazardous substance releases, as well as for other limited purposes.\textsuperscript{19} To recover from the Superfund, a claimant must follow the claims procedure set forth in the statute.\textsuperscript{20} When controversies arise under CERCLA, the federal district courts will generally have original jurisdiction, with proper venue in the district where the release occurred or where the defendant is located.\textsuperscript{21}

Finally, CERCLA has a notice provision. The statute states that "any person in charge" of a vessel or facility must immediately give notice to the National Response Center of any release of a hazardous substance in excess of specified quantities.\textsuperscript{22} Pen-
alties for failure to give the required notice include fines, imprison-
ment, or both.23

Once Congress had laid the groundwork for dealing with
hazardous substances problems, the federal courts were faced
with the task of determining precisely how liability would be im-
posed. Beginning with United States v. Wade,24 the courts issued a
series of opinions that created new law concerning the extent to
which officers, directors and stockholders may be held liable
either as owners or operators of facilities, or as persons who ar-
ranged for the disposal or transport of, or who accepted for trans-
port, hazardous substances. Despite protestations to the
contrary, the cases decided after Wade have largely abandoned the
traditional rules in favor of new rules that greatly reduce the bur-
den of proof on the United States. The new rules created in the
CERCLA cases may expose officers, directors and stockholders to
liability under the statute, in contravention of traditional concepts
of limited liability, on the basis of activities that may be commonly
accepted ways of doing business.25

Center has been notified of a hazardous substance release, it must “expedi-
tiously” convey the information to “all appropriate Government agencies, in-
cluding the Governor of any affected State.” Id.

CERCLA also required “any person who owns or operates or who at the
time of disposal owned or operated, or who accepted hazardous substances for
transport and selected, a facility at which hazardous substances . . . are or have
been stored, treated, or disposed of” to give notice to the Environmental Pro-
tection Agency by June 9, 1981 (180 days after the statute was originally en-
acted). Id. § 103(c), 42 U.S.C. § 9603(c).

23. CERCLA § 103(b), 42 U.S.C. § 9603(b) (1988). Failure to report may
result in imprisonment of up to three years for the first offense, and up to five
years for subsequent offenses. Id.

note 42.

25. For a discussion and criticism of expanded liability under the CERCLA
cases, see infra notes 26-178 and accompanying text. Although the facts of each
CERCLA case are crucial to understanding the present state of the law, particu-
larly as it might apply to specific individuals, the discussion in this Article is of
necessity more general. The Article focuses on the rules that the courts have
articulated, rather than on the perhaps narrower holdings that could be con-
strued from a closer look at the facts of each case. The broader focus is essential
to appreciate the sweeping advances in the law that have been announced in
these cases, and the license that they give to federal courts addressing similar
issues in future cases. There are several excellent articles that describe in great
detail the facts of the important CERCLA liability cases. See, e.g., Davidson, Cor-
porate Ownership of Real Estate: The Impact of Environmental Legislation on Shareholder
Liability, 17 REAL EST. L.J. 291 (1989); Tundermann, Personal Liability for Corporate
Directors, Officers, Employees and Controlling Shareholders Under State and Federal Envi-
ronmental Laws, ROCKY MTN. MIN. L. INST., ch. 2 (1985); Wallace, Liability of Corpo-
rations and Corporate Officers, Directors, and Shareholders Under Superfund: Should
Corporate and Agency Law Concepts Apply?, 14 J. CORP. L. 839 (1989); Comment,
Corporate Officer Liability for Hazardous Waste Disposal: What Are the Consequences?, 38
CERCLA LIABILITY

A. The CERCLA Rules of Liability

The attempts to extend liability of officers, directors and stockholders under CERCLA beyond the traditional state common law generally fall into two categories: (1) those that attempt to impose direct liability on such persons by virtue of their actions; and (2) those that attempt to liberalize the doctrine of disregarding the corporate entity, more commonly known as "piercing the corporate veil." Both of these categories have three variations.

With respect to direct liability, the first variation is one in which officers, directors and even stockholders have been held liable for CERCLA damages and cleanup costs as "owners and operators" due to their capacity to control a facility or corporation. In the second variation, courts and commentators have found a slightly different form of direct liability based on an interpretation of the statute itself, which defines the term "person" to include individuals as well as corporations, and does not exclude officers, directors and employees. The third form of direct liability relies on a statutory exception to liability for persons who, without participating in management, hold indicia of ownership primarily to protect their security interests. Certain cases have read this exception as a basis for imposing liability on individuals who own stock in a corporation and who actively par-
The doctrine of "piercing the corporate veil," as articulated in the CERCLA cases, also has three variations. The first variation emerged from *United States v. Nicolet, Inc.*,[^32] which enunciated a rule that a court may pierce the corporate veil of a subsidiary corporation and impose liability upon its parent if the parent had substantial financial or ownership interests in the subsidiary and the parent controlled, at the relevant time, the management and operations of the subsidiary.[^33] The second line of cases relies upon federal corporate veil piercing cases as authority for disregarding the corporate entity in the interests of "public convenience, fairness and equity."[^34] Finally, the third line of cases draws upon the federal common law tradition to hold a stockholder liable when the corporation was acting as a "business conduit" for the stockholder.[^35]

The creation of the rules concerning officer, director and stockholder liability has not been without controversy, however. Criticism of the cases articulating these rules generally focuses on flaws in the reasoning of the cases. Often, internal inconsistencies exist and numerous citations are made to cases that do not support the holdings for which they are cited.[^36] The flaws in the CERCLA cases demonstrate that the rules of liability articulated therein do not fit into or follow closely from the larger body of federal or state common law of either direct liability or piercing the corporate veil.[^37] Missing from the rules are the protections of

[^31]: For a discussion of cases imposing liability pursuant to the security interest exception, see *infra* notes 129-34 and accompanying text.


[^33]: For a discussion of the ownership interest and control rule articulated in *Nicolet*, see *infra* notes 136-50 and accompanying text.

[^34]: For a discussion of cases in which the corporate veil has been pierced to promote public convenience, fairness and equity, see *infra* notes 151-68 and accompanying text.

[^35]: For a discussion of stockholder liability when the corporation acts as a business conduit, see *infra* notes 169-78 and accompanying text.

[^36]: For specific criticisms of the CERCLA rules, see *infra* notes 70-96, 110-28, 132-34, 139-50, 160-68, 175-78 and accompanying text.


[T]his court holds that the corporate form, including limited liability for stockholders, is a doctrine firmly entrenched in American jurisprudence that may not be disregarded absent a specific congressional directive. Neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers or direct liability on parent corporations.

*Id.*
officers, directors and stockholders that have built up over many years of corporate common law. This section of the Article will trace the evolution of these six rules and evaluate the criticism of the cases in which these rules have been articulated, deferring a discussion of the missing safeguards until after the examination of federal and state common law.

1. Direct Liability

A number of cases addressing issues of officer, director and even stockholder liability under CERCLA have held that liability may be imposed without resort to the doctrine of piercing the corporate veil. These cases hold that such individuals may be directly liable under the terms of CERCLA. Courts have not, however, clearly articulated the rules they are using to impose direct liability. In fact, courts have often commingled the three rules for liability in a single finding. Nonetheless, each has also been used as an independent basis for liability.

The three rules of direct liability—capacity to control, statutory liability and indicia of ownership—are products of judicial reasoning that loosely interprets existing law so as to formulate new law. The capacity to control rule, for example, begins as a variation of the traditional common law rule that an officer or director is personally liable for torts or wrongful conduct that
causes a violation of a statute. The other two rules are based solely on interpretations of the language of CERCLA. In all three instances, however, there are flaws in the reasoning of the opinions that erode the link between the rule as articulated and the existing law on which it is purportedly based.

a. Capacity to Control

The rule of direct liability that has received the most attention focuses on the capacity of an individual to control the release of hazardous substances. Although early cases focused on the capacity of an individual to control the actual facility where the release occurred, later cases have instead focused on the individual's capacity to control the corporation that was responsible for the release.42

*United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO I)*43 was the first significant case in this line. In *NEPACCO I*, the District Court for the Western District of Missouri used the following definition to hold the president and vice-president of a dissolved corporation, both of whom were major stockholders of the corporation, liable as owners and operators under section 107(a)(1) of CERCLA: “The owner-operator of a vessel or a facility[sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage.”44

42. United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1983), which was handed down less than six weeks before *NEPACCO I*, appears to be the earliest decision concerning liability of corporate officers under CERCLA. *Wade* dealt with liability under §107(a)(4) of CERCLA (accepting hazardous substances for transport to sites, selected by such person, from which there is a release), and thus raises somewhat different issues than are found in the “capacity to control” cases. The *Wade* court refused to grant summary judgment against the owner/defendant because insufficient evidence existed that he had personally participated in the activity that caused the release. 577 F. Supp. at 1341-42. For a discussion of liability under CERCLA §107(a)(3) and (4), see infra notes 97-128 and accompanying text.


44. *Id.* at 848-49 (emphasis omitted) (quoting Apex Oil Co. v. United...
The court noted that the defendant officers had the capacity to control the disposal of hazardous substances at the facility, the power to direct the negotiations concerning the disposal and the capacity to prevent and abate damage caused by the disposal of hazardous substances. The court also noted that each defendant was a major stockholder in the corporation and had actively participated in the management of the corporation. Accordingly, the court determined that it was necessary to impose liability on these defendants in order to prevent any frustration of congressional purpose that would occur through exemption of "a large class of persons who are uniquely qualified to assume the burden imposed by [CERCLA]."

The Court of Appeals for the Eighth Circuit reversed the district court's decision with respect to owner and operator liability of the two officers on the grounds that neither man owned or operated the "facility" from which the release had occurred (which was not the site and plant operated by the corporation). Nevertheless, the rule adopted by the district court survived and was subsequently carried forward and even liberalized in later decisions. In United States v. Carolawn Co., the District Court for the District of South Carolina cited the NEPACCO I opinion as persuasive authority and held:

[T]o the extent that an individual has control or author-

States, 530 F.2d 1291, 1293 (8th Cir.), cert. denied, 429 U.S. 827 (1976)). The Apex Oil case quoted by the NEPACCO I court had involved not liability under CERCLA, but rather liability under § 1321 of the WPCA. The Apex Oil opinion, in turn, had adopted the language used in United States v. Mobil Oil Corp., 464 F.2d 1124, 1127 (5th Cir. 1972), which had also discussed liability under the WPCA.

The quoted portion of the NEPACCO I opinion was addressing liability under § 107(a)(1) of CERCLA. The court addressed liability under § 107(3) and (4) separately. For a discussion of the NEPACCO I court's treatment of liability under § 107(3) and (4), see infra notes 103-07 and accompanying text.

46. Id.
47. Id. (quoting Apex Oil, 539 F.2d at 1293). According to the court, this frustration would occur if it were to permit the individual defendant "to be shielded by the corporate veil." Id. This reference to piercing the corporate veil has added to the confusion in an area of the law not noted for its clarity. For a further discussion of the problematic aspects of, and confusion inherent in, the NEPACCO I opinion, see Wallace, supra note 25, at 852-54. For the purposes of this Article, NEPACCO I will be treated exclusively as a direct liability case.
48. NEPACCO II, 810 F.2d 726, 742-43 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Although the circuit court reversed the district court's finding that both defendants were liable under § 107(a)(1), it affirmed the liability of one defendant under § 107(a)(3). Id. at 743-44.
ity over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs incurred at the facility notwithstanding the corporate character of the business. 50

Both NEPACCO I and Carolawn were cited later in United States v. Conservation Chemical Co. 51 Conservation Chemical held that the chief executive officer of a corporation, who was also its founder and a majority stockholder, was liable under subsections 107(a)(1) and (2) of CERCLA. 52 The Conservation Chemical opinion contained findings concerning the defendant officer's education and work experience, his involvement in the creation of the facility and the administration of the corporation, the frequency of his visits to the facility and his frequent communication with plant managers. 53 The court concluded that liability was appropriate because of the defendant's "high degree of personal involvement in the operation and the decision-making process," particularly during the early years of the corporation. 54

Significantly, neither the Carolawn opinion nor the Conservation Chemical opinion contains any findings that the officer defendants actively or directly participated in the activity that led to the releases of hazardous substances. Nor was it shown in either case that any of the officer defendants actually had the capacity to discover the release, to direct the activities of the person who did control the release, or to prevent or abate the release. Instead, the respective courts took a simpler route by focusing on the active participation by the defendants in the overall management of the facilities from which the hazardous substances had been re-

50. Id. at 20,700. The Carolawn court was ruling on the individual defendants' motions to dismiss the United States's complaint for failure to state a claim. Carolawn thus helped to give the capacity to control rule a life independent of the NEPACCO I decision. This illustrates the vitality of rules in this area of law, which may assume an importance far in excess of the facts that gave rise to them. For a discussion of this Article's focus on the effect of rules enunciated in cases, rather than the cases' factual settings, see supra note 25.


52. Id. at 420. The court delivered its decision on the issue of liability of the individual defendant in a Supplemental Memorandum Opinion. This opinion was issued after a separate hearing to determine the nature and degree of the defendant's personal participation in the management of the facility. Id.

53. Id.

54. Id. The court found that the defendant had been personally active in establishing the layout of the site, as well as supervising its construction. He had also taken an active role in research, marketing, administration and hiring. Id.
leased. Thus, because neither Carolawn nor Conservation Chemical rely on (or even contain) findings that the respective defendants were involved in activities closely related to the releases, they represent a further step in the evolution of the "capacity to control" rule set out in NEPACCO.56

The next step in the expansion of the "capacity to control" rule was the inclusion of corporate stockholders within the scope of direct liability. The significance of this step lies in the fact that corporate stockholders, unlike the individuals who were defendants in the cases previously discussed, are not officers of the corporation that issued the stock. A corporate stockholder thus has no direct role or participation in the operation or activities of the corporation whose stock it owns. In Idaho v. Bunker Hill Co.,57 the District Court for the District of Idaho held that the corporate parent of a subsidiary found liable under section 107(a)(2) of

55. See id. (noting defendant's "high degree of personal involvement in the operation and the decision-making process"); Carolawn, 14 Envtl. L. Rep. (Envtl. L. Inst.) at 20,700 ("CERCLA contemplates personal liability of corporate officials, such as [defendants], who are responsible for the day-to-day operations of a hazardous waste disposal business"). Since the Carolawn decision was rendered on a motion to dismiss for failure to state a claim, the court made no specific findings with respect to the extent of the individuals' control. The language of the decision, however, makes clear that a finding of control over the facility will be sufficient to establish liability. For the relevant language used in the Carolawn decision, see supra text accompanying note 50.

56. Cf. Vermont v. Staco, Inc., 684 F. Supp. 822, 831-32 (D. Vt. 1988) (holding individual managing stockholders personally liable "in their respective executive capacities in the corporate structure"), rescinded in part, vacated in part on other grounds, Civil No. 86-190, 1989 U.S. Dist. LEXIS 17541 (D. Vt. Apr. 20, 1989). A slight twist on this step was added by the decision in Kelley ex rel. Natural Resources Commission v. ARCO Industries Corp., 725 F. Supp. 1214 (W.D. Mich. 1989), which identified the key element in the liability analysis as "whether the individual ... could have prevented or significantly abated the hazardous waste discharge that is the basis of the claim." Id. at 1219. The court then stated that to determine liability under this "prevention" test it would look at evidence of the individual's authority to control waste handling practices, the distribution of power within the corporation, evidence of responsibility undertaken for disposal practices and affirmative attempts to prevent unlawful disposal or to avoid or abate hazardous waste damage. Id. at 1219-20. Significantly, the court refused to apply a strict liability standard against the individuals on the grounds that it was "too harsh and broad-sweeping a standard" to use in all cases. Id. at 1219.

In Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1539-45 (W.D. Mich. 1989), the author of the ARCO opinion expanded on the "prevention" test, noting that it should also require an analysis of the officer's power and authority within the corporation, factors not generally considered in the traditional common law. The court reasoned that inclusion of such factors in the test for liability would encourage responsible conduct by high level corporate officers, rather than giving them an incentive to distance themselves from the corporate facilities that actually handle hazardous substances. Id. at 1544.

CERCLA would also be held liable as an owner or operator under the statute. The court adopted the test of "owner-operator" used in NEPACCO I. To support its conclusion that the parent was an "owner or operator," the court cited the same facts it had used to determine that it had personal jurisdiction over the parent. While not expressly piercing the corporate veil, the court noted that the parent had reserved the right to approve or make decisions on almost all matters relating to pollution and capital expenditures, and that the authorized capital of the subsidiary was only $1,100.00, while the parent received $27 million in dividends from the subsidiary.

Although the Bunker Hill decision could perhaps be read as a piercing the corporate veil case instead of a direct liability case, two subsequent decisions contain no such ambiguity and are clearly based on direct liability under the capacity to control rule. In United States v. Nicolet, Inc., the District Court for the Eastern District of Pennsylvania denied the defendant parent corporation's motion to dismiss the United States government's first amended complaint, filed under section 107(a)(2) of CERCLA, stating that:

There 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.

58. Id. at 671-72. The court stopped short, however, of making the corporate parent automatically an owner or operator when only "normal" activities of a parent and its subsidiary are carried out. Id. at 672.

59. Id. at 671-72. For a discussion of the NEPACCO I test, which was adopted from Apex Oil and Mobil Oil, see supra note 49-47 and accompanying text.


61. 635 F. Supp. at 672. The court also noted that the parent controlled the subsidiary's board of directors at times, and was continuously informed about the subsidiary's daily activities. Id.

62. For a discussion of the Nicolet court's view of Bunker Hill as a piercing the corporate veil case, see infra notes 144-48 and accompanying text.


64. Id. at 1199-200. Although it denied the motion to dismiss, the court felt it necessary to discuss the theories of liability that had been advanced by the United States, "in an attempt to clarify any existing confusion and expedite the scheduled trial of this matter." Id. at 1200. This is yet another example of the importance of rules of liability in this area of the law.
Both individuals and corporations are included within the definition of "person" under Section 101(21) of CERCLA. Accordingly, if an individual stockholder can be liable under CERCLA for his corporation's disposal, a corporation which holds stock in another corporation (e.g., a subsidiary) and actively participates in its management can be held liable for clean-up costs incurred as a result of that corporation's disposal.65

In a later case, liability was extended to include a minority corporate stockholder. In United States v. McGraw-Edison Co.,66 the District Court for the Western District of New York denied a motion for summary judgment by the corporate stockholder. The stockholder had argued that, as a matter of law, it could not be an "owner or operator" under section 107(a)(2) because of its minority position.67 In denying the motion, the court apparently ac-

65. Id. at 1203. United States v. Kayser-Roth Corp. 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991), affirmed a lower court decision holding a parent corporation liable as an operator under CERCLA § 107(a)(2) without regard to piercing the corporate veil. The Court of Appeals for the First Circuit in Kayser-Roth emphasized that stock ownership alone is not sufficient to impose direct liability on a parent for its subsidiary's activities: "To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." Kayser-Roth, 910 F.2d at 27. The court did not address the plausibility of a corporate parent's having complete ownership of and general authority over its subsidiary, yet refraining from active involvement in the subsidiary's activities. See also CPC Int'l, Inc. v. Aerojet-General Corp., Nos. G89-10503 CA, G89-961 CA, 1991 U.S. Dist. LEXIS 12143 (W.D. Mich. Aug. 27, 1991) (reasoning that the language of CERCLA creates "new, middle ground" between traditional limited liability of corporate stockholders and liability of certain stockholders as "operators" of facility; also identifying factors to be considered in determining whether parent is "operator"); Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 352-54 (D.N.J. 1991) (reviewing history of capacity to control rule, and denying summary judgment motion by corporate parent); City of New York v. Exxon Corp., 112 B.R. 540, 546-48 (S.D.N.Y. 1990) (applying capacity to control rule in suit concerning disposal of hazardous substances under CERCLA § 107(a)(3) and (4), but modifying rule to require "active participation in and actual control over the affairs of the subsidiary"), aff'd in part, 932 F.2d 1020 (2d Cir. 1991); Colorado v. Idarado Mining Co., 18 Envtl. L. Rep. (Envtl. L. Inst.) 20,578, at 20,579 (D. Colo. 1987) (holding parent liable as operator because it was "intimately involved in the management" of subsidiary), rev'd, 916 F.2d 1486. (10th Cir. 1990), cert. denied, 111 S. Ct. 1584 (1991).


67. Id. at 157. The corporate stockholder in this case owned 49% of the stock of the corporation that actually owned the facility, and argued that there was no authority for imposing direct liability on a minority stockholder. Id. at 156. The government countered with two responses: that a minority stockholder could be liable under a direct liability rule, and that the facts of the case would also justify piercing the corporate veil. Id.
cepted the government's argument that evidence of the corporate stockholders' "actual participation in the day-to-day operations of [the corporation that actually owned the polluting facility] should not be disregarded as a possible basis for CERCLA liability merely because of the percentage of shares owned." This evidence would also be relevant in determining liability under NEPACCO I and Nicolet.

Thus, the capacity to control rule has undergone significant expansion since its inception. It has evolved from a rule imposing liability on individual officer/stockholders who had the capacity to take specific actions directly related to the release of hazardous substances to a rule under which even minority corporate stockholders who participated in the operations of a corporation could be liable for environmental damages at a facility owned and operated by that corporation. The rule allows courts to impose liability on officers, directors and stockholders for actions taken in the name of the corporation, even if such persons (or, in the case of corporate stockholders, such entities) did not actively participate in such actions.

The most fundamental problem with the capacity to control rule is that it fails to respect the status of a corporation as a separate legal entity. A corporation can own property, act through its officers and agents, and contract in its own name. Its stockholders have an ownership interest in the corporation, but neither they nor the corporation's officers or directors have any ownership rights in the corporation's assets. Although a corporation can operate a facility, it is only capable of acting by and through

68. Id. at 157. While the court recited the holdings of NEPACCO I and Nicolet, it did not expressly adopt these as its rules. In denying the motion for summary judgment and permitting discovery to proceed on the issue of the corporate stockholder's involvement in the operations of the facility owner, however, the court at least tacitly endorsed those opinions. See id.

69. See id.


71. Id. § 31 (earnings and profits of corporation belong to corporation itself and are not owed to stockholders until dividend declared); see also Henn & Alexander, Laws of Corporations and Other Business Enterprises § 71 (3d ed. 1983) (stockholders have limited control over assets of corporation, but do not own such assets). In Amcast Industrial Corp. v. Detrex Corp., No. S88-620, 1990 U.S. Dist. LEXIS 15191 (N.D. Ind. Sept. 12, 1990), the court refused to hold former stockholders of a corporation liable as "owners" of a facility under § 107(a)(2) of CERCLA with respect to property actually owned by the corporation. The court reasoned that nothing in the statute "even remotely suggests a congressional intent to abrogate the common law of corporations by subjecting stockholders to liability as the 'owners' of corporate property." Id. at *8.
its officers. Their acts in performance of the business of the corporation are the acts of the corporation itself.\textsuperscript{72}

The capacity to control rule, however, treats the officers as if they were the operators under CERCLA, rather than individuals acting on behalf of the corporate operators. This rule makes the officers liable under section 107(a) of CERCLA without regard to whether they have actively participated in the actions leading to the release of hazardous substances.\textsuperscript{73} The \textit{NEPACCO I} court attempted to justify equating employees of a corporate operator with the corporate operator itself by resorting to language borrowed from another context.\textsuperscript{74} After quoting a passage from \textit{Apex Oil Co. v. United States}\textsuperscript{75} describing various powers and capabilities of an "owner-operator," the \textit{NEPACCO I} court reasoned that because the defendant officer/stockholder shared the same powers and capacities, he must also be an owner or operator.\textsuperscript{76}

\textsuperscript{72} Transcontinental \& W. Air v. Bank of Am. N. T. \& S. A., 46 Cal. App. 2d 708, 713, 116 P.2d 791, 794 (1941) (defendant airline liable for employees' withholding of proceeds of traveler's check sales); accord Silver Spring Dev. Corp. v. Guertler, 257 Md. 291, 297, 262 A.2d 749, 753-54 (1970); (corporation is placed on notice of all acts performed by its agents in furtherance of corporation's affairs); see also United States v. Chicago Express, Inc., 273 F.2d 751, 753 (7th Cir. 1960) (attributing acts of employee acting within scope of his employment to corporation for purposes of Interstate Commerce Commission violation).

\textsuperscript{73} For a discussion of the "active participation" concept of direct liability under federal and state common law, see infra notes 179-202 and accompanying text.


\textsuperscript{75} 530 F.2d 1291, 1293 (8th Cir.) (quoting United States v. Mobil Oil Corp. 464 F.2d 1124, 1127 (5th Cir. 1972)), cert. denied, 429 U.S. 827 (1976).

\textsuperscript{76} The text of the quoted passage in \textit{NEPACCO I} reads:

The owner-operator of a vessel or a facility [sic] has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage. Accordingly, the owner-operator of a facility governed by the WPCA, such as the Mobil facility here, must be regarded as a "person in charge" of the facility for the purposes of § 1161. 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. \textit{NEPACCO I}, 579 F. Supp. at 848-49 (emphasis omitted) (quoting \textit{Apex Oil}, 530 F.2d at 1293).

The officer in \textit{NEPACCO I} had the capacity to control disposal of waste at the plant, the power to direct negotiations concerning disposal and the ability to prevent and abate damage. Id. at 849. The court treated the term "owner-opera-
The passage quoted from *Apex Oil* is taken well out of context. *Apex Oil* focused on the duty of a “person in charge” to give notice required by the Federal Water Pollution Control Act (WPCA). It was not a release liability provision like section 107(a) of CERCLA. Instead of deciding whether an individual officer should be treated as an owner or operator, the Court of Appeals for the Eighth Circuit in *Apex Oil* started with the assumption that an individual officer or employee could be liable as a “person in charge” for failure to give the required notice. The issue was whether his or her corporate employer could also be held liable. Using the description of “owner-operator” referred to above, the *Apex Oil* court concluded that an owner-operator is “in charge” of a facility. Because a corporate owner could be a “person” under the WPCA, the court held that it could also be a “person in charge” responsible for giving the required notice.

It is significant that the passage which the *NEPACCO I* court quoted from *Apex Oil* did not define “owner-operator” under the WPCA. It merely described some of the qualities that an owner-operator shares with a person who is “in charge” of a facility. Nothing in the *Apex Oil* opinion suggested that an individual officer or other employee of a corporate owner-operator under the

77. 530 F.2d at 1292 (defendant corporation charged with violating WPCA § 311(b)(5)). The *Apex Oil* court noted that 33 U.S.C. § 1161(b)(4), referenced in the *Mobil Oil* opinion, is the predecessor of WPCA § 311(b)(5), and that the language of each provision is identical. *Apex Oil*, 530 F.2d at 1293 n.3.

78. See Comment, *Dissolving the Corporate Veil*, supra note 25, at 963: (“It should be noted, however, that the *Mobil Oil* court, in defining owner-operator broadly, allocated responsibility to a corporation for reporting oil spills in contrast to the *NEPACCO I* court’s imposition of individual liability for response costs on a corporate officer.”).

79. *Apex Oil*, 530 F.2d at 1292 (issue was whether corporation could be “person in charge” under § 311(b)(5) of WPCA). It can be inferred, from one of the *Apex Oil* court’s arguments, that the individual employees were liable under this part of the WPCA. The court noted that a separate provision of the WPCA dealt with liability for prohibited discharges of oil and clearly covered corporations. *Id.* at 1292-93. The court’s goal was to prevent, by holding employer corporations directly liable for failure to give the required notice of any such prohibited discharges, giving such corporations an incentive to discourage individual employees from giving the required notice. *Id.* at 1293. Thus, the *Apex Oil* court was trying to eliminate an inconsistency that would result within the statute if individual employees, but not their corporate employers, were held liable for failure to report discharges. *Id.*

80. *Id.* at 1293. But see *United States v. Skil Corp.*, 351 F. Supp. 295, 299 (N.D. Ill. 1972) (holding that only individual or natural person can be “person in charge”).

81. For the text of the quoted passage, see *supra* note 76.
WPCA must be considered an owner-operator if he is "in charge" of a facility. Yet the NEPACCO I court drew that precise inference.\textsuperscript{82}

CERCLA draws a distinction between notice provisions and liability provisions. Section 107 of CERCLA imposes liability on certain persons, including owners and operators.\textsuperscript{83} Separate provisions in section 103 set forth the various notice requirements.\textsuperscript{84} The notice provisions expressly state that "any person in charge" of a vessel or facility must notify the National Response Center as soon as he has knowledge of any release of a hazardous substance from such vessel or facility.\textsuperscript{85} A different notice was required, within 180 days after the enactment of CERCLA on December 11, 1980, from "any person who owns or operates" a facility at which hazardous substances were or had been located.\textsuperscript{86} This notice has less immediacy than that required from "any person in charge." The use of the terms "person in charge" and "owner and operator" for separate notices suggests that Congress recognized a distinction between them. If Congress had intended "owner and operator" to include both individual officers of a corporation as well as the corporation itself, it would have had no reason to use the separate term "person in charge" for the more pressing notice. Thus, it would be entirely consistent with the statutory language to hold that the term "person in charge" includes corporations and their officers and employees, but that the term "owner or operator" excludes such officers and employees.

The next major criticism of the "capacity to control" cases focuses on the limited relationship required between the individual and the harm in order to establish liability for that harm. Under the NEPACCO I test, an individual defendant was held liable because of his capacity to control disposal, direct negotiations and prevent and abate damage, as well as his participation in the management of the corporation.\textsuperscript{87} Later cases such as Carolawn and Conservation Chemical relaxed this test even further by elimi-

\textsuperscript{82} NEPACCO I, 579 F. Supp. at 848-49 (concluding that because defendant officer/stockholder had capacity to control and prevent corporation's hazardous waste disposal, he was liable under CERCLA § 107(a)(1) as owner and operator). For a further discussion of the NEPACCO I court's definition of owner-operator, see supra notes 74-76 and accompanying text.

\textsuperscript{83} CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

\textsuperscript{84} Id. § 103, 42 U.S.C. § 9603.

\textsuperscript{85} Id. § 103(a), 42 U.S.C. § 9603(a).

\textsuperscript{86} Id. § 103(c), 42 U.S.C. § 9603(c).

\textsuperscript{87} NEPACCO I, 579 F. Supp. at 849 (defendant liable as "owner and operator" under § 107(a) of CERCLA).
nating the requirement that the particular harm in question have any relation to areas within such person's capacity to control. These cases focused on the defendant's general participation in the management of the facility, or even the management of the corporation. By restricting the focus to the individual's relationship to overall management, however, this line of cases exposes to liability an extraordinary number of individuals who would not ordinarily be thought culpable. Management of a corporation, or even a facility, often keeps an officer busy with numerous duties far removed from the precise activity that proximately caused the harmful release. Thus, a senior executive who was diligent in managing a corporation, establishing sound and cautious policies with respect to environmental matters and selecting capable subordinates for implementing those policies, could still be held liable under this test. The executive's liability would even extend to acts taken by subordinates without his knowledge and in contravention of his policies. made no attempt to limit the liability of such persons. Yet it clearly seems unreasonable to expose a person in that situation to the enormous liability of CERCLA cleanup costs.


89. Cf. Davidson, supra note 25, at 303 (Conservation Chemical "decision was based on the actions of the owner that were no different than those of an owner normally conducting the affairs of his business, such as supervision of construction, hiring and firing of employees, and generally running the business of his corporation.").

90. But see Wallace, supra note 25, at 857. Professor Wallace argues that there may be some justification for holding "non-participatory, but controlling, officers, directors, and stockholders" liable for CERCLA violations under a direct liability theory on the grounds that

one of the most central features of their status within the corporation's control involves the right and duty to actually operate the corporate facilities. The statute's plain language, therefore, would appear to fix liability on individuals for controlling and managing corporate operations generally rather than only for specific, active participation in tortious activities. 

Id. (footnote omitted).
The courts do not always appear conscious of the new ground they are breaking by extending the liability of officers, directors and stockholders. For example, the court in Carolawn cited both the holding in NEPACCO I that "a person who owns interest in a facility and is actively participating in its management" may be liable under section 107(a)(1) of CERCLA and the holding in United States v. Wade that "[a] corporate officer may be held liable if he personally participates in the wrongful, injury-producing act." In the next sentence, however, the Carolawn court attempted to summarize the two holdings, and in the process broke new ground in this area of law:

Thus, to the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs incurred at the facility notwithstanding the corporate character of the business.

Completely lost in the Carolawn court's restatement of the NEPACCO I and Wade rules are the concepts of active participation in the management of the facility or personal participation in the wrongful act that caused the damage. Similarly, the court in Conservation Chemical devoted a great deal of its opinion to establishing rules for direct liability derived from contemporary CERCLA cases, yet went through an analysis that in effect paralleled piercing the corporate veil. The court focused on the in-

93. Id. Pursuant to its summary of the law, the Carolawn court denied judgment on the pleadings to two corporate officials without any proof of a connection between the defendants and the specific acts in question. Id.
94. See Wallace, supra note 25, at 860. Professor Wallace takes a harsher view of the Carolawn opinion, treating the Carolawn court's decision as a restatement of the Wade opinion alone. Id. The Carolawn restatement is in fact much closer to the NEPACCO I rule than it is to the holding in Wade, arguably extending liability to employees with general authority, and not necessarily requiring participation in the act that caused the harm. See Carolawn, 14 Envtl. L. Rep. (Envtl. L. Inst.) at 20,700; see also United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1038 (E.D.N.C. 1989) (stating rule that corporate officers may be individually liable for corporate torts in which they have actively participated, followed by list of factors allegedly indicative of such "activity": capacity to discover releases in reasonable time; power to direct mechanisms causing release; and capacity to prevent and abate damages).
volvement of the officer/majority stockholder in the operation and decision making processes of the corporation, rather than on his connection with the facility from which the hazardous substances were released. These cases, which extend the liability of individual officers, directors and stockholders while not always recognizing the full consequences of this extension, have had a significant impact.

b. Statutory Liability

The second rule of direct liability under CERCLA relies on two points. First, subsections 107(a)(3) and (4) of CERCLA impose liability on any "person" who arranged for disposal or treatment of a hazardous substance or accepted a hazardous substance for transport. Second, the term "owner and operator" used in subsections 107(a)(1) and (2) is defined elsewhere in the statute to include "any person" who owns or operates a facility or vessel. Since the definition of "person" in the statute includes individuals as well as corporations and other entities, the statutory liability rule affirms that officers, directors and stockholders are included within the scope of CERCLA liability.

96. Id. at 420; see Davidson, supra note 25, at 303-04. Mr. Davidson argued that:

The focus of the [Conservation Chemical] court on these actions, as opposed to the issue of whether the actions of the owner were tortious, provides a precedent that in essence equates the personal participation in operating a corporation that owns contaminated property to conduct sufficient to pierce the corporate veil when focusing on liability under CERCLA, notwithstanding the fact that the court expressly disavowed that it was basing liability on this theory. Davidson, supra note 25, at 303-04. For a further discussion of liability based on general control as opposed to liability based on participation in the specific act that caused the harm, see supra notes 88-90 and accompanying text.


98. See id. § 107(a)(1)-(2), 42 U.S.C. § 9607(a)(1)-(2) (imposing liability on owners and operators of certain vessels and facilities); id. § 101(20)(A), 42 U.S.C. § 9601(20)(A) (defining "owner or operator").

99. Id. § 101(21), 42 U.S.C. § 9601(21). The definition of "person" covers any "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." Id.

100. The statutory liability rule was articulated in substantially similar form in the Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring to Assistant Administrator for Solid Waste and Emergency Response, Associate Enforcement Counsel for Waste, Regional Administrators and Regional Counsels (June 13, 1984), reprinted in Acquiring or Selling the Privately Held Company 377 (PLI 1989) [hereinafter EPA Memo]. The EPA Memo dealt only with the liability of stockholders, and for some reason omitted reference to § 107(a)(1). Courts have adopted the statu-
CERCLA LIABILITY

Under this rule, in its purest form, no showing of capacity to control, active participation in management or capacity to prevent damage is required to impose liability. If the statutory liability rule were carried to its logical conclusion, few officers, directors or stockholders would escape liability once a hazardous substance release was associated with their corporation. Perhaps in an effort to avoid such extensive liability, the CERCLA cases have not attempted to predicate liability of individuals purely on the definition. The Assistant Administrator for Enforcement and Compliance Monitoring for the EPA, however, in a 1984 internal memorandum (EPA Memo), did advocate extensive liability based on the definition. Nevertheless, the EPA Memo remains the sole advocate of the statutory liability rule in its strong form.

The district court in NEPACCO I used a weaker version of this rule to impose liability on one of the managing stockholders under CERCLA section 107(a)(3) for arranging the disposal and transport of hazardous substances. The court first noted that the individual was a “person” as defined in the statute, and then, to show that the term “person” could be applied to both the statutory liability rule, although not in the precise form advocated by the EPA Memo. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (holding owning stockholder liable as owner and operator); United States v. Carolawn Co., 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,699, at 20,700 (D.S.C. 1984) (holding individuals who were stockholders and officers liable as owners or operators).

101. The Carolawn opinion combined the statutory rule of liability with the holdings of NEPACCO I and Wade, resulting in a rule that imposes liability for control or authority over activity of a facility from which a release has occurred, or for participation in the management of such facility. 14 Envtl. L. Rep. (Envtl. L. Inst.) at 20,700.

The Shore Realty court used a combination of the “indicia of ownership” rule and the statutory rule. See 759 F.2d at 1052. For a discussion of the indicia of ownership rule, see infra notes 129-34 and accompanying text.

102. The EPA Memo recognized that courts often attempt to preserve some part of the doctrine of limited liability. EPA Memo, supra note 100, at 379-80. Nevertheless, the memo concluded:

The [Environmental Protection] Agency should rely upon the statutory language of the Act as the basis for imposing liability on any person who controlled or directed the activities of a hazardous waste facility immediately prior to abandonment, or on any person who is a generator or transporter, notwithstanding the fact that that individual is a stockholder.

Id. at 386.

103. 579 F. Supp. 823, 847-48 (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). The NEPACCO I court treated liability under CERCLA § 107(a)(3) as distinct from liability under § 107(a)(1), which was based on the capacity to control rule. For a further discussion of the NEPACCO I decision, see supra notes 43-47 and accompanying text.
poration and its individual employees, borrowed the definition of "person-in-charge" previously adopted in *Apex Oil Co. v. United States* 104 in connection with the WPCA. 105 Although the *NEPACCO I* court noted that the *Apex Oil* case dealt with a different issue, it concluded that the analysis in *Apex Oil* was relevant, and that section 107 of CERCLA should be liberally interpreted to include both the corporation and an employee. 106 The defendant vice-president was responsible for arranging, and did arrange, the disposal of hazardous substances. He was therefore held liable. 107

The *EPA Memo* and *NEPACCO I* both rely on expansive readings of key terms defined and used in CERCLA to extend the reach of the statute. This kind of attempt to impose direct liability on officers, directors and stockholders by broadly interpreting the language of a statute is of course not a new development in the law. 108 Statutory interpretation takes place against a back-

104. 530 F.2d 1291 (8th Cir.), cert. denied, 429 U.S. 827 (1976). The *Apex Oil* decision concerned the liability of a corporation under WPCA § 311(b)(5), which required that "any person in charge" of certain facilities give notice of oil spills to the federal government. 530 F.2d at 1292-95.

105. *NEPACCO I*, 579 F. Supp. at 847-49. The *Apex Oil* court had determined that corporations, as well as individuals, can be "persons in charge" and therefore be held liable for failure to give the requisite notice. *Apex Oil*, 530 F.2d at 1293.

106. *NEPACCO I*, 579 F. Supp. at 848. In *Apex Oil*, the issue was whether the WPCA, which was acknowledged to apply to individuals, also applied to corporate employers of those individuals. *Apex Oil*, 530 F.2d at 1292. *NEPACCO I* dealt with the opposite, but still similar, issue: whether § 107(a) of CERCLA, which clearly applied to corporations, also applied to individual employees of those corporations. *NEPACCO I*, 579 F. Supp. at 848.


108. See, e.g., Anderson v. Abbott, 321 U.S. 349, 361-65 (1944) (interpreting provisions of National Bank Act regarding "double liability" of bank stockholders to apply to stockholders of bank holding company as well). Broad statutory interpretation also serves to impose criminal liability on individual corporate officers for corporate violations under certain statutes regulating the processing and distribution of food or drugs, where such officers had a "responsible relation" to the act or acts constituting the violation. A "responsible relation" is established if the defendant, by reason of his position, had the responsibility and authority either to prevent the instance, or later correct it. The fact that such officers had no awareness of wrong doing does not exonerate them. See United States v. Park, 421 U.S. 658 (1975) (defendant who was generally responsible for sanitation and had received warning letter from Federal Drug Administration found liable); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (president and general manager liable for misbranding drugs); United States v. New England Grocers Supply Co., 488 F. Supp. 230, 232-37 (D. Mass. 1980) (defendant was not liable solely because of position, but rather because of "responsible relation"). For a general discussion of statutory interpre-
CERCLA LIABILITY

ground of state laws, however, including the laws of limited liability. Although Congress has the authority to override state laws if it wishes, state laws remain controlling in the absence of congressional action.109 In the case of CERCLA, however, the interpretations in the EPA Memo and NEPACCO I distort beyond recognition traditional notions of corporate law in areas in which Congress has elected to remain silent.

It is true that CERCLA imposes liability on any "person" who has committed certain specified acts or who is an "owner or operator" as defined in the statute. It is also true that the term "person" is defined to include individuals as well as corporations.110 From these two propositions, the EPA Memo and NEPACCO I each conclude that CERCLA liability may be fixed on individual officers, directors and stockholders. The more logical inference from these propositions, however, is that liability will be imposed on the owners and operators of vessels and facilities and the other perpetrators of the proscribed acts, regardless of whether such owners and operators or perpetrators are individuals or corporations. This inference would be consistent with traditional corporate law, under which a corporation, even though acting through its officers, is still a distinct entity in whose name the acts are done.111 The interpretations suggested in the EPA Memo and NEPACCO I, on the other hand, ignore the separate entity structure of the corporation developed in the corporate common law. Instead, these interpretations sweep in persons who were acting for and at the direction of an employer.

109. DeBreceni v. Graf Bros. Leasing, Inc., 828 F.2d 877, 880 (1st Cir. 1987) ("The principle of limited liability for corporate debts is longstanding enough and important enough to be considered a background norm, against which Congress may act of course, but which is controlling in the absence of such action."). cert. denied, 484 U.S. 1064 (1988); see also 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, 810-14 (1957) ("Congress legislates against a background of existing state law"). But see Note, Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law, 95 HARV. L. REV. 853, 857 (1982) (arguing that "automatic application of state law in the absence of express statutory guidelines ignores legal realities," because, despite presumptions to the contrary, Congress may not fully comprehend overall relationship between federal and state law when it passes new legislation).

110. For a further discussion of the scope of CERCLA liability, see supra notes 9-13 and accompanying text. For a statutory definition of "person" under CERCLA, see supra note 11 and accompanying text.

111. For a further discussion of corporate liability under CERCLA, see supra notes 70-72 and accompanying text.
Yet nothing in the CERCLA statute or its legislative history indicates any congressional intent to override the well-established common law separation of the corporation and its agents.\textsuperscript{112} There is no evidence of any federal policy concerning the liability of officers, directors or stockholders under CERCLA.\textsuperscript{113}

A closely analogous argument to that offered in the EPA

\textsuperscript{112} One commentator has suggested that certain language in the CERCLA statute indicates that Congress drew a distinction between "persons" and officers. Quoting from 49 U.S.C. § 11901(h) (1976), which refers to "a person subject to the jurisdiction of the Commission under subchapter II... of this title, or an officer, agent or employee of that person," the commentator concludes that "[t]his language suggests that Congress in drafting CERCLA may have viewed a person as not necessarily including an officer." Comment, \textit{Dissolving the Corporate Veil}, \textit{supra} note 25, at 956.

\textsuperscript{113} In this respect, the cases concerning liability under banking and food and drug statutes are distinguishable. For a further discussion of these cases, see \textit{supra} note 108. The statute in Anderson v. Abbott, 321 U.S. 349 (1944), specifically imposed liability on stockholders of banks in an amount equal to the par or stated value of the stock held by such stockholders. 12 U.S.C. §§ 63-64 (1935), \textit{repealed by Act of Sept. 8, 1958, Pub. L. No. 86-230, § 7, 75 Stat. 457}. The issue in \textit{Anderson} was whether stockholders of a holding company, which was the actual owner of the bank's stock, should be liable for this "double liability." 321 U.S. at 361-65. The Supreme Court reversed the decision of the Court of Appeals for the Sixth Circuit, holding that "[t]o allow this holding company device to succeed would be to put the policy of double liability at the mercy of corporation finance." \textit{Id.} at 363. The Court held that while state laws of limited liability were enforceable in federal courts, state law would not be permitted to defeat the federal policy concerning national banks that Congress had announced. \textit{Id.} at 365.

Unlike the statute in \textit{Anderson}, CERCLA contains no provision that expressly purports to hold any stockholders liable. Since no federal policy concerning the liability of officers, directors or stockholders has been announced in the CERCLA statute, the holding in \textit{Anderson} is inapposite. Cf. Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1111 n.6 (9th Cir. 1979) (distinguishing \textit{Anderson} on grounds that federal labor laws in question did not expressly mandate individual liability like statute in \textit{Anderson}).

Similarly, the statute under which liability was imposed in United States v. Dotterweich, 320 U.S. 277 (1943), had, prior to amendment in 1938, specifically provided for liability of "any officer, agent, or other person acting for or employed by any corporation." 21 U.S.C. § 4, \textit{repealed by Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059}. The Supreme Court noted this fact, stating that the later legislation was intended to tighten the existing law, rather than to weaken it. \textit{Dotterweich}, 320 U.S. at 281-82. On the basis of this historical review of the statute, together with consideration of "safeguarding the public welfare," the Court reversed the Second Circuit and upheld the conviction of the president of the corporation. \textit{Id.} at 285.

In contrast, CERCLA has no comparable legislative history. Because the statute in \textit{Dotterweich} was a criminal statute, its general force in matters of civil liability is questionable. Because it had an ascertainable federal policy concerning the liability of corporate officers, its impact on CERCLA liability is negligible. \textit{But see Comment, Dissolving the Corporate Veil}, \textit{supra} note 25, at 954-57 (arguing that \textit{Dotterweich} strongly supports the expansive definition of "person" in \textit{NEPACCO I}, because \textit{Dotterweich} interpreted criminal statute, which requires higher demand for specificity regarding liability than civil statute).
Memo has been raised and rejected in several cases concerning liability under Title 1 of the Employee Retirement Income Security Act of 1974 (ERISA). Section 515 of ERISA imposes liability for contributions to multi-employer plans on an "employer." In several cases, plaintiffs attempting to recover from officers and stockholders of corporations for delinquent contributions have pointed to the definition of "employer" in the ERISA statute. "Employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." The plaintiffs have then argued that because the word "person" is defined to include both individuals and corporations, Congress intended that any officer or stockholder who was involved in corporate decisions regarding payment of pension contributions fall within the scope of employer liability for delinquent contributions. The Court of Appeals for the District of Columbia Circuit in International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc. rejected this argument squarely:

Only the corporation, as signatory to the agreement, fits within the parameters of Section 515 as the "employer who is obligated to make contributions . . . under the terms of" either the plan or the agreement. Nor do the statutory definitions of "employer" and "person" supply the necessary link between liability and Kracher individually. It cannot be said that a corporate official is a "person acting directly as an employer." It is hornbook law that a corporate employee functioning purely as such acts not as but solely for the corporate employer; the corporation acts as the employer it is, though it can do so only through the agency of the employee or someone else.

115. Id. § 1145 (1988).
116. Id. § 1002(5).
117. See, e.g., Scarbrough v. Perez, 870 F.2d 1079, 1082 (6th Cir. 1989) (granting sole stockholder's motion for summary judgment by rejecting argument that corporate officers were liable for delinquent contributions); International Bd. of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546, 1547 (D.C. Cir. 1988) (arguing that chief corporate officer/sole stockholder should be held personally liable as employer; court held that only corporation could be "employer").
118. 856 F.2d 1546 (D.C. Cir. 1988).
119. Id. at 1548.
The court went on to explain that under the plaintiff’s interpretation of the statute, which included within the definition of “employer” any person who acted indirectly on behalf of the corporation, “every employee or other agent who discharges some responsibility in regard to a corporation’s employee benefit plan would be swept within the definition and thereby become an ‘employer’ subject to liability for delinquent contributions. Obviously Congress did not contemplate that.”

The Kracher holding is consistent with and has been followed by numerous decisions in other circuits. Rather than create a new, extensive form of liability for officers, directors and stockholders, the courts have (notwithstanding the remedial nature of ERISA) restricted the liability of such individuals under ERISA to the more traditional avenues.

The attempt to hold a corporate official liable under CERCLA simply on the basis of the definition of the term “per-

120. Id.
121. See, e.g., Plumbers’ Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297, 1301-02 (7th Cir. 1989) (former president and secretary held not personally liable for corporation’s failure to make contribution), cert. denied, 110 S. Ct. 2169 (1990); Scarbrough, 870 F.2d 1079 at 1083-84 (sole stockholder/chief executive of parent corporation could not be held personally liable for bankrupt subsidiary’s unpaid contribution); Massachusetts Laborers’ Health & Welfare Fund v. Starrett Paving Corp., 845 F.2d 23, 24-26 (1st Cir. 1988) (“Although Starrett’s corporation may have been ‘obligated’ to make the contributions, Starrett personally was not.”); Solomon v. Klein, 770 F.2d 352, 353-55 (3d Cir. 1985) (“There is no indication that Congress intended to expose corporate officers to liability . . . .”); Operating Eng’rs Pension Trust v. Reed, 726 F.2d 513, 515 (9th Cir. 1984) (by incorporating business, majority stockholder/chief executive officer avoids liability for trust fund contribution obligations). But see Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co., 635 F. Supp. 9, 13-14 (D. Mass. 1984) (relying on interpretation of Fair Labor Standards Act in holding that controlling stockholder or officer may be liable as “employer”); cf. Dardaganis v. Grace Capital Inc., 889 F.2d 1237, 1242-43 (2d Cir. 1989) (affirming liability of individual who was president and chief executive officer of corporation engaged as investment advisor for pension fund, where he violated terms of written agreement by investing more than 50% of assets of benefit plan in common stock).

122. See, e.g., Niedrich, 891 F.2d at 1302. The Niedrich court stated: “Corporate officers who are not parties to a pension plan or a collective bargaining agreement requiring contributions to a pension plan are personally liable for pension contributions only to the extent they are liable for general corporate debts under state corporate law.” Id.

Unlike the CERCLA cases, in which the liability of the officers and directors is usually under a tort theory, ERISA cases are usually framed as an action on a debt. Because the doctrine that imposes liability on corporate officers for torts in which they actually participated has no application to actions on debts, corporate officers who were not liable for ERISA contributions under this “person” theory completely escaped liability. Even though the courts had even more incentive to hold the individual officer liable under ERISA in order to make the statute work, they declined to make new federal law in this area.
son” in the statute is just as inappropriate as it would be under ERISA. By creating such an expansive reading of the liability provisions of CERCLA, a broad range of officers, directors and employees could be swept within the definition and subjected to liability for cleanup costs. In the absence of any standards for singling out those individuals who might have some significant relationship to the harm that was done, the statutory rule would apply to many individuals who were only remotely connected with the release of hazardous substances but who otherwise were able to act on behalf of the corporation. Congress gave no indication that it contemplated creating such a broad range of liability.

A second argument against the EPA interpretation takes the form of a reductio ad absurdum. The term “person,” as defined in CERCLA, refers not only to individuals and corporations, but also to, inter alia, the United States government, the fifty states and all political subdivisions of the states. Under the EPA Memo, it follows that if a troubled facility were federal property, direct liability could be imposed on the President of the United States (or perhaps his designee at the Environmental Protection Agency) as easily as it could be imposed on the president of a responsible corporation. Likewise, the governor of a state or the mayor of a city could be liable for releases on property owned by the “person” under his control. These public officials are certainly individuals, and therefore fall within the definition of “person.” Yet the idea of holding such individuals personally liable for releases of hazardous substances on public land seems preposterous. Such liability would follow, however, under the...


124. For the purposes of this hypothetical, it is assumed that sovereign immunity and other similar defenses would not be applicable. It should be noted that CERCLA contains express provisions applicable to both federal facilities and states. See, e.g., id. § 120(a)(1), 42 U.S.C. § 9620(a)(1) (“Each department agency and instrumentality of the United States . . . shall be subject to and comply with, this Act . . . as any nongovernmental entity . . . .”); id. § 104(c)(3), 42 U.S.C. § 9604(c)(3) (outlining actions required of states before President provides remedial actions); see also Pennsylvania v. Union Gas Co., 491 U.S. 1, 42-44 (1989) (holding that state could be liable for monetary damages under § 107(a) of CERCLA and that defense of sovereign immunity does not bar such claims); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (noting that while United States Army could not be both plaintiff and defendant in CERCLA lawsuit, it could be liable under subsections 107(a) and (g)).

125. Of course, if such individuals personally participated in actions leading to the release of hazardous substances, personal liability is far less outrageous. In that case, however, traditional rules of tort liability for corporate officers would apply. For a further discussion of the traditional rules of direct liability for corporate officers, see infra notes 179-202 and accompanying text.
logic of the *EPA Memo*.

The *NEPACCO I* court attempted to establish the link between "person" and individual officers, directors and stockholders by appealing to the definition of "person-in-charge" used by the Eighth Circuit in *Apex Oil*. As discussed in the context of the capacity to control rule, however, the *Apex Oil* decision is factually distinguishable from CERCLA liability cases. Thus, *Apex Oil* does not provide persuasive authority for imposing CERCLA release liability on individual officers, directors or stockholders.

Reliance on the definition of the term "person" to impose liability on officers, directors and stockholders, as suggested in the *EPA Memo* and in *NEPACCO I*, would turn traditional state corporate law on its head, and would capture within the nets of CERCLA liability a great number of persons who do not belong there. Similar attempts have been consistently rejected in ERISA actions, for reasons that are also persuasive in the CERCLA context. Therefore, the statutory rule of liability appears to be an unwarranted and unwise invention of the federal courts in the CERCLA cases, without foundation in the statute or other common law precedent.

c. Indicia of Ownership

The third variation of direct liability in environmental cases is, like the statutory liability rule, based on language in the statutory definition of "owner or operator." This rule is most clearly stated in *New York v. Shore Realty Corp.* After first mentioning


127. For a discussion of the factual dissimilarity between *NEPACCO I* and *Apex Oil*, see supra notes 77-82 and accompanying text.

128. But see Comment, Dissolving the Corporate Veil, supra note 25, at 955. The commentator argued that in light of the United States Supreme Court's decision in United States v. Dotterweich, 320 U.S. 277 (1943), which imposed criminal liability on a corporate officer under the Food, Drug, and Cosmetic Act, "there is strong support for the broad interpretation of the CERCLA definition of 'person' made by the NEPACCO court particularly in light of Congress' obvious intent to use CERCLA as a device to expand the 'web' of liability for hazardous waste problems." Comment, Dissolving the Corporate Veil, supra note 25, at 955.

the statutory theory just discussed, the Court of Appeals for the Second Circuit reasoned as follows:

More important, the definition of "owner or operator" excludes "a person who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility." The use of the exception implies that an owning stockholder who manages the corporation, such as [the defendant], is liable under CERCLA as an "owner or operator." 130

Under this rule, the existence of an exception to liability for those who hold liens or security interests in troubled facilities without participating in management creates the possibility of liability for other individuals who are involved in the management of the corporation that owns the facility. 131

The "indicia of ownership" rule of direct liability has been criticized for seemingly transforming an express statutory exception to liability for lenders into a new avenue of liability. The provision in question excludes from the definition of "owner or operator" those persons who hold an "indicia of ownership" in a facility implicated in hazardous substance damage primarily to protect a security interest therein, but who do not participate in the management of such facility. 132 As several commentators point out, this exception was created for the purpose of exempting from liability lenders who hold liens on property. 133

By deriving from the express terms of this exception a hold-

---

130. 759 F.2d at 1052 (citation omitted) (quoting CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988)). Similarly, the NEPACCO I court, after citing the same statutory definition, stated 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." 579 F. Supp. at 848.

131. Courts have generally concluded that the exemption from liability [found in Section 101(20) of CERCLA, 42 U.S.C. § 9601(20)] gives rise to an inference 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.


133. See, e.g., Wallace, supra note 25, at 853. One commentator identified a committee report as support for criticism of the "indicia of ownership" rule: Language in a committee report that accompanied proposed legislation that gave rise to CERCLA suggests the exclusionary language was inserted to protect certain financial institutions and, consequently, it
ing that a stockholder who manages the corporation that owns such a facility is liable for cleanup damages on that property, courts have made a serious logical error. They have mistakenly concluded that because the statute exempts a person who does not participate in management, it must therefore include all persons who do so participate regardless of whether they are in fact owners or operators or otherwise actively involved in the release of hazardous substances.134 CERCLA specifies that persons who own or operate facilities may be liable under certain conditions. The fact that the statute contains an exception for certain non-participating persons who have a recognized legal interest in such property is not evidence that persons who have no recognized legal interests in such properties, but who do participate in the management thereof, should be made liable.

2. Indirect Liability: Disregarding the Corporate Entity

In addition to direct liability, stockholders of corporations face CERCLA liability under one or more theories loosely grouped under the heading of “piercing the corporate veil.” Not surprisingly, courts imposing derivative liability under CERCLA have established several different variations of piercing the corporate veil. Despite this diversity, each of the rules has been alleged to be an accurate reflection of the modern federal common law practice of piercing the corporate veil.

a. Ownership Interest and Control

One rule for the liability of parent corporations135 under CERCLA was created in United States v. Nicolet, Inc.136 After determining that federal law, rather than state law, governed the issue,
the district court drew the following rule from its understanding of the federal common law on piercing the corporate veil:

Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.137

The court then used this rule to reject the defendant's motion to dismiss the United States' claim, noting that: the defendant corporate parent was the sole stockholder of the corporation that owned the waste disposal site from which the hazardous substance had been released; the parent had actively participated in the management of the operation of the site; it was familiar with the waste disposal practices at the site and had the capacity to control the disposal and resulting releases and to abate the damage from such releases; and finally, it had benefitted from the waste disposal practices.138

Despite claims in the Nicolet opinion that piercing the corporate veil was consistent with and followed from existing federal common law, the rule set forth in that opinion was in fact a departure from existing law.139 The court claimed that the rule it was establishing with respect to piercing the corporate veil was "[b]ased upon federal common law regarding alter ego liability."140 A review of the cases cited by the court, however, reveals only one case that even remotely supports the Nicolet holding:

137. Id. at 1202. The court opined that it was possible to develop such a rule: "There are a sufficient number of federal holdings dealing with alter ego liability that one can decipher a 'sort of generalized federal substantive law on disregard of corporate entity.'" Id. (quoting Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1111 (9th Cir. 1979)). The court then reasoned that such federal common law is derived from the general principle that "the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime." Id. (quoting American Bell, Inc. v. Federation of Tel. Workers, 736 F.2d 879, 886 (3d Cir. 1984)).

138. Id. The court noted that these allegations would meet the criteria of the federal rule on piercing the corporate veil that the court had adopted. Id.

139. For a discussion of the existing federal common law in non-CERCLA contexts, see infra notes 203-73 and accompanying text.

Berkowitz v. Allied Stores of Penn-Ohio, Inc. Berkowitz was authored by the same judge who wrote the Nicolet opinion. The other cited cases generally require a much higher degree of control by the parent or stockholder over the subsidiary before the veil may be pierced.

The Nicolet court also stated that a similar rule had been adopted in Idaho v. Bunker Hill Co. A close look at Bunker Hill, however, reveals some startling differences. First, the court in Bunker Hill does not appear to have even attempted to pierce the corporate veil. It imposed liability on a corporate parent as an operator under section 107(a)(2) of CERCLA, using language that strongly suggests direct liability, not liability based on disregarding the corporate entity. In fact, the court in Bunker Hill used alternative bases for establishing that the corporate parent was an owner or operator under CERCLA. In the first instance, it referred to the analysis used by the court in establishing personal jurisdiction over the parent, and ruled that the same facts supported the conclusion that the parent was an owner or operator under CERCLA. The Bunker Hill court then found sufficient evidence to support liability of the parent under the definition of

141. 541 F. Supp. 1209 (E.D. Pa. 1982). Berkowitz held that where the parent and subsidiary have acted jointly or where the subsidiary has acted as an extension of the parent, subject to its knowledge and involvement, the court may disregard the parent's separate corporate existence. Id. at 1215. In addition to Berkowitz and American Bell, the Nicolet court cited Parker v. Bell Asbestos Mines, Ltd., 607 F. Supp. 1397, 1399 (E.D. Pa. 1985), vacated, 838 F.2d 462 (3d Cir. 1987) and Publicker Industries v. Roman Ceramics, 603 F.2d 1065 (3d Cir. 1979).

142. Raymond J. Broderick, United States District Judge for the Eastern District of Pennsylvania, authored both Berkowitz and Nicolet.

143. American Bell, 736 F.2d at 886-87 (requirements for piercing the corporate veil are "demanding ones" requiring "specific, unusual circumstances"; "[t]here is no policy of federal labor law, either legislative or judge-made, that a parent corporation is bound by its subsidiary's labor contracts simply because it controls the subsidiary's stock and participates in the subsidiary's management"); Publicker Indus., 603 F.2d at 1069-70 (vacating judgment of district court on piercing the corporate veil issue for lack of findings on perpetration of fraud, illegality or injustice; not discussing issue of control); Parker, 607 F. Supp. at 1399 (that corporate entity has essentially no mind of its own is not enough alone; "must also be showing that corporate entity is being used to 'defeat public convenience, justify wrong, protect fraud or defend crime' " (quoting Sams v. Redev. Auth., 431 Pa. 240, 244, 244 A.2d 779, 781 (1968))).


145. Bunker Hill, 635 F. Supp. at 671-72 ("Defendant Gulf was in a position to be, and was, intimately familiar with hazardous waste disposal and releases at the Bunker Hill facility . . . ".)

146. Id. at 671. The court agreed that the analysis with respect to the parent corporation's involvement in the management and operations of the subsidi-
“owner or operator” in *NEPACCO I*. Both of these bases, however, relate to direct liability and are significantly different from piercing the corporate veil.

*Bunker Hill* is also distinguishable from *Nicolet* in a more significant way. The court in *Bunker Hill* relied heavily on the parent’s domination over the subsidiary to justify imposing liability on the parent. Among other things, the *Bunker Hill* court noted the tight limits established by the parent on pollution expenditures; the great disparity between the subsidiary’s capitalization and the amount the parent received in dividends; the required approval by the parent of the subsidiary’s capital expenditures; and the parent’s right to veto all of the subsidiary’s management decisions.

The kind of control and domination of a subsidiary by the parent found in *Bunker Hill* is in stark contrast to *Nicolet*’s requirements for ignoring the parent’s corporate existence. *Nicolet*’s requirements were that the subsidiary at the relevant time have been a member of the class of persons potentially liable under CERCLA, that the parent have a substantial financial or ownership interest in the subsidiary and that the parent control the management and operations of the subsidiary. To the extent that *Bunker Hill* supports any rule of liability, it would be a far more narrowly limited rule than that articulated in *Nicolet*.

The court stated that the parent was intimately familiar with hazardous waste disposal and releases at the subsidiary; had the capacity to control such disposal and releases; and had the capacity to make decisions and implement actions and mechanisms to prevent and abate the damage caused by the disposal and releases of hazardous wastes at the subsidiary’s facility. *Id.* at 672. For a further discussion of the *NEPACCO I* court’s definition of owner or operator, see supra notes 43-47 and accompanying text.

The *Bunker Hill* court never explicitly stated that it was applying a direct liability theory rather than piercing the corporate veil. Such intent may be inferred, however, from the court’s reliance upon the “more precise definition of owner or operator” that it utilized from the *NEPACCO I* opinion. *Id.* at 671. The *Bunker Hill* court adopted and applied the *NEPACCO I* test, thus making the language relating to control factors (on which the *Nicolet* court later relied) dicta, at best.

*Bunker Hill*, 635 F. Supp. at 672. The *Bunker Hill* court did add a caveat to its holding: “[I]n 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.” *Id.* The court held that in the case at bar, however, allowing the parent to escape liability would frustrate the purpose of CERCLA. *Id.*

The Nicolet opinion thus represents a broadening of the traditional federal law of piercing the corporate veil. It puts at risk a large number of corporate stockholders that had not engaged in the type of control or domination that previous decisions in other areas of the federal common law had required.

b. Public Convenience, Fairness and Equity

A second variation on piercing the corporate veil in CERCLA cases is based on the general principle that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity."\textsuperscript{151} The District Court for the District of Massachusetts in \textit{In re Acushnet River \& New Bedford Harbor Proceedings re Alleged PCB Pollution}\textsuperscript{152} (\textit{In re Acushnet River}) noted that this principle was not much help in determining whether to pierce the corporate veil in a particular case.\textsuperscript{153} Accordingly, the court described the various factors articulated by other courts in piercing decisions:

The factors include, in approximate descending order of importance, (1) inadequate capitalization in light of the purposes for which the corporation was organized, (2) extensive or pervasive control by the shareholder or shareholders, (3) intermingling of the corporation's properties or accounts with those of its owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation, (6) absence of corporate records, and (7) non-functioning officers or directors.\textsuperscript{154}

The court also observed that no single factor was either necessary or sufficient to pierce the corporate veil, and added that the policies underlying CERCLA would be important in determining the emphasis that a court should place on each of the various

\textsuperscript{151} \textit{In re Acushnet River \& New Bedford Harbor Proceedings re Alleged PCB Pollution}, 675 F. Supp. 22, 33 (D. Mass. 1987) \textit{(hereinafter In re Acushnet River)} (quoting Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981)). This rule, like the rule developed in \textit{Nicolet} concerning ownership, arises from the "sort of generalized federal substantive law on disregard of corporate entity." \textit{Id.} at 33; see also EPA Memo, supra note 100, at 9.


\textsuperscript{153} \textit{Id.} at 33.

\textsuperscript{154} \textit{Id.} Courts had developed these factors to give some guidance about what level of interest in public convenience, fairness and equity would suffice to pierce the corporate veil. \textit{Id.}
CERCLA LIABILITY

The district court in United States v. Kayser-Roth Corp. adopted the general rule and the seven factors described in In re Acushnet River. The Kayser-Roth court then increased the likelihood that stockholders would be held liable by concluding that "CERCLA places no special importance upon the corporate structure." Focusing on the purposes of the statute, the court held that an expansive reading of CERCLA was necessary to avoid frustrating the twin goals of providing for a prompt and effective response to hazardous substance disposal, and forcing those responsible for releases to bear the costs of the cleanup. Having thus liberalized the standard, the Kayser-Roth court held the defendant's corporate parent liable on the basis of the "overwhelming pervasive control" it had exerted over its subsidiary.

The general principle that the corporate entity may be disre-
garded in the interest of public convenience, fairness and equity, in contrast to the *Nicolet* rule, has a respectable tradition in federal common law. The origin of this tradition, however, is not consistent with the way in which the rule was used in *Kayser-Roth*.

In *Kayser-Roth*, the court saw this rule as a way to lower the standards that might otherwise be required for piercing the corporate veil. The court quoted the First Circuit: "[F]ederal 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 . . . ." The ultimate authority for this quote is *Capital Telephone Co. v. FCC*. A look at *Capital Telephone*, however, shows that the court was engaged in an entirely different type of analysis.

*Capital Telephone* involved an appeal from a decision by the Federal Communications Commission (FCC), which had denied the plaintiff's application for authority to construct and operate a radio paging station. Of the four applicants for the two available channels, one was a corporation that was wholly owned by an individual who was an applicant for the other channel. The FCC treated the individual and his wholly-owned corporation as a single applicant, and granted the individual's application while deny-

---

160. This general principle is of limited usefulness, however, unless it is supplemented by a summary of factors “which, when viewed together, sharpen the focus of the inquiry.” In re Acushnet River, 675 F. Supp. 22, 33 (D. Mass. 1987). Unfortunately, not all courts have been so circumspect. The court in United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D.R.I. 1989), aff’d, 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991), found that it did not need to give a great deal of respect to strict common law alter ego doctrine because of the remedial purposes that underlie CERCLA. Id. at 22-23. The obvious problem with the *Kayser-Roth* reasoning, however, is that CERCLA’s remedial purposes can be used to justify liability in almost any situation. By speaking in vague terms, and by emphasizing the remedial purposes of the statute, courts can easily twist this test to pierce the veil regardless of how much control the parent or stockholder had over the subsidiary. For a further discussion of the federal common law rule of ignoring the corporate entity in the interest of fairness, convenience and equity, see infra notes 207, 211, 213, 217 and accompanying text.

161. *Kayser-Roth*, 724 F. Supp. at 23-24 (stating that CERCLA provisions should be viewed expansively, to avoid frustrating the congressional purposes, and concluding that “CERCLA places no special importance upon the corporate structure”); accord United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988); EPA Memo, supra note 100, at 9.

162. *Kayser-Roth*, 724 F. Supp. at 23 (quoting Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986)).

163. 498 F.2d 734, 738 (D.C. Cir. 1974).

164. Id. at 735.
The plaintiff argued that there had not been a sufficient showing to justify piercing the corporate veil. The appellate court responded that the traditional piercing the corporate veil analysis was not applicable in this case:

[W]e need not pause to consider whether [the corporation] would be [the individual owner's] alter ego under the strict standards of the common law alter ego doctrine which would apply in a tort or contract action. The contest in this case is over a license in a regulated industry and the applicable standard appears in the statute, not in court decisions involving civil suits.

Thus, Capital Telephone does not stand for the broad proposition that federal courts should routinely give less respect to the corporate form. The court was not concerned with liability under a federal statute, but instead with an application for a license under a federal regulatory statute. The statute in Capital Telephone gave "less respect to the corporate form" not because it was a remedial statute like CERCLA, but because it involved the granting of government license privileges. Courts have long recognized that regulatory agencies have greater discretion in fashioning policies and granting licenses than they do in imposing liability for violations of statutes or regulations. The Capital Telephone decision, read in that context, simply illustrates judicial deference to the FCC's discretion in refusing to grant a license. It does not evidence a general decline in the standards for piercing the corporate veil in federal question cases.

The two CERCLA cases employing the "public convenience, fairness and equity" rule thus illustrate two very different approaches to piercing the corporate veil. The court in In re
Acushnet River stated the principle and then, in effect, discarded it in favor of a collection of factors distilled from a number of other federal decisions. In contrast, the court in United States v. Kayser-Roth Corp. invoked the rule to make piercing the corporate veil easier than under traditional federal or state law. Therefore, to the extent this rule has been employed in CERCLA cases, it was used to depart from the traditional federal common law.

c. Business Conduit

The Fifth Circuit has adopted a third rule of derivative liability under CERCLA. In Joslyn Corp. v. T.L. James & Co., the District Court for the Western District of Louisiana applied a rule for disregarding the corporate entity that had been previously described by the Court of Appeals for the Fifth Circuit in United States v. Jon-T Chemicals, Inc. This rule, as described by the Joslyn district court, allows a parent corporation to be held liable for the obligations of a subsidiary only where the parent has misused the subsidiary by “treating it, and by using it, as a mere business conduit for the purposes of the dominant corporation.” Such misuse may be shown by proving that “[f]irst, the dominant corporation must have controlled the subservient corporation, and second, the dominant corporation must have proximately caused plaintiff harm through misuse of this control.”

On appeal, the Fifth Circuit expressly declined to follow the capacity to control rule, observing that there was nothing in the statute or its legislative history to indicate that Congress intended to impose direct liability on corporate parents. Joslyn Mfg., 893 F.2d at 82-83. The court also commented that “[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so.” Id. at 83. The holding in Joslyn Mfg. has been narrowly construed and distinguished by other courts. See, e.g., United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990) (noting that in Joslyn Mfg., parent had not participated in the activities of its subsidiary).

On appeal, the Fifth Circuit expressly declined to follow the capacity to control rule, observing that there was nothing in the statute or its legislative history to indicate that Congress intended to impose direct liability on corporate parents. Joslyn Mfg., 893 F.2d at 82-83. The court also commented that “[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so.” Id. at 83. The holding in Joslyn Mfg. has been narrowly construed and distinguished by other courts. See, e.g., United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990) (noting that in Joslyn Mfg., parent had not participated in the activities of its subsidiary).
made clear that the control element of this rule "amounts to total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation." 

Finally, the court set out an exhaustive list of twelve factors to be considered in determining whether the parent corporation has exercised the requisite control, making clear that 100% ownership of the subsidiary, and even having common officers and directors, is insufficient to support a finding of such control.

The business conduit rule is one that not only rests squarely within the federal common law tradition, but also has been applied to CERCLA liability in a manner consistent with that tradition. Nonetheless, Joslyn has sown the seeds of inconsistent future applications. The Joslyn court, citing the Fifth Circuit decision in Jon-T Chemicals, ruled that federal and state law in the Fifth Circuit are "essentially the same" with respect to the alter ego test. While the Joslyn court acknowledged that the Jon-T Chemicals court was comparing federal law to Texas law, and that Louisiana law governed the issues in Joslyn, the court stated that it was "satisfied that the principles utilized in this opinion would control whether Louisiana or federal common law governs."

The Joslyn holding is problematic in that it gives no guidance as to what test a court should follow if it discerns a difference between the federal and applicable state law. The Jon-T Chemicals court had reasoned that it need not decide whether federal and Texas alter ego doctrines were equivalent in all respects, because they "overlap at least with regard to the principles involved in the present case.

The Joslyn holding is problematic in that it gives no guidance as to what test a court should follow if it discerns a difference between the federal and applicable state law. The Jon-T Chemicals court had reasoned that it need not decide whether federal and Texas alter ego doctrines were equivalent in all respects, because they "overlap at least with regard to the principles involved in the present case."

173. Id. (quoting Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1106 (5th Cir. 1973)).

174. Id. at 227, 230. The court discounted other facts cited by the plaintiff to the effect that the parent corporation had made substantial loans to the subsidiary, it had caused the hiring and firing of certain executive officers of the subsidiary and certain individuals who were officers of both the parent and the subsidiary worked out of the offices of the parent. The court decided that these facts were not sufficient, either individually or in the aggregate, to justify piercing the corporate veil. Id. at 231.


176. Joslyn, 696 F. Supp. at 226 ("[W]e find no need to determine whether a uniform federal alter ego is required, since the federal and state alter ego tests are essentially the same.").

177. Id. n.8.

178. Jon-T Chemicals, 768 F.2d at 690 n.6.
court should apply in the event that a state in the Fifth Circuit other than Texas is involved, especially if the laws of that state are not as compatible with federal law as was the law of Texas. In addition, it leaves open the question of what law would apply if Texas law should change and become less compatible with federal law. Finally, what are the “principles” that overlap between state and federal law in the Jon-T Chemicals case? Are they present in environmental cases? Because the Joslyn opinion leaves these questions unanswered, the Fifth Circuit has created a business conduit rule that can be used in the future to enforce a standard of liability that is far different from the standard used in Joslyn and Jon-T Chemicals.

In summary, the CERCLA cases articulating the various rules of both direct and indirect liability have consistently tried to harmonize their holdings with existing law, making it appear that these rules are supported by and follow from the authority of the statute itself and the common law arising in other environmental and non-environmental contexts. The cited authority does not, however, support the rules. Although this critique has not attempted to prove that the rules themselves are defective, it does establish that there has been an enormous amount of judicial lawmaking in the area. Part III of this Article will examine, in detail, the power of the federal courts to engage in such lawmaking. Preceding that examination, the remainder of Part II will show how far apart the CERCLA rules of direct liability and piercing the corporate veil have strayed from their counterparts in traditional federal and state common law.

B. Traditional Common Law Rules of Liability

Federal and state courts are familiar with the issue of officer, director and stockholder liability. Long before CERCLA was enacted, the courts grappled with the problem of how to reconcile the recognition of a corporation as a legal entity separate from the individuals who owned or managed it with the desire to hold such individuals liable in certain cases where their actions merited liability. To resolve the issue as to officers and directors, the courts borrowed a rule from agency law—an officer or director will be liable for torts in which he actively participated. Rules concerning stockholder liability, on the other hand, developed in the equity jurisdiction of state and federal courts. The equity courts were attempting to achieve a just result in cases where liable corporations were unable to satisfy judgments against them.
To achieve justice, the equity courts developed new rules. Courts imposing traditional direct liability and piercing the corporate veil observed significant limitations on their use. These limitations most often required the establishment of a nexus between the conduct of an individual being sued and the harm that formed the basis of the lawsuit.

The remainder of Part II will take a closer look at the federal and state law dealing with direct liability and piercing the corporate veil. Only after this analysis can the true distance between the CERCLA rules and the traditional common law rules be measured.

1. Direct Liability

The doctrine that officers and directors are personally liable for torts in which they have personally and actively participated is firmly embedded in both federal and state common law. Both also have developed certain exceptions to liability to protect those persons not directly connected to the tortious harm.

a. Federal Law

Under traditional federal common law, officers of a corporation can be held personally liable for tortious conduct of the corporation "if they personally took part in the commission of the tort or specifically directed other officers, agents, or employees of the corporation to commit the tortious act."179 Similarly, a director who actually voted for the commission of a tort can be personally liable to the damaged party even if the act was performed in the name of his corporation.180

Two cases help illustrate the nature of the activity required to

---

179. Orthokinetiks, Inc. v. Safety Travel Chairs, Inc., 806 F.2d 1565, 1579 (Fed. Cir. 1986) (holding president and two directors who were directly responsible for design and production of infringing goods to be liable); see also Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16, 25 (Temp. Emer. Ct. App.) (rule of personal liability applies not only to tort but also to instances where wrongful conduct of individual has caused violation of a statute; held president/director/major stockholder liable for exceeding domestic controls on overseas sales), cert. denied, 484 U.S. 943 (1987); Donsco, Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978) (holding president of corporation "central figure" in corporation); Marks v. Polaroid Corp., 237 F.2d 428, 435 (1st Cir. 1956) (officer and part owner of small family corporation was held liable as "moving, active conscious force" behind patent infringement by corporation), cert. denied, 352 U.S. 1005 (1957).

hold an officer or director liable. In *Marks v. Polaroid Corp.*, the officer in question was the "guiding spirit" behind the corporation's infringement upon a patent. In so finding, the Court of Appeals for the First Circuit focused on his supervision and direction of the building of the machines and equipment used in manufacturing the infringing product, his intimate familiarity with details of the process and his status as the holder of the patent under which the corporation operated. The court found these facts sufficient to establish his liability because they "certainly show that the [officer] was more than merely an officer of an infringing corporation. They show that he, individually was the moving, active conscious force behind [the corporation's] infringement."

In *Donsco, Inc. v. Casper Corp.*, the Court of Appeals for the Third Circuit imposed liability on a corporate officer on the basis of a finding that he was "the central figure" in a corporation that had engaged in unfair competition. The officer, as president of the corporation, was responsible for arranging marketing services and distributing the corporation's product. In addition, the district court found that the officer knew and personally approved the acts of unfair competition that caused harm to the plaintiff. The court distinguished the liability it imposed from piercing the corporate veil, ruling that the officer was liable as a result of his actions, rather than on the basis of his status as an owner.

though directors were ignorant of illegality of their acts due to lawyer's misguided advice).

181. 237 F.2d 428 (1st Cir. 1956).
182. Id. at 435.
183. Id.
184. Id.
185. 587 F.2d 602 (3d Cir. 1978).
186. Id. at 606.
187. Id. Among other things, the defendant officer gave the designer of the corporation's sales materials a "certificate of authenticity" to be enclosed with each product sold, even though he knew that the plaintiff competitor was the only manufacturer of the product licensed to use that certificate of authenticity. Id.
188. Id. The opinion in *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-01 (5th Cir. 1976), takes a more conservative position with respect to liability under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1988). The court stated that a corporate officer could not be held liable under the statute unless either the statute itself authorized such liability or it was possible to pierce the corporate veil. 526 F.2d at 1300. Because the court could find no evidence in the language of the statute that an officer of a corporation that had violated the Rivers and Harbors Act would be personally liable, and because facts sufficient to pierce the corporate veil had been neither alleged nor proven, the judgment against the former president of the corporation was reversed. Id.
Marks and Donsco illustrate the type of actual participation that is required under the traditional federal common law to impose liability on a corporate officer for activities of a corporation. In each case, the corporate officer not only occupied a high position of authority within the corporation, but was also an active, knowledgeable and responsible participant in the precise act that created the harm. In each case, liability was predicated on the officer's actions, rather than his capacity to take actions.

Although courts have in numerous cases imposed personal liability on officers and directors under the federal common law, there are significant limitations on such liability. First, personal liability cannot be imposed on an officer of a corporation simply because of his official position. The plaintiff must allege that such officer has actively participated in the act giving rise to the corporation's liability. Second, an officer will not be liable for the mere omission to perform a duty that is owed to the corporation rather than to the plaintiff. These two important safeguards are built into the traditional federal common law of direct liability to protect corporate officers in cases where they have acted on behalf of the corporation.

b. State Law

The discussion of state law concerning the liability of officers and directors will summarize the relevant law in California, New York and Texas. These states represent a geographical cross-section of the United States, and generally reflect the existing state law of the remaining states on officer and director liability.191

at 1300-01; see also United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1310 (5th Cir. 1976) (Rivers and Harbors Act does not impose personal liability for violations). But see United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133, 134-35 (2d Cir.) (distinguishing Sexton and Moretti as cases concerning derivative liability, and instead holding corporate officers liable under analogous statute on basis of their personal involvement in illegal dumping and storage activities, not merely their corporate position), cert. denied, 474 U.S. 1037 (1985).

189. See, e.g., Musikiwamba v. ESSI, Inc., 760 F.2d 740, 753 (7th Cir. 1985) (court held that incorporator/chief executive officer/major stockholder of corporation that allegedly violated federal discrimination laws was not liable merely because of his position); see also Lahr v. Adell Chem. Co., 300 F.2d 256, 260 (1st Cir. 1962) (mere identification of defendant as "an officer" does not adequately allege personal involvement sufficient to support cause of action).

190. Morefield v. Ozark Pipe Line Corp., 27 F.2d 890, 891 (N.D. Okla. 1928) (holding that foreman who neglected to perform his duties as employee of corporation with respect to inspections and engine repairs was not liable to widow and family of man killed in industrial accident at corporation's facility).

191. While this Article discusses state laws of California, New York and
The common law of California, New York and Texas imposes liability on officers and directors for wrongs of the corporation in which they actively participated. In *Frances T. v. Village Green Own-
the California Supreme Court analyzed the liability of officers and directors for the torts of a corporation. In this case, the plaintiff, who owned a condominium unit, sued the condominium owners’ association and individual members of its board of directors for injuries sustained in an attack in her condominium unit. This attack followed numerous attempts by the plaintiff to have adequate security lights installed in the complex. In addressing the liability of the directors, the court developed a two-prong test:

To maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed or participated in the allegedly tortious conduct; or that although they specifically knew or reasonably should have known that some hazardous condition or activity under their control could injure plaintiff, they negligently failed to take or order appropriate action to avoid the harm. The plaintiff must also allege and prove that an ordinary prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances.

The law in New York is similar. Corporate officers can be held “personally liable for those torts they personally commit, or which they inspire or participate in, even though performed by an artificial body.” The court in Michaels v. Lispenard Holding Corp.

193. Id. at 497-98, 723 P.2d at 574-76, 299 Cal. Rptr. at 457-59 (plaintiff submitted complaint to be published in condominium newsletter, made formal requests for lighting to manager of premises and installed lighting on her own only to be ordered by condominium management to remove it).
194. Id. at 508-09, 723 P.2d at 583-84, 299 Cal. Rptr. at 466 (footnote omitted); see also United States Liab. Ins. Co. v. Haldinger-Hayes, Inc., 1 Cal. 3d 586, 595, 463 P.2d 770, 775, 85 Cal. Rptr. 418, 423 (1970) (president of insurance agency found not personally liable for recommending poor insurance risk to insurance company where defendant agency found to be negligent); Thomsen v. Culver City Motor Co., 4 Cal. App. 2d 639, 645, 41 P.2d 597, 600 (1935) (directors of automobile agency who did not participate in alleged acts of conversion of bank’s security were held not personally liable).
195. Michaels v. Lispenard Holding Corp., 11 A.D.2d 12, 14, 201 N.Y.S.2d 611, 614 (1960) (citing 3A W. FLETCHER, supra note 70, § 1135) (individual managing agents of corporate defendant not liable for damage to plaintiff’s property allegedly resulting from negligent repairs that they did not personally make); accord Lutz Feed Co. v. Aradet & Co., 72 Misc. 2d 28, 31, 337 N.Y.S.2d 852, 856 (Sup. Ct. 1972) (corporate officer of defendant insurance agent held not personally liable for failure to timely renew plaintiff’s insurance plan because negligence was nonfeasance); see also Marine Midland Bank v. John E. Russo Produce
Corp. declared that in order to hold a corporate officer liable in an individual capacity for torts of the corporation, “it must appear that the acts were other than the ordinary acts of corporate agents acting for their principal or that they were in exclusive and complete control of the management and operation of the building” in which the tortious damage occurred. Under Texas law, active participation in a tort by a corporate officer or director will lead to liability for such officer or director:

Knowing participation in a tortious act will render the corporate agent personally liable, while the mere breach of a corporate contractual obligation will not. It is not necessary that the “corporate veil” be pierced in order to impose personal liability, as long as it is shown that the corporate officer knowingly participated in the wrongdoing.

In Barclay v. Johnson, for example, the Texas appellate court imposed liability on a corporate officer who had personally signed the brochure in which a false representation of a material fact had been made and upon which the plaintiff had relied to his detriment when signing an earnest money contract.

Co., 50 N.Y.2d 31, 44, 405 N.E.2d 205, 212 (1980) (“As a general proposition, corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it. Mere negligent failure to acquire knowledge of the falsehood is insufficient.” (footnotes omitted)).

In holding that liability did not arise from nonfeasance, court held that liability may have arisen if defendants had personally performed work.

Barclay v. Johnson, 686 S.W.2d 334, 336-37 (Tex. Civ. App. 1985) (footnotes omitted); accord Grierson v. Parker Energy Partners, 737 S.W.2d 375, 377 (Tex. Ct. App. 1987); see also Permian Petroleum Co. v. Barrow, 484 S.W.2d 631, 634 (Tex. Civ. App. 1972) (“An officer or any other agent of a corporation may be personally as responsible as the corporation itself for tortious acts when participating in the wrongdoing.”); Mayflower Inv. Co. v. Stephens, 345 S.W.2d 786, 795 (Tex. Civ. App. 1960) (declining to hold liable corporate officers who were present at construction site and “generally knew what was going on,” because there was no evidence that they had knowledge of specific problem or that they gave direction to engineer or independent contractor on site).


Id. at 335-38 (“[T]he directors of a corporation are personally liable for false representations made by them to an injured party, whether they know they are false or not.” (quoting Dollar v. Lockney Supply Co., 164 S.W. 1076, 1079 (Tex. Civ. App. 1914))).

Under Texas law, officers and directors who participate in the torts of a company by “instigating, aiding or abetting the company” in the commission of such torts are liable, along with the company. Earthman’s, Inc. v. Earthman, 526 S.W.2d 192, 206 (Tex. Civ. App. 1975) (corporate officers who participated in
Like the federal common law, the common law of each of the three states under discussion limits the liability of officers and directors in two ways. The first significant limitation is that neither officers nor directors are liable solely by virtue of their office. The second exception to liability under the states' common law is similar to the nonfeasance exception in federal law. This requires a finding that the officer or director breached a duty that he or she owed to the injured third party, not merely to the corporation, in order to impose personal liability.

conversion may be found personally liable); Permian Petroleum Co., 484 S.W.2d at 634 (holding corporate officer personally liable for debt where he committed conversion). Similarly, officers may be liable for acts of employees where the employees acted upon the direct orders of such officer, who knew that the act was wrong. Norton Refrigerated Express, Inc. v. Ritter Bros. Co., 552 S.W.2d 910, 912 (Tex. Civ. App. 1977) (president of corporation held liable for conversion where evidence showed that he had personally ordered employees of the corporation to convert items when he knew or reasonably should have known that property belonged to another).

New York law is similar. Compare Clark v. Pine Hill Homes, Inc., 112 A.D.2d 755, 755, 492 N.Y.S.2d 253, 254 (1985) (corporate officer held liable for failure to construct plaintiff's home in workmanlike manner, where he personally supervised and participated in negligent construction) with Haefeli v. Woodrich Eng'g Co., 255 N.Y. 442, 450-51, 175 N.E. 123, 126 (1931) (declaring to hold president of corporation liable where design and construction of defective cesspool were committed under personal supervision of superintendent in charge, and president neither knew nor had any reason to know of any defects in plan or construction).

Texas law is in general agreement with California and New York. K & G Oil Tool & Serv. Co. v. G & G Fishing Tool Serv., 158 Tex. 594, 611, 314 S.W.2d 782, 799 ("The cases are agreed that a director or officer of a corporation is not liable merely because of his official character for [illegal acts] of the other officers or agents of the corporation or for [acts] attributable to the corporation, if such director or officer is not personally connected with the wrong and does not participate in it."); cert. denied, 358 U.S. 898 (1958); see also Earthman's, 526 S.W.2d at 206 ("An officer who actively participates with the corporation in the [illegal act] may be held personally responsible, not solely by reason of his corporate office, but because of his active participation in a tortious act.").
2. Indirect Liability: Disregarding the Corporate Entity

Federal and state rules for disregarding the corporate entity have less in common with each other than do the various direct liability rules. Because piercing the corporate veil is an equitable remedy, statements of applicable rules have been notoriously difficult to formulate. The purpose of this survey is not to analyze the doctrine of piercing the corporate veil, but to show the simi-

The court emphasized that the presence of a duty toward the third parties was critical:

"More must be shown than breach of the officer's duty to his corporation to impose personal liability to a third person upon him." In other words, a distinction must be made between the director's fiduciary duty to the corporation (and its beneficiaries) and the director's ordinary duty to take care not to injure third parties.

Id. (footnotes omitted) (quoting Haidinger-Hayes, 1 Cal. 3d at 595, 463 P.2d at 775, 83 Cal. Rptr. at 418). This exception to liability has previously been stated in terms of holding directors or officers personally liable for acts of misfeasance or malfeasance, but not for mere acts of nonfeasance. See Haidinger-Hayes, 1 Cal. 3d at 595, 463 P.2d at 775, 83 Cal. Rptr. at 423; Middlesex Ins. Co. v. Mann, 124 Cal. App. 3d 558, 574, 177 Cal. Rptr. 495, 505 (1981); Trott v. Pope, 168 Cal. App. 2d 520, 530, 336 P.2d 276, 282 (1959). Frances T. stated, however, that officers and directors may be held liable for negligent nonfeasance "where they knew that a condition or instrumentality under their control posed an unreasonable risk of injury to the plaintiff, but then failed to take action to prevent it." Frances T., 42 Cal. 3d at 468, 723 P.2d at 585, 229 Cal. Rptr. at 458; see Dwyer v. Lanan & Snow Lumber Co., 141 Cal. App. 2d 838, 841, 297 P.2d 490, 495 (1956) (president of lumber company held personally liable for negligent failure to prevent fall of steel wire).

Under New York law it has been held that negligence in actually performing duties is misfeasance rather than nonfeasance. Michaels, 11 A.D.2d at 14, 201 N.Y.S.2d at 614 (citing 3A W. FLETCHER, supra note 70, § 1161). The Michaels court limited the nonfeasance liability exception to breaches of duty owed by the officer to the corporation, and stated that the exception "has no application where there is a breach of duty owing by the agent himself to third persons." Id. (quoting 3A W. FLETCHER, supra note 70, § 1135).

The distinction between misfeasance and nonfeasance is also noted in Texas law. In Mayflower Investment Co. v. Stephens, 345 S.W.2d 786 (Tex. Civ. App. 1960), the appellate court rejected the imposition of liability on individual officers for trespass. The court noted that there was no evidence that either of the individuals knew that the work being done was on plaintiff's land or knew what the effects of such work would be on plaintiff's land. Id. at 795. It ruled that the president and vice-president of a corporation could not be held liable for a wrong in which they had not participated. The court then stated that "an agent is personally liable to third persons for his own misfeasance and positive wrong, but is not generally liable for his nonfeasance or omission of duty in course of his employment." Id. (quoting Seismic Explorations v. Dobray, 169 S.W.2d 739 (Tex. Ct. App. 1943)); see also Maxey v. Citizens Nat'l Bank of Lubbock, 507 S.W.2d 722, 725 (Tex. 1974) ("Directors or officers of a corporation . . . are not responsible to third persons for negligence amounting merely to nonfeasance, to a breach of duty owing to the corporation alone, the act must also constitute a breach of a duty owed to the third person.").

203. For a further discussion of the role of equity in piercing the corporate veil, see infra notes 222, 235, 240, 246-48 and accompanying text.
CERCLA LIABILITY

larities and differences among the various jurisdictions on certain key issues affecting the doctrine.204

a. Federal Law

The difficulty in formulating rules applicable to piercing the corporate veil can be illustrated by a brief survey of federal law on the subject. Five principal categories identified from recent case law will be discussed below.205 These categories include the Seymour rule, the DeWitt rule, the Milwaukee Refrigerator rule, the Jon-T rule and the Zubik rule.

i. The Seymour Rule

In a case frequently cited by federal courts in numerous areas of law, the Court of Appeals for the Ninth Circuit in Seymour v. Hull & Moreland Engineering206 devised its own rule from numerous sources. The Seymour court stated that the federal common law on piercing the corporate veil "concentrates on three general factors: the amount of respect given to the separate identity of the corporation by its stockholders, the degree of injustice visited on the litigants by recognition of the corporate entity, and the fraudulent intent of the incorporators."207


205. There are, no doubt, numerous other rules and variations of rules in the opinions handed down by the federal courts. In order to give the reader a taste of the diversity of federal opinion on the subject, I have selected five rules that have been popular in recent federal cases.

206. 605 F.2d 1105 (9th Cir. 1979).

207. Id. at 1111; accord Laborers' Pension Trust Fund v. Sidney Weinberger Homes, Inc., 872 F.2d 702, 704 (6th Cir. 1988) (finding that three-prong test was violated where defendant loaned money to corporation with no formalized agreement, paid corporate expenses with his own money, operation of corporation was for defendant's sole benefit, records of expenses were inadequate and defendant withdrew funds when entity ended while there were outstanding debts of corporation); Orloff v. Allman, 819 F.2d 904, 909 (9th Cir. 1987) (finding no liability under Seymour test where adequate records were kept, no intermingling of personal and corporate funds occurred, no evidence of fraud was present when incorporation occurred and no evidence of undercapitalization); Bergen v. F/V St. Patrick, 816 F.2d 1345, 1351-52 (9th Cir. 1987) (reflecting upon Seymour factors and finding sufficient evidence to justify liability since record indicated intermingling of funds, undercapitalization, failure to file corporate tax returns, failure to pay dividends and lack of company bank account); Alman v. Danin, 801 F.2d 1, 4 (1st Cir. 1986) (disregarding corporate identity based on Seymour factors); Contractors, Laborers, Teamsters and Eng'rs Health & Welfare Plan v. Hroch, 757 F.2d 184, 190 (8th Cir. 1985) (disregarding corpo-
ii. The DeWitt Rule

The Court of Appeals for the Fourth Circuit in DeWitt Truck Brokers v. W. Ray Flemming Fruit Co.208 declined “the mere incantation of the term ‘instrumentality’” in favor of a recitation of the factual basis for its conclusion in a piercing the corporate veil case.209 It instead cited the following factors as significant in its analysis of the issue: gross undercapitalization; failure to observe corporate formalities; nonpayment of dividends; insolvency of the corporation at the relevant time; siphoning of corporate funds by the dominant stockholder; nonfunctioning of other officers or directors; absence of corporate records; and use of the corporation as a mere facade for the operation of dominant stockholders.210 The court made clear that, in order to pierce the corporate veil, a number of these factors must be found, and further, that there must be “present an element of injustice or fundamental unfairness.”211


208. 540 F.2d 681 (4th Cir. 1976).
209. Id. at 685 (quoting Kirvo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1103 (5th Cir. 1973)).
210. Id. at 685-87. In formulating the factors to be considered, the court combined various situations set forth in previous case law and structured a guideline for courts to use in their analyses. Id.
211. Id. at 687. Although the DeWitt decision involved a diversity case decided under South Carolina law, it has been cited by numerous federal courts in federal question cases. See, e.g., Keffer v. H.K. Porter Co., 872 F.2d 60, 65 (4th Cir. 1989) (case brought against parent and wholly-owned subsidiary under Labor Relations Act of 1947, 27 U.S.C. § 185 and ERISA, 29 U.S.C. §§ 1001); Solomon v. Klein, 770 F.2d 352, 353-54 (3d Cir. 1985) (case involving ERISA, 29 U.S.C. §§ 1000 where court referenced the factors, noting that issue did not involve inquiry into alter ego but involved statutory construction); American Bell, Inc. v. Federation of Tel. Workers, 756 F.2d 879, 886 (3d Cir. 1984) (citing DeWitt as one possible approach in piercing the corporate veil); Carpenter's Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 284 (3d Cir. 1983) (court found alter ego theory for piercing the corporate veil not applicable under § 301 of Labor Management Relations Act of 1947 where individuals used personal assets for corporation's survival and acted in interests of corporation rather than utilizing corporate assets for their own benefit); United States v. Pisani, 646 F.2d 83, 88 (3d Cir. 1981) (utilizing factors in DeWitt to pierce corporate veil and hold physician personally liable for Medicare overpayment made to physician's solely-owned corporation); United States v. Thomas, 515 F. Supp. 1351, 1357 (W.D. Tex. 1981) (doctor violated most of factors set forth in DeWitt rule, and corporate veil was pierced rendering him personally liable for overpayments of Medicare funds under 42 U.S.C. § 1395 (1974)).
iii. The Milwaukee Refrigerator Rule

The rule articulated by the Circuit Court for the Eastern District of Wisconsin in 1905 in United States v. Milwaukee Refrigerator Transit Co.\textsuperscript{212} has been resurrected in a number of contemporary decisions. Unlike the DeWitt rule and the Seymour rule, this rule takes a rather abstract approach to the matter:

[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.\textsuperscript{213}

iv. The Jon-T Rule

The Court of Appeals for the Fifth Circuit in United States v. Jon-T Chemicals, Inc.,\textsuperscript{214} which focused on the parent-subsidiary context, despaired of finding any single formula for piercing the corporate veil. Instead, the court elected to take an approach not unlike that found in the DeWitt rule:

In lieu of articulating a coherent doctrinal basis for the alter ego theory, we have instead developed a laundry list of factors to be used in determining whether a subsidiary is the alter ego of its parent. These include whether:

1. the parent and the subsidiary have common stock ownership;
2. the parent and the subsidiary have common directors or officers;
3. the parent and the subsidiary have common business departments;

\textsuperscript{212} 142 F. 247 (C.C.E.D. Wis. 1905).
\textsuperscript{214} 768 F.2d 686 (5th Cir. 1985), cert. denied, 475 U.S. 1014 (1986).
(4) the parent and the subsidiary file consolidated financial statements and tax returns;
(5) the parent finances the subsidiary;
(6) the parent caused the incorporation of the subsidiary;
(7) the subsidiary operates with grossly inadequate capital;
(8) the parent pays the salaries and other expenses of the subsidiary;
(9) the subsidiary receives no business except that given to it by the parent;
(10) the parent uses the subsidiary's property as its own;
(11) the daily operations of the two corporations are not kept separate; and
(12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings. 215

v. The Zubik Rule

In Zubik v. Zubik, 216 the Court of Appeals for the Third Circuit held that "the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime." 217 The Zubik court added that the corporate entity should not be disregarded "unless specific, unusual circumstances call for an exception." 218

Despite the number and diversity of the federal rules, there


217. Id. at 272. Although similar to the Milwaukee Refrigerator rule, the Zubik rule incorporates the concepts of preventing illegality and injustice. Id. These were not clearly present in the older rule. For a further discussion of the Milwaukee Refrigerator rule, see supra notes 212-13 and accompanying text.

CERCLA LIABILITY

seems to be general agreement on the fact-intensive nature of piercing the corporate veil. For example, the court of appeals in Valley Finance, Inc. v. United States\(^\text{219}\) stated that "[g]iven the diversity of corporate structures and the range of factual settings in which unjust or inequitable results are alleged, it is not surprising that no uniform standard exists for determining whether a corporation is simply the alter ego of its owners."\(^\text{220}\) Similarly, in United States v. Standard Beauty Supply Stores, Inc.,\(^\text{221}\) the federal appellate court noted that "[w]hether the corporate veil should be pierced depends on the innumerable individual equities of each case. 'Only general rules may be laid down for guidance.'"\(^\text{222}\)

Of the large assortment of factors identified in the rules for piercing the corporate veil, it is generally true that no one factor alone is determinative. Thus, undercapitalization,\(^\text{223}\) sole ownership of the stock,\(^\text{224}\) identity of officers and directors of parent and subsidiary,\(^\text{225}\) and the right of the parent or stockholder to choose directors and set policy\(^\text{226}\) are not sufficient by themselves to justify disregarding the corporate entity and holding the stockholders liable.

While most of the rules articulated above contain a requirement that some element of fraud or inequitable result appear, the level of fraud required has not been fixed with any great precision. For example, several cases have held that actual fraud is not a prerequisite to piercing the corporate veil,\(^\text{227}\) especially where


\(^{220}\) Id. at 172. The court also stated that sole ownership would not by itself be sufficient to justify piercing the corporate veil, although it would be relevant. Id. Similarly, the court thought that "plain fraud," while helpful, is not a prerequisite to piercing the corporate veil. Id.

\(^{221}\) 561 F.2d 774 (9th Cir. 1977).

\(^{222}\) Id. at 777 (quoting Stark v. Coker, 20 Cal. 2d 839, 846, 129 P.2d 390, 392 (1942)).

\(^{223}\) Fisser v. International Bank, 282 F.2d 231, 240 (2d Cir. 1960).

\(^{224}\) Selser v. Pacific Motor Trucking Co., 770 F.2d 551, 554-55 (5th Cir. 1985); Jon-T Chemicals, 768 F.2d at 691; Valley Finance, 629 F.2d at 172; El Salto, S.A. v. PSG Co., 444 F.2d 477, 483 (9th Cir.), cert. denied, 404 U.S. 940 (1971).

\(^{225}\) Jon-T Chemicals, 768 F.2d at 691.

\(^{226}\) Johnson v. Flowers Indus., Inc., 814 F.2d 978, 982 (4th Cir. 1987); Selser, 770 F.2d at 555.

\(^{227}\) United States v. Van Diviner, 822 F.2d 960, 964-65 (10th Cir. 1987) (generally applying Seymour rule); Jon-T Chemicals, 768 F.2d at 692 (applying Jon-T rule and holding that fraud is not essential in tort cases, as opposed to contract cases); Valley Finance, 629 F.2d at 172 (applying rule that permits piercing "whenever an individual so dominates his organization 'as in reality to negate its separate personality'" (quoting Quinn v. Butz, 510 F.2d 743, 758 (D.C. Cir. 1978))); National Marine Serv., Inc. v. C. J. Thibodeaux & Co., 501 F.2d 940,
gross undercapitalization or complete domination exist. Similarly, it has been held that one can infer fraudulent intent and inequitable result from the failure of the stockholder to capitalize the corporation adequately. On the other hand, it has also been held that “the plaintiff bears the burden of demonstrating that some injustice or inequity will result from recognition of the corporate entity.”

b. State Law

Once again, California, New York and Texas law will be surveyed to provide a representative sample of state law on disregarding the corporate entity. California law is reputed to be among the most liberal in permitting piercing the corporate veil, while New York law has traditionally been considered among the most conservative in this regard. Texas law is instructive because recent changes in its common law demonstrate the volatile nature of the subject. The other states take approaches comparable to those of New York and California in defining what is needed to pierce the corporate veil.

942 (5th Cir. 1974) (not identifying any particular rule or test for piercing corporate veil).


229. See Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 524-25 (9th Cir. 1984) (applying Seymour rule). The court found that the failure to infuse the company’s non-liquid assets with any working capital rendered its initial capitalization inadequate and, thus, found evidence of fraudulent intent. Id.

230. See Van Diviner, 822 F.2d at 965. The court noted that in balancing the various equities regarding the determination of whether there is an injustice, it would give weight to the officers’ and stockholders’ respect of the corporate entity. Id.

231. For the rationale behind selecting these three states, see supra text accompanying note 191.


CERCLA LIABILITY

The modern rule in California for piercing the corporate veil was set forth in Automotriz Del Golfo de California v. Resnick. The California Supreme Court adopted a two-part test for determining whether the corporate entity may be disregarded in a particular case:

[References to cases and statutes are listed.]
[T]he two requirements for application of this doctrine are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.235

Subsequent cases have made clear that both of these elements must be present before the corporate entity will be disregarded.236

The principal rule found in New York common law for disregarding the corporate entity dates back to the historic case of Lowendahl v. Baltimore & O.R. Co.237 Drawing from a number of contemporary cases and one esteemed commentator, the court identified the following three factors that must be present in order to pierce the corporate veil:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.238

The court added that "[s]uch improper fraudulent activity will not be presumed, nor can it be based merely on suspicion, conjecture, or doubtful inference. Fraud here, as elsewhere, must be

236. Auer, 227 Cal. App. 2d at 408, 38 Cal. Rptr. at 691; Associated Vendors, 210 Cal. App. at 837, 26 Cal. Rptr. at 813.
237. 247 A.D. 144, 287 N.Y.S. 62, aff'd, 272 N.Y. 360, 6 N.E.2d 56 (1936). According to one pair of commentators, this case is one of the most frequently cited in the area of piercing the corporate veil and has had a wide influence. Krendl & Krendl, supra note 204, at 13.
238. Lowendahl, 247 A.D. at 157, 287 N.Y.S. at 76.
established by clear and convincing factual proof." 239

Unlike the law in California, where courts appear to have rallied around a single state supreme court formulation, New York law is similar to federal law in recognizing competing rules for piercing the corporate veil. One frequently cited rule in New York holds that the corporate entity may be disregarded whenever necessary "to prevent fraud or to achieve equity." 240 A more specific formulation of this rule mandates piercing the veil where the stockholder has used the corporation for the transaction of the stockholder's personal business, as opposed to the corporation's business. 241 New York's highest state court has created another variation of that rule, holding that courts are entitled to disregard the corporate entity of a subsidiary corporation if the parent has intervened in the subsidiary's management "to such an extent that 'the subsidiary's paraphernalia of incorporation, directors and officers' are completely ignored." 242

The Texas Supreme Court has in recent years taken a somewhat novel position on disregarding the corporate entity. The opinion of the supreme court in Castleberry v. Branscum 243 identified six separate circumstances under which it would recognize the piercing of the corporate veil:

(1) When the fiction is used as a means of perpetrating fraud;
(2) Where a corporation is organized and operated as a mere tool or business conduit of another corporation;
(3) Where the corporate fiction is resorted to as a means of evading an existing legal obligation;

239. Id. at 158, 287 N.Y.S. at 76.
243. 721 S.W.2d 270 (Tex. 1986).
(4) Where the corporate fiction is employed to achieve or perpetrate monopoly;
(5) Where the corporate fiction is used to circumvent a statute; and
(6) Where the corporate fiction is relied upon as a protection of crime or to justify wrong.\footnote{244}

The court made clear that the alter ego theory is merely one of several alternative theories that can be used to pierce the corporate veil.\footnote{245}

Numerous decisions in each of the three jurisdictions have given judicial recognition to the equitable nature of piercing the corporate veil. The California Supreme Court described the matter in this way:

The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the \textit{alter ego} of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court. Only general rules may be laid down for guidance.\footnote{246}

A lower California court reiterated the thought, stating that the doctrine of piercing the corporate veil is “essentially one of equity which rests largely upon the facts peculiar to each case.”\footnote{247}

This emphasis on the fact specific nature of piercing the corporate veil and the difficulty of formulating any helpful general rules is repeated in New York and Texas law.\footnote{248}

\begin{footnotes}
\item[244] Id. at 272 (footnotes omitted).
\item[245] Id. Because Castleberry permits piercing the corporate veil under any of the six “circumstances,” some of which do not require any showing as to domination or control by the stockholder, it immediately gave rise to concerns in the business community. The Texas legislature therefore amended the Texas Business Corporation Act to restrict the effects of Castleberry in contract claims, but not in tort claims. For an excellent discussion of Castleberry, its ramifications, the legislative response and the resulting state of the law in Texas, see Hamilton, \textit{A New Turn in the Texas Law of “Piercing the Corporate Veil,”} 8 CORP. COUS. REV. 1 (1989).
\item[246] Stark v. Coker, 20 Cal. 2d 839, 846, 129 P.2d 390, 394 (1942); see also Resnick, 47 Cal. 2d at 796, 306 P.2d at 3 (reiterating two-prong test set forth in \textit{Stark} and \textit{Watson} as guideline to be followed in determining whether to pierce corporate veil).
\item[248] A federal district court best summarized the understanding of New York courts with respect to the equitable nature of piercing the corporate veil, stating: “The circumstances under which the court should disregard the corpo-
\end{footnotes}
Although all three states’ laws agree that no single factor may be conclusive in determining whether to pierce the corporate veil, there is no general agreement as to what factors are relevant. *Associated Vendors, Inc. v. Oakland Meat Co.*\(^{249}\) compiled an exhaustive list of the factors cited by California cases in considering whether to disregard the corporate entity.\(^{250}\) After setting out this list, the

rate fiction are not always clear and it is difficult, if not impossible, to formulate a precise and categorical definition applicable to all situations, each case being *sui generis.*” *Brunswick Corp. v. Waxman,* 459 F. Supp. 1222, 1229 (E.D.N.Y. 1978) (citations omitted), *aff’d,* 599 F.2d 34 (2d Cir. 1979).

Similarly, the Texas Supreme Court, noting that piercing the corporate veil is an equitable doctrine, stated that a “flexible fact specific approach focusing on equity” was to be used in Texas. *Caseberry,* 721 S.W.2d at 273. To illustrate the fact-specific approach of disregarding the corporate veil, the court cited piercing the veil when adherence to the fiction of the corporation would produce injustice or an inequitable result. *Id.* The court further stated that the time to pierce the corporate veil “is a question of fact and common sense. The court must weigh the facts and consequences in each case carefully, and common sense and justice must determine [its] decision.” *Id.* (quoting I. Hildebrand, Texas Corporations § 5, at 42 (1942)).

250. *Id.* at 838-40, 26 Cal. Rptr. at 813-15. The court cited the following factors:

- Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue stock or to subscribe to or issue the same; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities and responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family; the use of the same office or business location; the employment of the same employees and/or attorney; the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization; the use of a corporation as a mere shell, instrumentality, or conduit for a single venture for the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm’s length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity.
court rejected the appellant's contention that inadequate capitalization was itself sufficient to justify piercing the corporate veil. The court reasoned that while inadequate capitalization was an important factor to consider, it did not, standing alone, require the intervention of equity. Other California cases have held, as a matter of law, that disregarding the corporate entity will not be justified solely by virtue of the corporation's failure to issue stock or apply for a stock permit, or the sole ownership of the stock of the corporation by a parent or stockholder.

Although numerous New York cases have identified factors to be considered in piercing the corporate veil, no single case has collected the relevant factors for that state. It has been held that neither sole ownership of the stock, nor a common board of directors, nor the failure to observe corporate formalities will by itself justify the imposition of liability on the stockholders.

It has been held under Texas law that mere ownership of stock, duplication of some or all of the directors or officers,

Id. (citations omitted).

251. Id. at 841-42, 26 Cal. Rptr. at 816; accord Harris v. Curtis, 8 Cal. App. 3d 837, 841-43, 87 Cal. Rptr. 614, 617-19 (1970) (concluding that individuals were not corporation's alter ego and declining to pierce corporate veil where there was no fraud, misconduct or overreaching and only factor present was underfinancing); cf. Minton v. Cavaney, 56 Cal. 2d 576, 580, 364 P.2d 473, 475, 15 Cal. Rptr. 641, 643 (1961) (piercing corporate veil where individual was secretary, treasurer and director, where court determined he was equitable owner of corporation, where defendant actively participated in conduct of business and, most importantly, where there was no attempt to provide adequate capitalization).

252. Remick, 47 Cal. 2d at 796, 306 P.2d at 4 (failure to issue stock or apply for stock permit indicates that corporation is doing business for individual's benefit but does not amount to conclusive evidence).

253. Shafford v. Otto Sales Co., 119 Cal. App. 2d 849, 260 P.2d 269, 276-77 (1953) (other factors such as confusion of corporate and individual affairs, failure to disclose to third parties existence of two entities and abuse or bad faith in exercise of corporate control must be present with sole ownership to disregard corporate veil).


255. Total Care Health Indus., Inc. v. Department of Social Servs., 144 A.D.2d 678, 679, 535 N.Y.S.2d 15, 17 (App. Div. 1988); see also Lowendahl, 247 A.D. at 156, 287 N.Y.S. at 74-75 (recognizing that entire concept of corporation as separate legal entity could be destroyed by piercing corporate veil because parent exercised control over subsidiary through stock ownership, identity of stockholders or common directors).


258. Id.
exercise of control by the stockholders\textsuperscript{259} or undercapitalization,\textsuperscript{260} while relevant to the inquiry, will not be sufficient to pierce the corporate veil. Under the sham theory, however, the plaintiff need not prove that any element of control exists. Mere constructive fraud is sufficient.\textsuperscript{261}

The presence of "inequitable result" is required for disregarding the corporate entity in California.\textsuperscript{262} Several cases have attempted to give substance to this requirement by clarifying that actual fraud is not required.\textsuperscript{263} The California appellate court in \textit{Platt v. Billingsley}\textsuperscript{264} made clear that piercing the corporate veil could be used to "prevent that which would result in fraud or an injustice."\textsuperscript{265} The court in \textit{Associated Vendors} went even further:

Certainly, it is not sufficient to merely show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up an unhappy circumstance as a proof of an "inequitable result." . . . The purpose of the doctrine is not to protect every unsatisfied creditor, but rather to afford him protection, where some conduct amounting to bad faith makes it inequitable under the applicable rule above cited, for the equitable owner of a corporation to hide behind its corporate veil.\textsuperscript{266}

Thus, under California law, equitable concerns are of considerable importance in every piercing the corporate veil case.

The precise extent to which inequitable result is required under New York law to pierce the corporate veil is not clear. At one extreme, the \textit{Lowendahl} case expressly stated that a plaintiff must prove actual or constructive fraud, or "other legal wrong to

\textsuperscript{259} Id.

\textsuperscript{260} Torregrossa v. Szelc, 603 S.W.2d 803, 804-05 (Tex. 1980).

\textsuperscript{261} Castleberry, 721 S.W.2d at 273. The court distinguished between actual and constructive fraud, noting that in actual fraud there is an intent to deceive, whereas in constructive fraud there is a breach of a legal or equitable duty that involves deception, a violation of confidence or an injury to the public. \textit{Id.}

\textsuperscript{262} For a discussion of the inequitable result requirement, see \textit{supra} notes 235-36 and accompanying text.

\textsuperscript{263} See, e.g., Minifie v. Rowley, 187 Cal. 481, 488, 202 P. 673, 676 (1921). The court stated: "It is not necessary . . . that the complaint allege actual fraud; it is sufficient if the facts set forth disclose that the dealings were in form with a corporation but in reality with an individual and that a refusal to recognize this fact will bring about an inequitable result." \textit{Id.}

\textsuperscript{264} 234 Cal. App. 2d 557, 44 Cal. Rptr. 476 (1965).

\textsuperscript{265} \textit{Id.} at 586, 44 Cal. Rptr. at 483.

\textsuperscript{266} 210 Cal. App. 2d at 842, 26 Cal. Rptr. at 816.
plaintiff's rights" in order to pierce the corporate veil. The court in Majestic Factors Corp. v. Latino, on the other hand, held that the question of fraud was not essential where the individuals had so dominated the corporation that they were deemed to be the principals of the transaction. The court held that their actions created liability under "the general rules of agency."

According to the Texas Supreme Court, the requisite level of fraud necessary in Texas to pierce the corporate veil depends upon which of the six bases for piercing the corporate veil is being applied. Under the alter ego theory, it must be shown that "there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice." Under the sham basis, however, the emphasis is solely upon showing some kind of fraud. The Castleberry court made clear, however, that actual or intentional fraud is not required, stating that it "is sufficient if recognizing the separate existence would bring about an inequitable result." The court went on to hold that the sham basis may be established on a showing of constructive fraud, which it had previously defined as "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests."

---


269. Id. at 330-31, 184 N.Y.S.2d at 660. Several factors were present that illustrated the defendants' domination of the corporation: failure to have a separate bank account for the corporation; failure of the corporation to have any assets of its own; defendants and corporation occupied and used the same premises; orders of the corporation were turned over to the defendants; all payments made to corporation were turned over to defendants; failure of corporation to issue stock; failure to hold stockholder and director meetings; failure to elect officers or directors; and failure to file tax returns with appropriate governmental agencies. Id.

270. Castleberry, 721 S.W.2d at 272.

271. Id. at 272-73.

272. Id. (citations omitted).

273. Id. at 273 (quoting Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964)).
C. Distinguishing CERCLA Liability Rules from Traditional Common Law

As the preceding discussion of the traditional federal and state common law regarding direct liability and piercing the corporate veil suggests, the traditional federal and state common law rules have more in common with each other than they do with the rules articulated in the CERCLA cases. This section of the Article will explore the ways in which the direct liability and the piercing the corporate veil liability rules articulated in the environmental cases differ from their counterparts under traditional common law.

1. Direct Liability

The most obvious distinction between the traditional direct liability cases and the CERCLA direct liability cases is that federal and state cases adhering to the traditional doctrine require that the officer or director being held liable have personally participated in or authorized and approved the act causing the damage at issue. These traditional cases make clear that such persons are not liable solely by virtue of their offices. In this regard, the capacity to control rule set forth in NEPACCO I and its progeny is quite different. The early environmental cases focused on the capacity of the officer or director to control hazardous substance disposal, rather than on the individual's acts. The later cases in this line have relaxed the requirement even further. Instead of focusing on the individual's relationship to the hazardous substances, the cases now focus on the individual's management of the relevant facility, or even the individual's management of the corporation. Similarly, the "indicia of ownership" line of

274. For a further discussion of the traditional requirement of personal participation, see supra notes 179-89, 194-95, 198 and accompanying text.

275. For a further discussion regarding liability relating to various corporate offices, see supra notes 189, 201 and accompanying text.

276. For a discussion of the capacity to control rule implemented in the environmental cases, see supra notes 42-96 and accompanying text.

277. This shift in focus permits courts to hold a parent corporation directly liable as an "operator" of its subsidiary, without requiring evidence of how such parent, which is not an officer or director, was able to influence the actions of the subsidiary. For example, in United States v. Kayser-Roth Corp., 910 F.2d 24, 27-28 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991), the circuit court upheld the lower court's finding that the parent was an operator of a facility from which a release of hazardous substances had issued. The appellate court quoted with approval the lower court's finding that the parent was an operator of a facility from which a release of hazardous substances had issued. The appellate court quoted with approval the lower court's summary of the evidence showing control by Kayser-Roth, the parent, over the activities of Stamina Mills, its subsidiary:

Kayser-Roth exercised pervasive control over Stamina Mills through,
environmental cases focuses on the ownership of stock in, and the active participation in the management of, the corporation as a whole. Little attention is paid to the individual's ownership or management of the facility from which the hazardous substance has been released. By diverting attention away from the actions of the officers and directors, and turning it instead toward their functions within the corporation and their capacity to make things happen, the CERCLA cases have, in essence, held officers and directors liable solely by virtue of their offices. This directly contravenes the traditional common law.

Traditional direct liability is also distinguishable from CERCLA direct liability in that the former contains an exception for nonfeasance. This exception protects an individual who breached a duty to the corporation arising from his employment, but who has neither breached any duty owed to a third party, nor allowed a condition under his control to pose an unreasonable risk to third parties. An officer or director cannot be held liable under the traditional common law for a tort committed in the name of the corporation unless the existence of a duty towards

among other things: 1) its total monetary control including collection of accounts payable; 2) its restriction on Stamina Mills' financial budget; 3) its directive that subsidiary-governmental contact, including environmental matters, be funneled directly through Kayser-Roth; 4) its requirement that Stamina Mills' leasing, buying or selling of real estate first be approved by Kayser-Roth; 5) its policy that Kayser-Roth approve any capital transfer or expenditures greater than $5000; and finally, its placement of Kayser-Roth personnel in almost all Stamina Mills' director and officer positions, as a means of totally ensuring that Kayser-Roth corporate policy was exactly implemented and precisely carried out.

Id. at 27. What is missing from this summary is evidence showing how Kayser-Roth was able to effect such control. Certainly a corporate parent can vote its shares to elect directors who are likely to act in accordance with the parent's wishes. The court in this case did state that Kayser-Roth had placed its personnel in substantially all of the officer and director positions at Stamina Mills. Id. At best, this evidence suggests that the Kayser-Roth personnel who were officers and directors of Stamina Mills may be liable operators under CERCLA. Conspicuous by its absence is any link between Kayser-Roth, as a corporation, and the release of hazardous substances at Stamina Mills.

For a discussion relating to the role of management of a facility or corporation and corresponding liability, see supra notes 49-56, 87-96 and accompanying text.

278. For a further discussion of the "indicia of ownership" line of cases, see supra notes 129-34 and accompanying text. "The use of the exception implies that an owning stockholder who manages the corporation...is liable under CERCLA as an 'owner or operator.' " New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985).

279. For a further discussion of the nonfeasance exception, see supra notes 190, 202 and accompanying text.
the injured third party is first proved. 280 None of the CERCLA liability rules have required such a finding as a condition to imposing liability. The CERCLA rules focus entirely on the position of the person in management of the facility or the corporation, and his capacity to prevent certain kinds of damage. 281 While it may be generally supposed that even under the traditional common law there exists a duty to avoid exposing innocent third parties to hazardous conditions, it is not clear by any means that this duty rests equally on all persons who participate in the management of a corporation or a facility. Under the traditional common law, an officer or director could be held liable for damages to third parties due to a release of hazardous substances if it were shown that he in fact had a duty to prevent the condition. 282 Establishing the existence of such a duty would presumably involve a thorough analysis of the individual's specific activities at the facility, a determination of whether he was generally aware of the conditions at the facility, and a determination concerning his knowledge of the specific condition that posed an immediate risk of injury to the third parties. 283 Under the CERCLA cases, however, there is an implicit premise that some senior officers have a duty to prevent all harm. 284 Given this premise, the exception for nonfeasance disappears.

In summary, the traditional common law created a mecha-

280. For a discussion of the duty owed to a third party and its role in determining liability, see supra notes 190, 202 and accompanying text.
281. For a further discussion concerning ability to prevent damage and an individual's position within the corporation in relation to CERCLA liability, see supra notes 49-56, 87-96 and accompanying text.
282. See, e.g., Frances T. v. Village Green Owners Ass'n, 42 Cal. 3d 490, 510, 723 P.2d 573, 585, 229 Cal. Rptr. 456, 468 (1986) (en banc) (basis for potential liability regarding hazardous condition rests upon officer's or director's unreasonable failure to prevent harm when they are only persons in position to prevent it).
283. Haefeli v. Woodridge Eng'g Co., 255 N.Y. 442, 451, 175 N.E. 123, 126 (1931) (declining to hold president of corporation liable where design and construction of defective cesspool were committed to and under personal supervision of superintendent in charge, and president neither knew nor had reason to know of defects in plan or construction); cf. Mayflower Inv. Co. v. Stephens, 345 S.W.2d 786, 795 (Tex. Civ. App. 1960) (declining to hold liable corporate officers who are present at construction site and "generally knew what was going on" because there was no evidence that they knew about specific problem or that they gave directions to engineer or independent contractor).
284. See, e.g., NEPACCO I, 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). Even though the corporate president was more than 1,000 miles from the release of the hazardous substances, he was still held liable based on his "capacity and general responsibility as president to control the disposal of hazardous waste." Id. at 849.
anism under which courts could determine the potential liability of
an individual officer or director by analyzing his actual participa-
tion in the activity leading to the tort or breach of statute, and
then looking at whether this activity breached a duty to any third
party. The federal courts that have articulated the capacity to
control rule in CERCLA cases have substantially modified this
mechanism by focusing not on what an individual did or how his
or her actions affected the injured third party, but on whether the
individual occupied a position of authority within the corporation.
This shift in focus eliminates the plaintiff’s need to present evi-
dence linking the defendant with the third party and the harm,
allowing the plaintiff to substitute evidence linking the defendant
with the corporation. As the preceding discussion has shown, this
shift has no basis in the language or legislative history of
CERCLA, or in prior common law, yet it drastically enlarges the
scope of the statute.

2. Indirect Liability: Disregarding the Corporate Entity

The CERCLA rules under which the corporate veil may be
pierced, like the CERCLA rules providing for direct liability, ig-
nore certain qualifications and limitations that form an essential
part of the traditional common law doctrine of piercing the cor-
porate veil. Most of the federal and state rules on disregarding
the corporate entity in non-CERCLA contexts require a finding
either of complete unity of interest between stockholder and cor-
poration or complete domination of the corporation by its stock-
holders, such that the corporation has no separate “mind” of its
own. 285 Under the CERCLA rules, however, it is not necessary to
show unity of interest or domination. The “ownership interest
and control” rule established in United States v. Nicolet, Inc. 286
requires only that the stockholder have a “substantial financial or
ownership interest” in the corporation and that the stockholder
control the management and operations of the corporation. 287 In
reality, in the normal course of operations a corporate parent will
have both an ownership interest in the subsidiary and effective
control over the management and operations of the subsidiary.

285. For a further discussion of the traditional requirements for piercing
the corporate veil, see supra notes 206-18, 234-45 and accompanying text. For a
contrasting view, in which the plaintiff did not have to show control, see supra
note 261 and accompanying text.
287. Id. at 1202-03. For a discussion of veil piercing under Nicolet, see supra
notes 136-50 and accompanying text.
Thus, under the Nicolet rule, routine shareholder activity constitutes grounds for liability, notwithstanding that incorporation of a subsidiary in order to avoid or limit liability has long been recognized as a completely legitimate activity.\(^{288}\)

The "public convenience, fairness and equity" rule used in CERCLA cases also does not appear to require any finding of domination or unity of interest.\(^{289}\) The district courts in *In re Acushnet River*\(^{290}\) and *United States v. Kayser-Roth Corp.*\(^{291}\) identified a number of factors that could be used to determine that such domination or unity of interest existed.\(^{292}\) The *Kayser-Roth* opinion based its holding on the determination that CERCLA puts "no special importance" on the corporate form and that the "public convenience, fairness and equity" rule should be applied with that in mind. The court thus made clear that a finding of domination is only an alternative basis for its holding that the corporate veil can be pierced.\(^{293}\) This leaves open the possibility that normal shareholder behavior arising from routine ownership and control of a corporation can be punished with personal liability for environmental damages.\(^{294}\)

---

288. See Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) (in applying test for "owner or operator," "care must be taken so that 'normal' activities of a parent with respect to its subsidiary do not automatically warrant finding the parent is owner or operator").

289. For a complete discussion of the public convenience, fairness and equity test, see *supra* notes 151-68 and accompanying text.


292. For a discussion of the factors identified by the *In re Acushnet River* and *Kayser-Roth* courts, see *supra* notes 154-59 and accompanying text.

293. *Kayser-Roth*, 724 F. Supp. at 23-24 (holding that subsidiary's corporate veil should be pierced to impose liability on corporate parent "not only because public convenience, fairness, and equity dictate such a result, but also due to the all encompassing control which [the parent] had over [the subsidiary] as, in fact and deed, an owner").

294. The same concern can be raised with respect to the "business conduit" rule. For a further discussion of the "business conduit" rule, see *supra* notes 169-78 and accompanying text. The court in *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 226 n.8 (W.D. La. 1988), *aff'd* sub nom. *Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991), followed the Fifth Circuit's lead from *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 (5th Cir.), *cert. denied*, 475 U.S. 104 (1986). Both courts stated that federal and state law on piercing the corporate veil were essentially the same, despite the fact that *Jon-T* referred to Texas law and *Joslyn* to Louisiana law. After the changes in Texas law brought about by the decision in *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986), it is unclear whether a federal court hearing a CERCLA case in Texas should apply: (1) the "business conduit rule," which is in fact the *Jon-T* rule; (2) the *Castleberry* rule, which looks very much like the "public convenience and equity" rule; or (3) some new stan-
In addition to domination or unity of interest, most federal and state rules require that some element of injustice or inequitable result be present to merit piercing the corporate veil.\textsuperscript{295} While actual fraud is not usually required, some kind of wrongdoing is almost always found in traditional piercing the corporate veil cases. Typically, there is an attempt to link such wrongdoing to the harm visited on the third party.\textsuperscript{296} The ownership interest and control rule used in the CERCLA cases does not contain any requirement of wrongdoing.\textsuperscript{297} The public convenience, fairness and equity rule, as the phrase implies, does appear to incorporate some aspect of this requirement. The \textit{In re Acushnet River} case did not make any specific findings, however, about inequity or unjust result.\textsuperscript{298} Moreover, the public convenience, fairness and equity rule does not require that the stockholder being held liable have done something wrong; the "fairness" or "equity" consideration could arise from the acts of others. For example, one can agree that it is fair and equitable for an innocent third party victim of a release of hazardous substances to receive compensation, without also agreeing that equity automatically demands the personal liability of the stockholders of the corporation from whose premises the release occurred.\textsuperscript{299} Under the traditional piercing the corporate veil doctrine, equity may side with the stockholders. The inquiry under the doctrine of piercing the corporate veil is whether

\textsuperscript{295} For a further discussion regarding injustice or inequitable result in the context of piercing the corporate veil, see supra notes 219-22, 235, 240, 246-48, 262-73 and accompanying text.

\textsuperscript{296} See, e.g., \textit{Lowendahl v. Baltimore & O.R.R.}, 247 A.D. 144, 158-59, 287 N.Y.S. 62, 77 (finding that there was not domination and control by corporate defendants during transaction with plaintiff, where defendants acted in manner that was normal and usual for majority stockholders with large investment in enterprise), aff'd, 272 N.Y. 360, 6 N.E.2d 56 (1936).

\textsuperscript{297} For a further discussion of the ownership interest and control rule, see supra notes 135-50 and accompanying text.

\textsuperscript{298} In \textit{In re Acushnet River}, the discussion focused on the amount of control that the parent corporation had over the subsidiary. The government had argued "more on the general principle that corporate separateness will be ignored to prevent injustice than on the specific factors" listed in the opinion, but the court found that the requisite amount of control was not present. The lack of control by the parent over the subsidiary precluded piercing the corporate veil. \textit{In re Acushnet River}, 675 F. Supp. 22, 34 (D. Mass. 1987).

\textsuperscript{299} It is difficult to see the injustice or inequity in not imposing liability on a sole stockholder who established sound policies and hired competent employees, only to have a release of hazardous substances occur by virtue of something he neither knew nor should have known about, even though an innocent third party was injured.
the stockholders have done something to deserve such liability.300

Thus, the traditional common law doctrine of piercing the corporate veil provided a way for courts to impose liability on stockholders where the stockholders’ actions or inaction could be linked to the harm suffered by third parties, much like the way in which traditional direct liability was used to impose liability on officers and directors. In the case of piercing the corporate veil, the new CERCLA rules of liability minimize or entirely dispense with the linkage that was required under traditional common law. As with direct liability, neither the language of the CERCLA statute nor legal precedent support this change in the law.

* * *

The preceding discussion has not attempted to show that the traditional federal and state common law rules of liability are better than the rules developed in the CERCLA cases, or that they are more beneficial for the economy or for the law in general. The rules and exceptions contained in the traditional common law have been subjected to a great deal of criticism, particularly in the parent-subsidiary context.301 Much of that criticism is justified, although perhaps not conclusive.302 What the preceding discussion has shown, however, is that the CERCLA rules are considerably different from the existing traditional law, and that there is a lack of authority in the form of legal precedent or doctrine to bridge the gulf between the two. Even the traditional federal common law in non-environmental cases for the most part stops short of the rules adopted in the CERCLA cases.

300. See, e.g., Lowenthal, 247 A.D. at 157, 287 N.Y.S. at 76 (focusing on individual’s control of finances, policy and business practice relating to transaction as well as utilization of such control).


302. For a discussion relating to validity of criticism of traditional common law rules in the subsidiary context, see infra notes 516-20 and accompanying text.
Limited liability and its exceptions remain an important part of the corporate law in this country, and influence countless business decisions every day. Although distinguished commentators have criticized the traditional rules, the existing rules have survived and evolved slowly. Thus, the issue arises as to whether the federal courts should be permitted to impose new rules of limited liability in areas of law like CERCLA, or whether they should exercise restraint in deference to the general common law. What is the proper role of the federal courts in the development of the law of limited liability? May the federal courts create special liability rules for CERCLA or are they relegated to applying rules developed over time in the state courts? It is to these questions that we turn our attention in Part III.

III. FEDERAL COURTS AND STATE COMMON LAW RULES: THE CASE FOR ADOPTING STATE LAW

After seeing the extent to which the CERCLA rules of direct liability and piercing the corporate veil represent a departure from their traditional common law counterparts, the next issue to explore concerns whether the federal courts that are interpreting and applying the CERCLA statute have the power and authority to move beyond the established state law. At first glance, it would seem the question can be easily answered in the affirmative. The landmark case of *Cleatfield Trust Co. v. United States*\(^{303}\) clearly established the right of the federal judiciary to make federal common law when deciding federal question cases. *Cleatfield Trust* involved a check drawn on the Treasury of the United States.\(^{304}\) The United States Supreme Court held that because the authority of the federal government to issue the check was rooted in the Constitution and federal statutes, federal law, not state law, should govern the rights and duties of the United States relating to the check.\(^{305}\) The Court noted that it had occasionally applied state law to federal questions, but declared that this case was much different because of the significant, adverse effects that state law would have

---

303. 318 U.S. 363 (1943).
304. *Id.* at 364-65.
305. *Id.* at 366-67. The Court reasoned that the authority to issue checks was simply one example of federal power that required federal protection: The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state . . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. *Id.* (citations omitted).
both on the rights and duties of the United States and on the large volume of transactions involving commercial paper of the United States. 306

Clearfield Trust did not close the door on the use of state law in interpreting federal statutes, however. Some thirty-six years later, the Supreme Court, after numerous opportunities to revisit the issue, 307 finally set forth in United States v. Kimbell Foods, Inc. 308 various factors for determining what role state law should have in federal questions. 309 As an initial matter, the Court noted that "[t]his Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." 310 The Court then decided that federal law would govern the priority of liens in the instant case created in favor of the Small Business Administration (SBA) and the Farmers Home Administration (FHA). 311 Having settled that issue, the Court then held that state law still had a role to play:

Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules. Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy "dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the

306. Id. at 367. The Court stated that the United States issued commercial paper "on a vast scale" that would normally involve several states subjecting "the rights and duties of the United States to exceptional uncertainty." Id. The Court also believed that application of state law "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." Id.


309. Id. at 728-29. In an opinion handed down a little over one month after Kimbell Foods, the Supreme Court articulated a slightly different test for determining whether state law rules would govern the authority of independent directors to decide whether a stockholder derivative suit could be pursued on the corporation's behalf. Burks v. Lasker, 441 U.S. 471, 477 (1979). The Court determined that the issue was not one that required uniformity, and then stated that the federal statutes in question "do not require that federal law displace state laws governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless 'their application would be inconsistent with the federal policy underlying the cause of action.'" Id. at 478-79 (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975)).


311. Id. at 726-27 (determining that "federal interests are sufficiently implicated to warrant the protection of federal law").
effects upon them of applying state law."312

The Court next enunciated the relevant considerations. To determine whether a court can adopt existing state law as the rule of decision for a given issue that is otherwise governed by federal law, a court must weigh three factors: whether a need for uniformity exists; whether adoption of state law would frustrate the specific objectives of the federal statute or program; and whether the creation of a new uniform federal rule would disrupt commercial relationships built on state law.313 The Supreme Court applied this test to the facts of the Kimbell Foods case, and decided that nondiscriminatory state laws regarding priority should be adopted rather than a new uniform federal rule.314

The test created in Kimbell Foods has been used in a vast number of cases in numerous areas of law.315 At the most fundamental level, the test is actually about control: should the federal courts surrender a portion of their power to influence the growth and development of a federal statute or program, in order to accommodate the interests represented in existing state law? The first two elements of the Kimbell Foods test measure the extent of the federal interests that are at stake. The final element gauges the possible disruption to the state interests. In essence, the question is whether the federal judiciary will allow the development of state law to dictate the direction that the federal statute or program will take, at least with respect to the issue in question.316

312. Id. at 727-28 (citations omitted) (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)).
313. Id. at 727-29.
314. Id. at 727-40.
315. For a discussion of some of the many cases utilizing the Kimbell Foods analysis, see infra notes 320-610 and accompanying text.
316. The federal courts can surrender their control for one issue, rather than an entire case or controversy. "[A] decision to apply state law as a matter of federal judicial incorporation may frequently be made as to a single issue at a time." Mishkin, supra note 109, at 804-05.

The issue of whether a court should adopt a state rule of decision to give content to federal law is distinguishable from the issue of whether federal law preempts state law. Determining whether federal law preempts state law is a matter of ascertaining the intent of Congress:

Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Second, congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary or state regulation . . . .

As a third alternative, in those areas where Congress has not com-
Despite the critical importance of resolving whether federal or state law will apply, early CERCLA cases managed to ignore the issue entirely. The later CERCLA cases that have addressed the *Kimbell Foods* test have consistently argued that a federal rule must be applied to determine liability of officers, directors and stockholders under CERCLA. The following completely displaced state regulation, federal law may nonetheless preempt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because “compliance with both federal and state regulations is a physical impossibility,” or because the state law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”


As one commentator has stated:

[T]he adoption issue doctrine arises not when there are both federal and state laws on the issue in question, but when a state law of general applicability is considered as a means of determining an issue on which Congress is silent. While the presence of congressional intent to occupy the area of law is one ground for preemption, the absence of any congressional intent is one of the prerequisites for the existence of the adoption issue.

Note, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. Chi. L. Rev. 823, 827 n.28 (1976), quoted in United States v. Walter Dunlap & Sons, Inc., 800 F.2d 1232, 1241 (3d Cir. 1986) (Adams, J., concurring). But see Boyle v. United Technologies Corp., 487 U.S. 500, 507 n.3 (1988) (stating that “displacement of state law” and “displacement of federal law’s incorporation of state law” are not different in the instant case, if ever). Preemption arguments have not been raised in the CERCLA liability cases or commentaries, and therefore will not be considered in the analysis that follows. It is submitted that the analysis of federal preemption of state law by CERCLA would be substantially similar to the analysis presented here.

317. The statutory rule and the indicia of ownership rule are both creatures of statutory interpretation by federal courts, and would not in any event require a discussion of state common law. Therefore, the discussion of direct liability in Part III will concentrate on the capacity to control rule. For criticism of the statutory rule and the indicia of ownership rule, see supra notes 110-28, 132-34 and accompanying text. For a defense of these rules, see P. BLUMBERG, supra note 108, § 18.02, at 613-20.

analysis will consider the arguments for and against uniform rules of direct liability and piercing the corporate veil (including those advanced in the CERCLA cases in favor of such a rule) in the context of the broader issue of whether the federal courts should adopt uniform federal rules to give the United States recovery and enforcement rights against individuals other than those who are expressly and unambiguously described in the statute or who are otherwise liable under existing state common law.319

A. Is There a Need for Uniformity?

CERCLA cases grappling with the choice of law issue have held consistently that a uniform federal rule of liability plays an essential role in fulfilling the purposes of the statute. The court in In re Acushnet River had no doubts about the need for uniformity in CERCLA liability issues:

Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend upon the particular state in which a defendant happens to reside.320

Other courts dealing with piercing the corporate veil under CERCLA have agreed, relying on this same language.321

319. Notwithstanding the importance of the Kimbell Foods test in so many areas of the law, no courts or commentators have attempted to collect and analyze the published opinions that have used the test. As a result, the courts (including the courts deciding the CERCLA cases) continue to use a number of different criteria in ascertaining whether the elements of the test have been satisfied. The criteria differ markedly from case to case. In order to pursue a more rigorous study of effects of the Kimbell Foods test on CERCLA liability, this Article sorts through the various cases that have applied the Kimbell Foods test in some detail. To assist in analyzing this mass of cases, the Article groups the cases into subcategories within the discussion of each element of the test. The author developed the classification system specifically for this Article.

320. In re Acushnet River, 675 F. Supp. at 31. The court thought that the need for a uniform rule was "true beyond peradventure." Id.

Two cases that dealt with the issue of joint and several liability under CERCLA also relied on the need for uniformity. The district court deciding *United States v. Chem-Dyne Corp.*, held that CERCLA is and "must be uniform in character throughout the nation." To support this holding, the court quoted then-Representative James Florio's speech in debate preceding enactment of CERCLA: "To insure the development of a uniform rule of law, and to discourage business [sic] dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area."

In *United States v. A & F Materials Co.*, another district court identified four reasons that compelled adoption of a uniform federal law of joint and several liability: the substantial federal interest in hazardous substances; the jurisdiction of the federal courts and their role in interpreting federal statutes; the need to prevent excessive dumping of hazardous substances in states with more lenient liability laws; and the need to protect the Superfund from "needless uncertainty and subsequent delay" caused by diverse state laws. Both *Chem-Dyne* and *A & F Materials*, while not directly on point, appear to lend support to the position adopted in *In re Acushnet River*, and have been cited on occasion in that regard.

Although the need for uniformity may have been obvious to the authors of the *Chem-Dyne* and *A & F Materials* opinions, as well as the *In re Acushnet River* court, the reasoning is not nearly so compelling when viewed in the context of other cases that have applied the *Kimbell Foods* test. These cases reveal a number of different factors that courts have considered in attempting to determine whether there is a need for uniform federal law. For the

---

323. Id. at 809.
324. Id. (quoting 126 CONG. REC. 31,965 (1980)). Since his days as a member of the House of Representatives and his statements concerning CERCLA, Florio has become the governor of New Jersey.
326. Id. at 1255 (quoting United States v. Chem-Dyne, 572 F. Supp. 802, 809 (W.D. La. 1983)).
purposes of this discussion, these factors can be grouped into four categories:

(1) the presence or absence of express or implied congressional intent that a uniform federal rule be created;
(2) the effects that diverse state laws would have on federal rights;
(3) the effects that state laws would have on operations; and
(4) the likelihood that a uniform law could actually be created by the federal courts.

Taken together, these factors lend themselves to a more sophisticated analysis of the subject than that found in the CERCLA cases.

1. **Did Congress Intend that the Federal Statute or Program Be Applied Uniformly?**

   The inquiry into the necessity of a uniform federal rule requires an initial determination of whether there exists any evidence of express or implied congressional intent to have the statute in question applied uniformly throughout the nation. If such intent is explicit, this would, of course, be entitled to great weight. Even if congressional intent is not expressed in the statute or the legislative history, however, it can sometimes be inferred from the statutory scheme.

   Neither the CERCLA statute nor its legislative history contain any express indication of congressional intent concerning choice of law on direct liability or piercing the corporate veil. The *In re Acushnet River* opinion offers no authority in support of its statement that Congress did not intend state laws to impair the executive’s cleanup capability. The *Chem-Dyne* opinion cites

   328. United States v. Carson, 372 F.2d 429, 432 (6th Cir. 1967) ("Congress, of course, is the primary source of federal law, and the federal courts must adhere to the intent of Congress whenever this intent is discernible.").


   330. *In re Acushnet River*, 675 F. Supp. at 31. The court noted that the intent of Congress was not that the executive "should depend on the attitudes of the several states toward parent-subsidiary liability," but never referred to actual language in the statute or legislative history. *Id.* The only potential justification
CERCLA's legislative history as authority for its assertion about the need for uniformity, but this citation deserves some close scrutiny.331 The hasty passage of the statute left relatively little legislative history for CERCLA,332 and none of that which does exist deals with direct liability or piercing the corporate veil.333 The record does, however, reflect extensive discussion on the issues of strict liability and joint and several liability. In fact, Representative Florio, quoted in Chem-Dyne, addressed specifically the issue of joint and several liability.334 Earlier versions of the statute that the House of Representatives considered had contained express language providing for joint and several liability. The Senate deleted this language in its version, leaving the issue to "traditional and evolving principles of common law."335 Thus, Representative Florio's statement that CERCLA would encourage development of federal common law "in this area" falls within the narrow context of a discussion of joint and several liability. There is no evidence that Representative Florio or any other member of Congress intended federal law to govern all aspects of CERCLA liability.

The question remains, however, whether any grounds exist for inferring congressional intent for a uniform rule of liability for officers, directors and stockholders from the language of the statute. No such intent is readily apparent. Arguably, the CERCLA statutory scheme implies that Congress did not intend to impose uniformity on this issue, and, in fact, made uniformity impossible by incorporating several elements of state law into the federal statute. For example, CERCLA provides for the creation of a lien in favor of the United States on real property subject to or af-

---

332. CERCLA was enacted on December 11, 1980 in the last days of the 96th Congress. The final version of the Act was conceived by an ad hoc committee of Senators who fashioned a last minute compromise which enabled the Act to pass. As a result, the statute was hastily and inadequately drafted. The only legislative history on the compromise is found in the floor debates.

333. See 126 Cong. Rec. 30,897-987 (1980); id. at 31,950-82. See generally Grad, supra note 7.
335. Id. at 31,965 (statement of Rep. Florio).
fected by CERCLA cleanup actions. 336 The priority of liens created under state law over the CERCLA lien, however, is governed entirely by state law. 337 Similarly, a state law may set the degree of cleanup that any federal remedial action of hazardous substance, pollutant or contaminant must attain, if such state law is more stringent than federal law. 338 Given the fact that state law can affect the cost of a remedial action by raising the standard of cleanup, and can also affect the priority of liens securing repayment of that cost, a good argument can be made that Congress did not intend uniformity of liability under CERCLA.

The United States Supreme Court considered a similar argument in the non-CERCLA context in Reconstruction Finance Corp. v. Beaver County. 339 The case dealt with the issue of whether the state common law definition of “real property” could be utilized to determine whether a particular piece of machinery would qualify for a federal exemption from state taxation. 340 The government argued that Congress intended that federal statutes should operate uniformly throughout the country to prevent impairment of federal programs. 341 The Court responded to this argument by noting that Congress had already injected a large amount of diversity into the issue by permitting the states to tax real property belonging to the United States. Because the states and their political subdivisions have different methods of assessing, collecting and refunding taxes, as well as different tax rates, the tax consequences for the United States would vary in each of the states and political subdivisions, making uniformity impossible. 342 In lieu of a uniform rule, the Court opted for the use of “settled state rules” with respect to real property. State rules would only be used to the extent that such rules did not discriminate against the United States or expressly conflict with the statute. 343

Applying the principles of Beaver County to CERCLA liability,

337. Id. § 107(i)(3), 42 U.S.C. § 9607(i)(3).
339. 328 U.S. 204 (1946).
340. Id. at 206-07. The statute in question allowed states and local governments to impose various state and local taxes on “any real property” of the various governmental agencies involved, but did not permit taxation on personal property. Id.
341. Id. at 209.
342. Id. (noting that if Congress had wanted to impose uniformity, it could have provided for fixed payments instead of taxes).
343. Id. at 210. For a discussion of what steps federal courts can take short of creating federal common law even where particular state law would discriminate against the United States, see infra notes 559-75 and accompanying text.
it appears that Congress, by letting state law govern the standards of the cleanup and the lien priority, has made it impossible to enforce liability with uniform consequences.\footnote{344} Just as the diverse methods of assessment, collection and refunding of taxes found in the various states precluded uniform application of a federal tax exemption, the diverse state cleanup standards and lien priority rules make it extremely difficult to apply the rules of CERCLA liability uniformly in each state. Given that the rights of the United States against a corporation vary from state to state with respect to liens and cleanup standards, both of which directly affect recovery of money by the United States, what grounds remain to think that Congress intended that the treatment of such corporation’s officers, directors and stockholders in connection with such recovery should be uniform? By injecting the diversity of state law into the liability of individuals and corporations unquestionably covered by the statute, Congress has indicated that the liability of officers, directors and stockholders of such corporations need not be uniform.\footnote{345}

2. What Effects Will Diversity of State Law Have on Federal Rights?

Courts have sometimes identified certain rights of the United States as so important that they must not be allowed to vary from state to state.\footnote{346} The desire to limit legal diversity, as articulated

\footnote{344. The issues governed by state law relate indirectly to the liability of officers, directors and stockholders of responsible corporations, by helping to determine the total cleanup cost and the value of the security held by the United States for reimbursement. The argument would be stronger if state laws had a more direct impact on the liability of those individuals. Even without such direct impact on such liability, Congress’s intentions are at best ambiguous.}

\footnote{345. A similar argument was made in Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1251 (6th Cir. 1991) (Kennedy, J., concurring). This case reversed a lower court decision that had granted a successor corporation’s motion to dismiss a claim for CERCLA liability. In concurring with the court’s holding that state law of successor liability should govern rather than a uniform federal law, Judge Kennedy stated that “in enacting CERCLA Congress deliberately left room for the operation of state law, thus acknowledging that nationwide uniformity was not required on all liability issues.” Id. He then identified two examples of CERCLA provisions that invoked state law. The first example was § 107(e), which concerns indemnification agreements among private parties that are to be interpreted under state law. Id. The second example cited by Judge Kennedy was § 113(f)(1), which concerns the procedure for bringing claims for contribution. This provision requires that such claims be handled under the Federal Rules of Civil Procedure, which in turn defer to state law on the issue of the capacity of a corporation to sue or be sued. Id.}

\footnote{346. For a discussion of cases in which the Supreme Court has identified important federal rights, see infra notes 350-54 and accompanying text.}
in the *In re Acushnet River*,\textsuperscript{347} *United States v. Chem-Dyne Corp.*\textsuperscript{348} and *United States v. A & F Materials Co.* opinions,\textsuperscript{349} has also been recognized by the United States Supreme Court on various occasions. In *Clearfield Trust Co. v. United States*,\textsuperscript{350} the Supreme Court expressed concern that state rules governing the negotiation of commercial paper would, if applied to the United States, create significant problems by subjecting the "rights and duties of the United States to exceptional uncertainty."\textsuperscript{351}

With similar reasoning, the Supreme Court several years later held in *United States v. Standard Oil Co.*\textsuperscript{352} that federal law controlled the liability of a third party to the United States for tortious injury to a soldier.\textsuperscript{353} Although the Court acknowledged in *Standard Oil* that state law may occasionally provide appropriate rules of decision consistent with federal interests, it found state law inappropriate in the case at bar. The Court remarked that it could not understand "why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines."\textsuperscript{354}


\textsuperscript{348} 572 F. Supp. 802, 809 (S.D. Ohio 1983) (CERCLA is federal program that must be uniform throughout nation and states with lax environmental laws must not be allowed to undermine federal goals).

\textsuperscript{349} 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) ("[T]here are compelling reasons for the development of a uniform federal common law in the area of hazardous waste.").

\textsuperscript{350} 318 U.S. 363 (1943).

\textsuperscript{351} Id. at 367. The Court discussed the need for a uniform federal rule covering this form of federal financial transaction: "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states." Id. But see Mishkin, supra note 109, at 830-32 (criticizing *Clearfield Trust* decision on grounds that "either it provides only the illusion of uniformity, or it achieves its substance—for the government—by the process of passing the burdens on to private shoulders").

\textsuperscript{352} 332 U.S. 301 (1947).

\textsuperscript{353} Id. at 305 (following reasoning of *Clearfield Trust* as it relates to protection of federal interests through uniformity of laws).

\textsuperscript{354} Id. at 310. Despite deciding that federal law governed, the Court declined to create the new rule of liability sought by the United States. The Court reasoned that the primary issue in this case pertained to federal fiscal policy, which is more appropriately addressed through congressional action rather than through judicial creativity. Id. at 311-17. This aspect of the *Standard Oil* opinion has generated heated criticism. See, e.g., Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881, 957-58 (1986) (arguing that *Standard Oil* rule serves no federal interest, because uniformity achieved by rejecting state law only prevents United States from recovering under state law).
In analyzing how the rights of the United States are affected by the diversity of state laws, direct liability and piercing the corporate veil must be distinguished. The concerns about uncertainty and diversity raised in the *In re Acushnet River* opinion, as well as in the other CERCLA cases previously cited, do not properly apply to direct liability.\(^{355}\) Traditional common law rules pertaining to the direct liability of corporate officers and directors for their torts are, for the most part, already uniform. Except for the CERCLA cases, federal law and the laws of the states examined in Part II are consistent with respect to direct liability.\(^{356}\) As a result, the CERCLA cases that impose direct liability on corporate officers and directors have not identified any way in which the rights of the United States would be threatened if traditional rules were applied in imposing liability.\(^{357}\) The federal rights will be treated uniformly, regardless of whether the new CERCLA rules or the traditional rules are ultimately adopted.

The rules concerning piercing the corporate veil, on the other hand, do vary from state to state. The argument that protection of the rights of the United States requires a uniform federal rule that disregards the corporate entity rests on a fundamental misconception of the nature of this remedy. Even if the federal government establishes a right of recovery against a particular corporate stockholder for cleanup costs, it does not necessarily follow that the federal government also has a "right" against other stockholders of the same corporation, much less the stockholders of other corporations in similar circumstances. The remedy of piercing the corporate veil rests not on rights under the law, but rather rests in equity.\(^{358}\) The United States cannot

\(^{355}\) For a further discussion of the *In re Acushnet River*, *Chem-Dyne* and *A & F Materials* decisions, see *supra* notes 320-27 and accompanying text.

\(^{356}\) For a discussion of traditional federal and state direct liability laws, see *supra* notes 179-202 and accompanying text.

\(^{357}\) For a discussion of the cases imposing direct liability under CERCLA, see *supra* notes 40-134 and accompanying text. Several of the CERCLA cases have cited as authority *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980), in which an employee sued his employer's parent corporation and its officers for injuries he had received. *Escude Cruz* is a diversity personal injury case, governed by the law of the Commonwealth of Puerto Rico. *Id.* at 903-04. In discussing the tests used for piercing the corporate veil, the opinion cited and relied on *Lobato v. Pay Less Drug Stores*, 261 F.2d 406, 408-09 (10th Cir. 1958), which was also a diversity case. *Escude Cruz*, 619 F.2d at 907. The *Escude Cruz* opinion contained a survey of recent federal law governing direct liability of corporate officers, and concluded that if the law of Puerto Rico were used, the decision would not be different from a decision following federal law. *Id.*

\(^{358}\) For a discussion of state rules concerning piercing the corporate veil...
expect to experience consistent outcomes in piercing the corporate veil decisions, because uncertainty and diversity of result remain the hallmarks of equity. In this respect, the use of piercing the corporate veil rules to recover environmental cleanup costs should be distinguished from the facts of Clearfield Trust and Standard Oil. Clearfield Trust involved the rights of the United States against a party that had improperly collected a check drawn on the United States Treasury. In Standard Oil, the United States suffered from injuries to a soldier, and the issue was whether it had a right to reimbursement from the party that had injured the soldier. In both cases, adoption of the federal rule in question would fix the rights of the United States for all future cases having substantially similar facts. Piercing the corporate veil, however, is different in that it is an equitable remedy.

A review of the fundamental distinction between rights at law and rights in equity helps to make this point more clearly. A court acting in equity often has discretion in deciding whether it will accept jurisdiction of a case and the manner in which it will grant relief. The discretion of an equity court does, of course, and the corresponding equitable remedies, see supra notes 231-73 and accompanying text. The district court in In re Acushnet River, 675 F. Supp. 22 (D. Mass. 1987) expressly recognized the importance of equity when it stated: "The equitable decision to pierce the veil is dependent upon the facts peculiar to each case." Id. at 33.

359. 318 U.S. at 364-65. The Court reasoned that the issuance of commercial paper by the United States government is a constitutional function and thus governed by federal law. Id. at 366.

360. 332 U.S. at 302-03. The Court followed the principles applied in Clearfield Trust to conclude that federal, rather than state law, should govern. Id. at 305.

361. Achieving consistency between court decisions affecting the United States Treasury was particularly important in the Clearfield Trust decision, primarily because of the high volume of similar transactions involving United States government paper. 318 U.S. at 367.

362. See Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) (courts have optional duty to grant jurisdiction for cases under Emergency Price Control Act of 1942); Burford v. Sun Oil Co., 319 U.S. 315, 317-18 (1943) (federal equity courts may decline jurisdiction of case if "the exercise of [jurisdiction] may be prejudicial to the public interest" (quoting United States v. Dern, 289 U.S. 352, 360 (1933)).

363. See Pugach v. Dollinger, 277 F.2d 739, 742 (2d Cir. 1960) ("The exercise of the power of a federal court to grant equitable relief is a matter of discretion."), aff'd per curiam, 365 U.S. 458 (1961); Julius Kayser & Co. v. Rosedale Knitting Co., 18 F. Supp. 836, 838 (E.D. Pa. 1937) (patent infringement claim), aff'd, 98 F.2d 839 (3d Cir.), cert. denied, 305 U.S. 649 (1938). Flexibility in a court's choice of remedies is an essential characteristic of equitable relief. Equitable remedies are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety.

http://digitalcommons.law.villanova.edu/vlr/vol36/iss6/2
have limits. Rules and precedents exist that must be followed.\textsuperscript{364} The distinctive feature of equity, however, is that a court’s decision to grant equitable relief is to be tailored to the circumstances of each case, rather than by fixed and inflexible rules.\textsuperscript{365} This focus on the specific facts of each case, and the flexibility of an equity court in applying equitable principles, runs counter to the goals of uniformity and certainty.\textsuperscript{366} The District Court for the District of Nevada in \textit{Aetna Casualty & Surety Co. v. Jeppesen & Co.}\textsuperscript{367} put the issue in historical perspective:

The principles of equity evolved as a necessity in order to obtain justice because the law by reason of its universality was deficient . . . . Equity depends essentially upon the particular circumstances of each individual case.

The cases, which occur, are various; but they are decided on fixed principles. Courts of Equity have, in this respect, no more discretionary power than Courts of Law. They decide new cases, as they arise, by the principles, on which former cases have been decided; and may thus illustrate, or enlarge, the operation of those principles. But the principles are as fixed and certain, as the principles on which the Courts of Common Law proceed.

\textit{1 J. Pomeroy, A Treatise on Equity Jurisprudence as Administered in the United States of America} § 109 (5th ed. 1941).

\textit{NLRB v. P*I*E* Nationwide, Inc.}, 894 F.2d 887, 893 (7th Cir. 1990). The \textit{P*I*E*} court specifically recognized the limitations on the choices of an equity judge: “[A] modern federal equity judge does not have the limitless discretion of a medieval Lord Chancellor to grant or withhold a remedy. Modern equity has rules and standards, just like law, except that the ratio of rules to standards is lower in equity than in law.” \textit{Id.} (citations omitted). The limits to an equity court’s discretion have long been recognized by courts and commentators:

\textit{Hecht}, 321 U.S. at 329 (viewing flexibility in addressing unique needs of each case as “essence of equity jurisdiction”); \textit{Virginian Ry. v. System Fed’n No. 40}, 300 U.S. 515, 551 (1937) (decision to refuse equitable relief is within discretion of court; “Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion.”).

\textit{1 J. Story, Commentaries on Equity Jurisprudence as Administered in England and America} § 20, at 22-23 (6th ed. 1853) (quoting Bond v. Hopkins, 1 Sch. & Lef. 413, 428-29 (Ir. Ch. 1802)) (punctuation as quoted in Story differs slightly from that used in Bond).

\textit{Id.; see also 2 J. Pomeroy, supra note 363, §§ 363-431} (also collecting maxims).
That being so, there can be no established rules and fixed principles laid down for its application, without destroying its very existence, and reducing it to positive law.\textsuperscript{368}

Because equity emphasizes justice over uniformity and certainty, the equitable remedy of piercing the corporate veil cannot uniformly protect the rights of the United States as effectively as the federal rules adopted in \textit{Clearfield Trust} and \textit{Standard Oil}. The traditional state common law rules for piercing the corporate veil require courts to examine the particular facts of the stockholder's relationship with the corporation, and then to determine whether injustice or inequity would result from enforcement of the statutory limits on stockholder liability in light of those particular facts.\textsuperscript{369} Not surprisingly, this has resulted in a plethora of fact-intensive cases from which easy generalizations are difficult to discern.\textsuperscript{370} Cases under the new CERCLA rules for piercing the corporate veil, however, can be no less fact-intensive, so long as the courts recognize the inherent element of equity in such rules. Uniformity and certainty are possible only if the issue is removed from equity and replaced with a fixed rule of law (or perhaps a large set of rules), something none of the CERCLA cases has yet suggested.\textsuperscript{371}

In summary, the arguments that uniform federal laws of liability of officers, directors and stockholders under CERCLA are needed for the protection of federal rights from diverse state laws do not stand up. In the area of direct liability, the traditional common law is already uniform, although it differs from the new

\textsuperscript{368} \textit{Id.} at 403 (insurer of airline that settled wrongful death action after fatal crash, acting as subrogee, brought indemnification action against manufacturer of landing chart) (citing 1 J. Story, supra note 364, ch. 1 and 1 W. Blackstone, Commentaries on the Laws of England § 1 (Chitty 1855)).

\textsuperscript{369} For a discussion of state common law rules for piercing the corporate veil and statutory limits on stockholder liability, see supra notes 231-73 and accompanying text.

\textsuperscript{370} For a discussion regarding the potential of applying uniform rules to piercing the corporate veil cases, see infra notes 418-24 and accompanying text.

\textsuperscript{371} But see Note, Parent Liability, supra note 301, at 999-1003 (advocating replacing state equitable rules of piercing corporate veil with fixed uniform federal rule denying limited liability under CERCLA for all parent corporations). In a sense, those CERCLA decisions holding stockholders liable under the direct liability theories are removing the equitable heart from the issue of stockholder liability without any basis in precedent or legal doctrine. Displacing equity with a fixed rule, particularly without the benefit of statutory authority, is a step which federal courts should be reluctant to take. \textit{Cf.} United States v. Standard Oil Co., 332 U.S. 301, 313-17 (1947) (refusing to create new federal rule of liability requested by United States, on grounds that decision to create new form of common law liability favorable to United States was for Congress, not courts).
CERCLA LIABILITY

CERCLA rules. Because the traditional common law of direct liability does not vary from state to state, new federal common law cannot be justified on the basis of a need for uniformity. With respect to piercing the corporate veil, the various federal and state courts have created a vast number of different rules. Because this diversity of law follows directly from the equitable nature of the remedy, it is unlikely that any CERCLA rules for piercing the corporate veil can ever provide uniform protection for federal rights.

3. What Effects Will Diversity of State Law Have on Operations of the Federal Statute or Program?

The holding of In re Acushnet River contains an implicit determination that adoption of the state liability rules would interfere with the federal government’s operations under CERCLA—“the ability of the executive to fund the clean up of hazardous waste sites.” Neither In re Acushnet River nor any of the other CERCLA opinions, however, explains how this interference would occur. Because the CERCLA cases offer no guidance on the issue, it will be useful to review how other cases have analyzed the issue of whether application of state law will interfere with a federal program.

In United States v. Kimbell Foods, Inc. and its progeny, analysis of the effects of diverse state law on federal programs has typically examined two different factors. The first is whether carrying out the mandate of the federal statute requires the application of uniform laws. The second focuses on the nature of the business transactions affected by the federal statute or program. Unlike the first factor’s analysis of the effects on the goals of the United States, the second factor addresses the more practical ef-

---

373. Id. at 31. The opinion states that “Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular.” Id.
375. For a discussion of the cases applying the Kimbell Foods test that are concerned with whether or not the mandates of federal statutes require the application of uniform laws, see infra notes 377-93 and accompanying text.
376. For a discussion of the cases applying the Kimbell Foods test that are concerned with the effects a federal statute or program will have on the relevant business transactions, see infra notes 394-410 and accompanying text.
The effects of a uniform rule. The discussion becomes more empirical as the workings of the federal program or statute are examined.

a. Is a Uniform Federal Rule Essential to Carry Out the Mandate of the Federal Statute or Program?

The need for a uniform federal rule is most apparent in those instances where a government department or agency must act quickly and decisively in order to carry out its mandate. This is illustrated by Gunter v. Hutcheson, in which the Court of Appeals for the Eleventh Circuit held that federal law provided the Federal Deposit Insurance Corporation (FDIC) with a defense to state and common law fraud claims, where such claims were asserted in connection with notes acquired by the FDIC in a purchase and assumption transaction. In justifying the need for a uniform rule, the court noted that the FDIC had to be able to act with exceptional speed in order to fulfill its mandate of choosing the most cost-efficient alternative to deal with a failed bank. The court concluded that by adopting a uniform federal rule, the FDIC could make the proper choice between liquidating the bank or entering into a purchase and assumption transaction. The court considered this the most efficient approach because it believed the FDIC would not otherwise have time to investigate the various state laws that might be implicated. A subsequent

---

378. Id. at 869-70. A purchase and assumption transaction, the court explained, is the FDIC's alternative to liquidating the assets of a failed bank and paying off the depositors. It is usually preferable to a liquidation because it is quicker and it protects confidence in the banking system. Purchase and assumption transactions usually have to be done overnight to preserve the going concern value of the bank, which is then sold to investors who can open it for business the next day. Id. at 865.
379. Id. at 869-70. The court applied the Kimbell Foods test, and by applying federal law, sought to protect the FDIC's ability to act quickly when dealing with failed banks and to ensure the FDIC's ability to execute its statutory mandate. Id.
380. Id. at 869. The court found the need for quick and efficient transactions as the critical factor distinguishing the case at bar from the holding in Kimbell Foods:

[T]he nature of the FDIC as insuror [sic] for a variety of banks across the country and the necessity for overnight decisions in dealing with a failed bank requires a uniform federal rule governing the FDIC's rights . . . . Subjecting the FDIC to the additional burden of considering the impact of the possibly variable state law on the rights involved could significantly impair the FDIC's ability to choose between the liquidation and purchase-and-assumption alternatives in handling a bank failure. Id.; see also FDIC v. Wood, 758 F.2d 156, 159-60 (6th Cir.), cert. denied, 474 U.S. 944 (1985) (applying federal common law to action by FDIC against guarantor to recover on note acquired as part of purchase and assumption agreement);
case elaborated on this threat to the FDIC's mission by pointing out that if state law governed, the FDIC would be required, prior to any purchase and assumption transaction, to make a detailed examination of all of the failed bank's assets. This examination would be necessary to enable the FDIC to locate all possible transfer restrictions and review all applicable state laws in order to insure compliance. Because of the time constraints created by the examination, the FDIC could not possibly decide on the most efficient course of action, as it was required to do by law.

In contrast, the FDIC was not successful when it sought the protection of a uniform federal common law rule to obtain priority over stockholders of a failed bank in suits against third parties. In FDIC v. Jenkins, the Eleventh Circuit distinguished Gunter on the ground that the FDIC's evaluation of the value of potential lawsuits against third parties did not present the same need to act quickly and decisively that existed when the FDIC was evaluating a failed bank's assets prior to a purchase and assumption. When discussing factors that discouraged the court from applying a federal common law rule, the court noted that "the Federal Deposit Insurance Act does not compel the FDIC to pursue claims to restore the deposit insurance fund against third parties who may have harmed a failed bank." The court then discounted the FDIC's argument that its need to maximize recovery to the deposit insurance fund created an overriding need for a federal rule. The court stated that although such a rule might be "convenient" for the FDIC to have, it would have to come from Congress, not the court.

FDIC v. Gulf Life Ins. Co., 737 F.2d 1513, 1516-18 (11th Cir. 1984) (following Gunter analysis and applying federal common law in FDIC suit against insurer for funds due debtors of two banks of which it was appointed receivers).

FDIC v. Bank of Boulder, 865 F.2d 1134, 1139 (10th Cir. 1988) (FDIC action to enforce letter of credit extended by defendant to failed bank despite state law classifying letter of credit as non-transferable asset).

FDIC v. Jenkins, 888 F.2d 1537 (11th Cir. 1989).

FDIC v. Braemoor Assocs., 686 F.2d 550, 553-54 (7th Cir.
The federal labor laws also illustrate how rules used primarily in litigation contexts do not have the same need for uniformity that exists with respect to the day-to-day operations of a federal program or statute. Although uniform federal law has been held essential to the collective bargaining process in order to achieve the "overriding federal policy of industrial peace and productivity," the same need for uniformity is not present when the collective bargaining process has broken down and the action has moved to the courtroom. In *UAW v. Hoosier Cardinal Corp.*, the Supreme Court clearly expressed the distinction between the collective bargaining process and subsequent court actions as it explained its adoption of state statutes of limitation for the federal labor laws:

The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.

Liability under CERCLA is distinguishable from the transactions described in *Gunter*, because the federal government does not have the overriding need under CERCLA to make quick and uniform responses. CERCLA authorizes the President of the United States to investigate and take the necessary steps for re-

---


387. *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1109 (9th Cir. 1979). The court observed that the policy of "industrial peace and productivity is best effectuated if collective bargaining agreements are interpreted and enforced in a uniform manner." *Id.* The court noted the Supreme Court's consistent call for a unified national law covering labor contracts:

The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

*Id.* at 1110 (quoting *Local 174, Int'l Bhd. of Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962)).


389. *Id.* at 702.
moval or remedial action after the release of hazardous substances.\textsuperscript{390} The decision to act in a particular case requires a prior finding that the state in which the release occurred will cooperate in the action.\textsuperscript{391} The statute sets forth numerous factors for the President to consider in deciding upon remedial action, including the total short-term and long-term costs of the actions, the effects of the hazardous substances on the environment and their risk to human health.\textsuperscript{392} CERCLA requires the President to choose the action "that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable."\textsuperscript{393} The statute does not require a prior determination as to whether any officers, directors or stockholders will eventually be held personally liable for damages not recoverable from the offending corporation. The issue of personal liability will not come up until the trial, during which time the government would presumably have had an opportunity to master the intricacies of state law. This negates the need for extremely rapid turnaround as discussed in \textit{Gunter}. Unlike the free and voluntary collective bargaining process under the federal labor laws, the CERCLA liability issues arise at a time when the administrative process has broken down, and litigation has become necessary to establish liability for the cleanup costs. Liability of officers, directors and stockholders should therefore be governed by the reasoning in \textit{Jenkins} and \textit{Hoosier} rather than \textit{Gunter}. Accordingly, CERCLA does not require a uniform rule to carry out the federal mandate.

b. Is a Uniform Federal Rule Required by the Nature of the Transactions Contemplated by the Federal Statute or Program?

The second part of the analysis concerns whether inconsistent state laws would adversely affect the operations of the federal program. The emphasis of the analysis shifts to how the program actually works, rather than whether the goals of the legislation can be met. If the federal program or statute requires individual negotiations at the local or state level, then there is less need for a uniform federal rule because the persons charged with imple-

\textsuperscript{390} CERCLA § 104(a), 42 U.S.C. § 9604(a) (1988).
\textsuperscript{391} Id. § 104(c), 42 U.S.C. § 9604(c).
\textsuperscript{392} Id. § 121(a)-(b), 42 U.S.C. § 9621(a)-(b).
\textsuperscript{393} Id. § 121(b)(1), 42 U.S.C. § 9621(b)(1).
menting the program or statute will have ample opportunity to learn the unique aspects of the local laws. In the alternative, if the program involves a high volume of standardized nationwide procedures and forms, then uniformity becomes more important to the day-to-day operations.

United States v. Kimbell Foods, Inc. was concerned with the FHA and SBA programs, which operated at the local level. The Supreme Court, in deciding Kimbell Foods, considered its prior decision in United States v. Yazell. In Yazell, the Court had upheld the application of state law to defeat a lien the United States government had acquired through a loan made by the SBA. The Kimbell Foods Court noted that the loan transactions of both the SBA and the FHA, like the loan transaction in Yazell, were individually negotiated, thus undermining the government's assertion that undue hardships would be placed on agencies dealing with diverse state laws. The Court further pointed out that both the SBA and the FHA regulations regularly incorporated state law and required their employees to keep apprised of new developments in that law. Additionally, the loans were made in local lending offices by employees who were familiar with state law.

394. For a brief overview of court decisions presenting factors to be considered when analyzing the need for uniform federal law, with emphasis on those situations not requiring uniform federal law, see infra notes 396-402 and accompanying text.

395. For a discussion of cases in which courts found a need for uniform federal law, see infra notes 403-10 and accompanying text.

398. Id. at 357. Specifically, the Yazell Court upheld the Texas law of coverture, which prevented the United States government from enforcing a lien on the separate property of a woman. Id. The Court rejected the government's arguments that federal common law should override the Texas law, reasoning that the government had individually negotiated the loan to the woman and her husband in great detail, and that an express provision in the loan documents stated that Texas law would apply. Id. at 345-46. Furthermore, the Court noted that the officials who negotiated the contract on behalf of the SBA were well aware of the Texas law of coverture, and that the SBA had not advised any of the borrowers that the state law defense would not apply. Id. at 346. The Court stated that of the prior cases in which a federal rule had been created, none had involved individually negotiated contracts, and added "[t]his Court's decisions applying 'federal law' to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation." Id. at 354.

399. Kimbell Foods, 440 U.S. at 729-30. The key to the Court's decision was the observation that the current agency procedures were detailed and thorough, and thus precluded the need for the level of efficiency and speed that had been deemed necessary by the Gunter Court for purchase and assumption transactions. Id. at 732.

400. Id. at 732. By discussing the role of the local employees, the Court
The Court then rejected the government's arguments that application of state rules would delay loan processing, by pointing out that each loan application had to receive rigorous individual scrutiny in any case. The Court concluded that because application of various state laws would not burden loan processing, a uniform federal law was not warranted.

Courts have found, however, that certain government programs do require uniform federal law. In *Marine Midland Bank v. United States*, for example, the United States Court of Claims created a uniform federal rule to govern the priority of certain liens of the United States created in connection with federal procurement programs over liens of general creditors. The federal rule was created in lieu of adopting the lien priority rules was responding to the government's allegations that the adoption of state laws would create a burden on the agencies:

Thus, the agencies' own operating practices belie their assertion that a federal rule of priority is needed to avoid the administrative burdens created by disparate state commercial rules. By using local lending offices and employees who are familiar with the law of their respective localities, the agencies function effectively without uniform procedures and legal rules.

*Id.* (footnote omitted). But see *United States v. Carson*, 372 F.2d 429 (6th Cir. 1967). The *Carson* court held that federal law governed the liability of a livestock merchant for conversion of property in which the United States had a security interest. *Id.* at 435. It distinguished *Yazell* on the grounds that the conversion was not a "peculiarly local" matter, but instead concerned "the extent of liability to be imposed when government property is tortiously mishandled in a commercial situation, a situation in fact involving an interstate transaction." *Id.* at 434. For a post-*Kimbell Foods* case applying state law on very similar facts, see *United States v. Public Auction Yard, Billings, Mont.*, 637 F.2d 613 (9th Cir. 1980). The court in *Public Auction Yard* stated: "*Kimbell Foods* established that while federal law governs these secured transactions, the content of the federal rule is determined by reference to non-discriminatory state law." *Id.* at 615.

*Kimbell Foods*, 440 U.S. at 792-93 (because each loan application receives "individual scrutiny," agencies should be able to compensate for different state priority rules in actual loan transactions).

*Id.* at 793. The significance of administrative convenience in determining the need for uniformity under the *Kimbell Foods* test was underscored in *Chicago Title Insurance Co. v. Sherred Village Associates*, 708 F.2d 804, 810-11 (1st Cir. 1989). *Chicago Title* involved the adoption of state laws that gave mechanics' liens priority over federal mortgage liens. *Id.* at 813. The government pointed out that the state laws concerning mechanics' liens were much less uniform than the state laws governing priority of liens and personal property at issue in *Kimbell Foods*. *Id.* at 810. The court held, however, that the loan program in this case was sufficiently like the loan programs in *Kimbell Foods* to justify adoption of state law. *Id.* at 811. In reaching this conclusion, the *Chicago Title* court relied on the existence of local field offices, the references to local law in the agency's regulations and the extensive individual scrutiny that each loan received. *Id.*

*Id.* at 404. The government's security interest was created pursuant to the "title vesting" clause contained in federal procurement contracts as required

Published by Villanova University Charles Widger School of Law Digital Repository, 1991
articulated in the various state enactments of Article Nine of the Uniform Commercial Code. The court contrasted the local negotiation procedures cited in *Kimbell Foods* with the facts of the case at bar, and concluded that a uniform rule of decision was necessary. Unlike the SBA and FHA loan programs at issue in *Kimbell Foods* and *Yazell*, the *Marine Midland* court observed, government procurement does not take place in small regional offices, and procurement practices are not directly related to the individual state practices. In addition, the existence of "extensive and detailed regulations for federal procurement to promote standardization and uniformity throughout the federal system" further impelled the court to adopt a uniform rule.

In *United States v. Pisani*, the Court of Appeals for the Third Circuit found that the administration of Medicare required a uniform federal rule of piercing the corporate veil. The *Pisani* court cited as the pivotal factor in its decision the need for uniform and prompt recovery of Medicare overpayments to ensure the continued performance of the Medicare program. The *Pisani* court distinguished the operating procedures of the Medicare program from the procedures mentioned in the *Yazell* and *Kimbell Foods* cases on the grounds that the doctors received the Medicare reimbursements under a uniform statutory program that required the government to make payments to the providers of health services on a regular basis, with a subsequent audit to make any necessary adjustments. The court reasoned that if non-uniform state law were applied in reimbursement recovery actions, the government might not be able to recover from providers residing in states that had a restrictive test for disregarding


405. *Marine Midland*, 687 F.2d at 404 (*Kimbell Foods" left open" potential for developing uniform rules, "especially where state practices would not be affected by such a uniform federal rule").

406. *Id.* ("[I]t is clear that *Kimbell Foods" resort to state laws would not be appropriate in this case, as contrary to evident congressional intent and established federal practice.").

407. 646 F.2d 83 (3d Cir. 1981).

408. *Id.* at 86 (government brought action against physician to recover Medicare overpayments to physician's solely-owned corporation).

409. *Id.* The court noted that the government had to make interim payments quickly to health service providers in order to encourage them to treat Medicare patients. *Id.* If the government had to investigate the actual costs and financial conditions of each provider before making the disbursement, the interim payments would be delayed and providers might not be as willing to offer Medicare services. *Id.*
CERCLA LIABILITY

The procedural characteristics of the Medicare and federal government procurement programs that necessitated uniform federal rules are not present in CERCLA. CERCLA does not require standardized forms or contracts. No payments are made on a regular basis. No volumes of regulations have been created to govern the liability of officers, directors and stockholders. An attempt to hold officers, directors or stockholders of a corporation liable for the cleanup costs of a hazardous waste release does not constitute a standardized decision requiring uniformity, given the potentially broad range of circumstances surrounding each incident. Instead, CERCLA cases will certainly involve intense negotiation or litigation and receive rigorous individual scrutiny. Because of the size and complexity of the issues involved, liability under CERCLA cannot be standardized by a uniform government program.

4. Are the Federal Courts Able to Handle the Statute or Program Uniformly?

The fourth consideration in determining the need for a uniform federal law is whether federal courts could achieve uniformity in their decisions if permitted to create a federal common law on the issue. This consideration, like those discussed above, has not been addressed in any of the CERCLA liability cases. Cases that have addressed the potential development of a federal common law in other contexts have come to different conclusions, based on principles that can be applied to the area of CERCLA liability.

Generally speaking, the impracticality of a uniform federal common law results from the improbability of general agreement among the twelve circuit courts. The United States Supreme Court is the only forum that can create true uniformity, and such uniformity is unlikely to be forthcoming given the present caseload of the Supreme Court. Courts have recognized this

410. *Id.* at 87 (further noting that it was unacceptable to allow "'rights of the United States . . . [to] change whenever state courts issue new decisions on piercing the corporate veil").

411. Mishkin, *supra* note 109, at 813. Although written in 1957, Professor Mishkin's article describes issues that still hold true for the present court system. Professor Mishkin succinctly described the problem:

[S]uch complete uniformity may be most unlikely as a matter of common law development: the only court in a position to assure that degree of uniformity—the United States Supreme Court—is so burdened with its present work that it is highly improbable that it could undertake
Powers v. United States Postal Service involved a dispute between a private landlord and the United States Postal Service concerning the landlord’s right to terminate a lease for nonpayment of rent. Judge Posner, writing for a three-judge panel of the Court of Appeals for the Seventh Circuit, found unpersuasive the various government arguments in favor of a uniform federal rule. Posner directly challenged the practicality of a uniform federal landlord-tenant law, noting that the federal courts are ill-suited to provide such a law.

The majority opinion written by Judge Randall for the Court of Appeals for the Fifth Circuit in Jackson v. Johns-Manville Sales Corp., which declined to create a federal common law rule in connection with asbestos litigation, utilized reasoning similar to that of the Powers court. After discussing numerous issues relating effectively to develop detailed substantive rules for any area we are here considering. Yet the argument for “uniformity” is made in a wide variety of contexts without any reference to this aspect of reality.

Id. (footnote omitted).

412. 671 F.2d 1041 (7th Cir. 1982).

413. Id. at 1042.

414. Id. at 1045-46. After analysis, Judge Posner believed that uniformity of the law and certainty of rights and obligations favored selection of state law rather than federal law. Id. at 1045.

415. Id. Judge Posner saw the problem as inherent in the federal court system:

It is not to be expected that the federal courts would do a very good job of devising a model code of landlord-tenant law, since they have very little experience in landlord-tenant matters; and though eventually some body of law would emerge it would not in all likelihood be a uniform body, because there are twelve federal circuits and the Supreme Court could be expected to intervene only sporadically.

Id. at 1046. Judge Posner ultimately stated that the case at hand did not require a choice between federal and state law. Id. His conclusion was that the “overriding federal interest . . . [was] certainty of right[s] and obligation[s] flowing from conformity to known law,” and that this interest was best served through adopting state law.

416. 750 F.2d 1314 (5th Cir. 1985) (en banc). Jackson, a former shipyard worker diagnosed with asbestosis, brought a strict liability action against Johns-Manville Corporation, whose asbestos product was used in the shipyard in which Jackson worked. Id. at 1316. The jury awarded punitive damages to Jackson for his injuries, as was permissible under Mississippi law. Id. at 1317. On appeal, Johns-Manville argued that “punitive damages should not be recoverable as a matter of law in the context of asbestos litigation” because large punitive damages would limit the ability of future plaintiffs to recover for their injuries. Id. at 1321. It was unclear whether punitive damages would be available under federal common law. Id. at 1322. The Court of Appeals for the Fifth Circuit nevertheless declined to replace the state law, asserting that “[a]ny effect state law recoveries would eventually have on the government’s ability to obtain needed materials is far too indirect to justify the imposition of federal common law.” Id. at 1325.
CERCLA LIABILITY

...ing to the choice of law, Judge Randall noted that a decision to create new federal law would apply only within the jurisdiction of the Fifth Circuit. She opined that this would only create further problems of inequities and forum shopping among the circuits. 417

Although some unity exists among the circuits with respect to direct liability (at least outside of the environmental area), achieving uniformity with respect to piercing the corporate veil would be especially problematic. As numerous commentators have acknowledged, including those who advocate a uniform federal rule of piercing the corporate veil, existing federal law on the subject presents a mélange of different rules and factors. 418 The diversity of federal rules can be traced directly to the fact that piercing the corporate veil is an equitable remedy. 419 No single rule can cover all of the fact situations traditionally encompassed under the umbrella of piercing the corporate veil. 420 Some commentators have found that the concept of piercing the corporate veil is economically and doctrinally deficient. 421 Others, however, see the issue

---

417. Id. at 1326. A problem the court identified was that the availability of larger damage awards outside the Fifth Circuit would not be affected by any rule the Fifth Circuit adopted:

Unless and until the Supreme Court imposes a similar federal common law on the country as a whole, any federal substantive rules fashioned by us would only exacerbate the alleged inequities among claimants, with punitive and certain types of compensatory damages being available outside the circuit but not within. Such a result, in turn, would encourage a massive effort at forum shopping to bring suits outside the circuit.

Id.

418. For a discussion of the diverse state piercing the corporate veil laws and their ability to protect federal interests, see Note, supra note 232, at 1246, 1253-55 and Note, supra note 109, at 857-64.

419. For the In re Acushnet River court's statement noting the equitable nature of piercing the corporate veil, see supra note 358 and accompanying text.

420. See, e.g., Douglas & Shanks, supra note 204, at 210 (discussing piercing corporate veil of subsidiary corporations and noting that "there is no one formula which can be successfully applied to the tort cases. The formula varies with the facts of each case."). But see Krendl & Krendl, supra note 204, at 6-7 ("Obviously somewhat different policy considerations are involved in [the many different factual scenarios], but a common set of rules and equitable principles are usually applied to all of them.").

421. See, e.g., Landers, supra note 301, at 619-20. Professor Landers takes a particularly harsh view:

Devoid of any consistent doctrinal basis, the cases themselves defy any attempt at rational explanation. This confusion has apparently been produced by a failure to identify what is at stake in a veil piercing case: the very principle of limited liability for the stockholders. As a result, the typical veil piercing case is an exercise in cataloging a number of factors in order to reach a normative conclusion that piercing is or is not appropriate.

Id. at 620 (footnotes omitted).
as going beyond the mere incompetency of courts or bad economics:

We believe that "piercing the corporate veil" is only a general term under which are subsumed a multitude of fact situations. No useful general statement can be made about such situations except that, despite the strong public policy in favor of preserving corporations, there are situations in which equity will require that the corporate form be disregarded.422

Thus, the existence of so many formulations of the doctrine in the federal common law is a natural result of the equitable approach.

As noted, a second problem that further reduces the possibility of developing a uniform federal law of piercing the corporate veil is the great disparity among the twelve circuits. If the chances of getting the right cases before the United States Supreme Court to develop a viable federal landlord-tenant law are remote,423 then it is even less likely that the Court will address piercing the corporate veil in a way that will resolve the differences among the circuits. Even the Supreme Court would face the problem of how to fit a "multitude of fact situations" into a simple formulation that can be applied uniformly.424 Because of the amorphous and fact-intensive nature of this equitable remedy, the adoption of a single rule will not resolve the issue.

Consequently, the search for a uniform rule of piercing the corporate veil under CERCLA is likely to be frustrated by the diversity of the twelve circuit courts, as well as by the equitable nature of the remedy. As a practical matter, this aspect of CERCLA is likely to remain unsettled notwithstanding the proliferation of new rules created by federal courts in the name of uniformity.

* * *

Numerous CERCLA cases have proclaimed that a uniform rule of liability of officers, directors and stockholders under CERCLA is essential. Under closer scrutiny, however, the need for such uniformity appears far less compelling. As the preceding

422. Krendl & Krendl, supra note 204, at 58. The authors also noted that the failure to formalize the veil-piercing rules "is not the fault of the judges or the commentators but is an inherent problem in this area of the law." Id.

423. See Powers v. United States Postal Serv., 671 F.2d 1041, 1046 (7th Cir. 1982) (citing federal courts' lack of experience with landlord-tenant matters as hinderance to ability to create effective federal law).

424. For two pairs of commentators' views on the fact-sensitive nature of piercing the corporate veil, see supra note 420 and accompanying text.
discussion has illustrated, the arguments for this need for a uniform rule are subject to a number of serious defects. The argument that Congress intended such a uniform rule of liability relies on a limited statement in the legislative history of CERCLA relating to the issue of joint and several liability and stretches that statement to advocate uniformity in all areas of the statute, ignoring the presence in the statute of provisions that expressly invoke state law. The CERCLA cases asserting the need for a uniform rule also reflect a fundamental misunderstanding of the equitable nature of the remedy of piercing the corporate veil. Because this remedy is essentially a use of judicial discretion to achieve justice within a specific factual context, it cannot provide uniform protection of federal rights, and may never be handled uniformly by the twelve circuit courts. Finally, a uniform rule of liability of officers, directors and stockholders is not necessary to carry out the operations of the statute, because the issue of liability is neither one that must be resolved by the federal government on an expedited schedule prior to commencing remedial actions, nor one that can be addressed on a routine procedural basis. Thus, with respect to this portion of the Kimbell Foods test, no need has been shown for a uniform federal rule to supplant the existing state rules of liability.

B. Will State Law Frustrate Specific Objectives of the Federal Statute or Program?

The second element of the Kimbell Foods test requires the court to determine "whether application of state law would frustrate specific objectives of the federal programs."425 The CERCLA liability cases have allotted little serious discussion to this element. The opinion in United States v. Nicolet, Inc.426 after quoting In re Acushnet River,427 referred to "the very real risk that the application of state laws [concerning alter ego claims] would

425. United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979). The Court concluded that if state law frustrates the objectives of a federal program, then special rules must be developed in order to protect the federal interests. Id.


427. 675 F. Supp. 22 (D. Mass. 1987). For a further discussion of In re Acushnet River, see supra notes 152-55, 320 and accompanying text. For the In re Acushnet River court's statement concerning the need for uniformity in CERCLA cases, see supra note 320 and accompanying text.
frustrate the objectives of the federal [CERCLA] program." The Nicolet opinion did not further discuss the specific risk, however. The United States v. Chem-Dyne Corp. opinion, which determined that the issue of joint and several liability under CERCLA required a uniform federal rule, does offer some insight into the nature of the risks. The Chem-Dyne court declared that the purpose of CERCLA was "to complement existing federal regulations by providing emergency funds for the clean-up of inactive or abandoned hazardous waste sites as well as illegal releases, such as 'midnight dumping,' located across the nation in virtually every state." Accordingly, the court held that adopting state law would frustrate this purpose by "encouraging illegal dumping in states with tax liability laws." Serious analysis of frustration of objectives pursuant to the Kimbell Foods test requires a more thorough treatment of the subject. The test for determining whether state law will frustrate the objectives of a federal program should be broken down into three separate elements. First, the court must identify the specific objectives of the statute or program. Second, the court must ascertain whether the objectives are in fact federal, rather than merely national. Finally, the court must determine whether state law will actually frustrate the objectives, or will simply cause the United States to lose money. The following discussion details each of these elements.

1. What Are the Objectives?

   In cases that apply the Kimbell Foods test and actually attempt

428. Nicolet, 712 F. Supp. at 1202. The court thus concluded that a uniform federal rule should be developed to govern alter ego claims under CERCLA. Id.


430. Id. at 808-10. The court distinguished CERCLA as a federal program that must be uniform throughout the nation in order to succeed. Id. at 809. Therefore, the court concluded, federal rules of decision must be developed in order to achieve uniformity in the program. Id. An important factor behind this conclusion was the belief that states passing lenient laws would provide safe havens for businesses dealing in hazardous substances. Id. The court noted that the government must be able to effectively enforce its environmental programs in every state if it is to be able to protect the federal interest. Id. Furthermore, the court stated that "the delineation of a uniform federal rule of decision is consistent with the legislative history and policies of CERCLA and ... no compelling local interests mandate the incorporation of state law." Id.

431. Id. at 809 (quoting 126 Cong. Rec. 31,965 (1980) (statement of Rep. Florio)). The court identified CERCLA as a federal program that "by [its] nature ... must be uniform in character throughout the nation." Id.

to identify the objectives of the relevant federal statute or program, there is a noticeable tension between broad, abstract social goals and more concrete fiscal objectives. The resolution of this tension often has a direct impact on whether the court will determine that the objectives of the program are at risk of being "frustrated" by state law. Characterizing the goals of a statute or program solely in monetary terms creates a bias toward adopting federal rules. If protection of the federal purse is paramount, then a court should reject any state rule that would increase costs borne by the United States in favor of a federal rule more sympathetic to the federal purse. To the extent that a court considers social/non-monetary objectives of a federal statute or program, however, it can incorporate state rules that advance such objectives, even if those rules result in added costs to the United States. Of course, a court may well adopt a federal rule to help achieve some social objective. A number of courts have in fact done so. Nonetheless, because monetary objectives generally weigh heavily against the opportunity for adopting state law, it is not surprising that the federal government often argues vigorously to phrase the objectives in strictly financial terms so as to maximize the possibility that the court will apply a favorable federal law.433

Cases articulating broad social goals generally focus on the long-term effects of a statute or program. For example, the cases that created federal common law defenses for the FDIC in purchase and assumption transactions held that a uniform federal rule was necessary to "permit the FDIC to promote the stability of and confidence in our nation's banking system."434 In United States v. Haddon Haciendas Co.,435 the Court of Appeals for the Ninth Circuit identified the objectives of the loan program created under the National Housing Act (NHA) in social terms. It

---

433. See, e.g., United States v. Kimbell Foods, Inc., 440 U.S. 715, 733-35 (1979) (government argued that application of state law to SBA lending program would undermine ability to recover loans and therefore conflict with program objectives); United States v. Ellis, 714 F.2d 953, 955-56 (9th Cir. 1983) (FHA argued that adoption of state law in mortgage foreclosure proceeding would result in increased operating costs which would defeat federal policy and goals of lending program).

434. FDIC v. Blue Rock Shopping Center, Inc., 766 F.2d 744, 748 (3d Cir. 1985) (FDIC action to recover debt). For a further discussion of protecting federal interests in FDIC purchase and assumption transactions, see supra notes 377-86 and accompanying text.

435. 541 F.2d 777 (9th Cir. 1976). Haddon Haciendas involved a suit brought by the United States against a limited partnership, seeking to foreclose on a note insured under the National Housing Act (NHA). Id. at 779.
explained that "[t]he purpose is to deter the exploitive management of federally-insured projects and the resulting substandard and slum-like housing conditions that the NHA was designed to eliminate."\textsuperscript{436} The court further noted that it was not in the best interest of the program to allow state laws designed to protect debtors to be used to encourage investment in sub-standard housing.\textsuperscript{437} To avoid both frustrating the objectives of the loan program and allowing state laws to operate against the program's best interest, the court adopted a federal rule.\textsuperscript{438} In \textit{United States v. Pisani},\textsuperscript{439} the circuit court identified two specific objectives of the Medicare program that would be frustrated by adoption of state piercing the corporate veil laws: providing prompt reimbursement to providers of medical services so as to encourage them to treat Medicare patients, and limiting such reimbursement to the reasonable costs of their services.\textsuperscript{440} In \textit{Pisani}, therefore, as in \textit{Haddon Haciendas} and the FDIC purchase and assumption cases, the court adopted federal rules to prevent frustration of the socially-oriented objectives that had been identified.\textsuperscript{441}

In contrast to the cases that espouse social goals, a number of other cases have identified the objectives of federal programs strictly in monetary terms. Long before the \textit{Kimbell Foods} opinion

\textsuperscript{436} Id. at 784. The \textit{Haddon Haciendas} court distinguished its case from other cases, such as \textit{Yazell}, purporting to protect a federal financial interest. \textit{Id.} at 783. The protection of federal interests in some loan programs, such as those created under the NHA, is not achieved by concentrating solely on the financial objectives of the program. \textit{Id.} at 784. In some cases, said the court, the federal interest in the social outcomes of a financial program is as important as the fiscal health of the program. \textit{Id.} As the \textit{Haddon Haciendas} court noted, "[t]he federal housing program is not furthered by insuring investments in housing stock declining in standards of decency, safety and sanitation." \textit{Id.}

\textsuperscript{437} Id. at 784-85 (court's primary concern was to discourage "profiteers" from "hanging on" to NHA projects and not maintaining them).

\textsuperscript{438} Id. at 783. California state law maintained a debtor-protection policy that did not permit post-foreclosure damage actions. \textit{Id.} The \textit{Haddon Haciendas} court, however, asserted that to prevent investors "from hanging onto projects after losing the ability to maintain them," the government must be allowed to bring post-foreclosure damage actions. \textit{Id.}

\textsuperscript{439} 646 F.2d 83 (3d Cir. 1981). For a further discussion of \textit{Pisani}, see \textit{supra} notes 407-10 and accompanying text.

\textsuperscript{440} 646 F.2d at 86.

\textsuperscript{441} Id. at 86-88. These three cases did adopt a federal rule despite articulating non-monetary objectives. It is interesting to note that in each of these cases adoption of the federal rule to help meet the "social" goals outlined therein would at the same time work to the economic advantage of the federal government. For a discussion of other cases in which recognition of non-monetary objectives contributed to adoption of state law rules, see \textit{infra} notes 448-57 and accompanying text.
was handed down, *United States v. Sommerville* created a federal rule to hold liable the auctioneer of livestock covered by a recorded FHA security agreement. In rejecting a state rule of liability, the Court of Appeals for the Third Circuit identified the major concern in fiscal terms, holding: "Protection of the [federal] purse is paramount." Other courts have also cited the goal of protecting the integrity of the Treasury in cases sustaining the choice of federal law to govern suits by the government for indemnification from third parties for torts against soldiers; rights of redemption when the federal housing authority has foreclosed on a mortgage that it had guaranteed; and the priority of mortgages held by the Department of Housing and Urban Development with respect to loans made under the NHA.

Some courts have directly addressed the balance between the fiscal interests of the government and other objectives of a federal

---

442. 324 F.2d 712 (3d Cir. 1963), cert. denied, 376 U.S. 909 (1964). The government sued an auctioneer to recover the value of livestock in which it had a financial interest pursuant to an FHA security agreement, even though the auctioneer had no prior knowledge of the government's lien upon the livestock. *Id.* at 714.

443. *Id.* at 716-17. Pennsylvania state law would not impose liability upon the auctioneer for the livestock because the auctioneer did not have knowledge of the government's lien on the livestock. *Id.* On the other hand, "federal policy" would impose liability under such circumstances. *Id.* at 717. The court asserted that "[a]n independent federal rule of decision must be applied when a genuine federal interest would be subjected to uncertainty by application of disparate state rules." *Id.* at 714-15 (footnote omitted).

444. *Id.* at 716. The court feared that varying state laws threatened the United States with financial loss:

The FHA would have to frame its loan program to suit the policies of particular states as evidenced by their respective laws. The United States, as a party-plaintiff would be able to protect itself from financial loss in one state but not in another. Protection of the purse is paramount here and is paramountly federal. Whether the United States can maintain a suit on an FHA loan must depend on uniform federal policies.

*Id.*; see also *United States v. Carson*, 372 F.2d 429, 433 (6th Cir. 1967) ("In cases affecting government money and the credit of the government . . . federal law should apply." (quoting *United States v. Helz*, 314 F.2d 301 (6th Cir. 1963))).


447. *United States v. Scholnick*, 606 F.2d 160, 164 (6th Cir. 1979) ("[I]n any consideration of remedies available upon default of a federally held or insured loan, federal interest predominates over state interest.").
program. In *United States v. Kimbell Foods, Inc.*\(^{448}\) the government argued that the application of state law to the FHA and SBA lending programs would undermine its ability to enforce repayment of loans, thereby conflicting with the objectives of those programs. It then compared recovery of dollars loaned under those programs to the collection of taxes, which it said would clearly be covered by uniform federal law.\(^{449}\) The Supreme Court, however, distinguished loan repayment from tax collection, holding that tax liens, which were essential to insure sufficient money to pay federal debts and which required uniform federal rules, were unlike liens for the recovery of money advanced under a "carefully circumscribed" loan program.\(^{450}\) Because the objectives of the SBA and FHA programs were identified in terms of assisting deserving borrowers, the Court could adopt state rules concerning lien priority, even though the United States would as a result suffer a higher risk of nonpayment.\(^{451}\)

Several years after the *Kimbell Foods* decision, the Ninth Circuit performed a similar balancing of fiscal and social objectives. *United States v. Ellis*\(^{452}\) concerned the application of a state law that granted redemption rights to a borrower after foreclosure on real

\(^{448}\) 440 U.S. 715 (1979). For a further discussion of *Kimbell Foods*, see supra notes 308-16 and accompanying text.

\(^{449}\) *Kimball Foods*, 440 U.S. at 733-34. The government argued that there is minimal distinction between dollars collected for taxes and dollars collected from loan repayments. *Id.* Therefore, it believed similar federal rules should be fashioned to provide the same protection for the collection of loans as the federal tax laws provide for the collection of taxes. *Id.* at 734. Disagreeing, the Court stated that "[t]he overriding purpose of the tax lien statute ... [was] to ensure prompt revenue collection," unlike the SBA and FHA lending programs which do not require prompt action. *Id.* at 735.

\(^{450}\) *Id.* at 734. The Court asserted that the tax liens required greater protection:

> The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines. By contrast, when the United States operates a moneylending institution under carefully circumscribed programs, its interest in recouping the limited sums advanced is of a different order. Thus, there is less need here than in the tax lien area to invoke protective measures against defaulting debtors in a manner disruptive of existing credit markets.

*Id.*

\(^{451}\) *Id.* at 734-38. The *Kimbell Foods* Court made an important distinction between the United States as involuntary creditor when taxes are unpaid, and the voluntary nature of the SBA and FHA lending programs. *Id.* at 736. It was the Court's position that the SBA and FHA programs place the government in a similar position to private lenders. *Id.* It concluded that the "special status" for which the government was arguing through the development of federal laws was unnecessary to protect the Treasury in its capacity as lender. *Id.* at 737.

\(^{452}\) 714 F.2d 953 (9th Cir. 1983).
property. The government had argued that because the loan was made under the FHA program, federal law should override the redemption rights granted under state law. It alleged that the state rule would add to the operating costs of the government and thereby "defeat the federal policy of maintaining a credit fund available to farmers at reasonable rates." The court disagreed, asserting that an increase in the program administration costs, which might result from adoption of a state law, did not necessarily require adoption of a federal rule. The court held that the objective of the program was "to support the farming segment of the economy, and, particularly relevant here, to help ease the financial burden on farmers when they encounter financial difficulty." The court then held that the state law regarding redemption rights would not impair this federal objective, and might even advance it.

The search for the objectives that underlie CERCLA begins with the statute and its legislative history. Although the statute itself does not contain a statement of purpose, the legislative history provides some insight into the objectives to be achieved by CERCLA. Senator Randolph, Chairman of the Senate Committee on Environment and Public Works, described the following

453. Id. at 957. The FHA sought to foreclose on a mortgage that expressly waived redemption rights, despite conflict with state law. Id.
454. Id. at 955. The Washington redemption law allowed debtors to repurchase foreclosed property one year after foreclosure. Id. The government argued that its costs would increase because the possibility of redemption would discourage bidding. Id. Additionally, under the Washington law the government would possibly have to purchase and hold properties for the one year redemption period before it could successfully put them up for bid. Id.
455. Id. The court noted that other courts, such as Kimbell Foods and Yazell, had come to a similar conclusion. "The fact that increased costs may result from the adoption of state law regarding debtor and creditor rights is not controlling. Both the Supreme Court and this court have adopted state law despite added costs to loan programs when state law did not jeopardize other federal interests." Id.
457. Ellis, 714 F.2d at 956. The court opined that "[s]tatutory rights of redemption give the mortgagor power to force the sale price close to true market value." Id.; see also United States v. Crain, 589 F.2d 996, 1000 (9th Cir. 1979). Crain involved an action by the federal government to foreclose on a mortgage and recover funds owed on an SBA loan. 589 F.2d at 998. The Court of Appeals for the Ninth Circuit asserted that the "[a]doption of . . . state law defenses [would] not adversely affect either of the federal policies involved." Id. at 1000. The Crain court identified "two federal interests . . . implicated in enforcing SBA loan contracts: protection of the federal fisc and the congressional purpose in enacting the Small Business Act." Id. at 999 (footnote omitted).
objectives of the Senate bill that eventually was enacted as CERCLA:

First, to make those who release hazardous substances strictly liable for cleanup costs, mitigation, and third party damages. Thus, it assures that the costs of chemical poison releases are borne by those responsible for the releases.

Second, the bill would establish a broad Federal response authority, and a fund of $4.1 billion over 6 years to clean up and mitigate damages where a liable party does not clean up or cannot be found.

Third, the bill would provide an opportunity through the courts, and a more limited opportunity through the fund, for victims to receive prompt and adequate compensation for losses and injuries.

Fourth, the bill would provide that the fund be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society. 458

Others have interpreted the purposes of CERCLA in various ways. The opinion in United States v. Chem-Dyne Corp. 459 declared that the purpose of the statute is to provide funds for the cleanup of various hazardous substance release sites. 460 The First Circuit in Dedham Water Co. v. Cumberland Farms Dairy, Inc., 461 identified two somewhat different objectives:

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Con-

458. 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph). Although Senator Randolph was discussing the purposes of an earlier version of the bill, each of the four stated objectives are consistent with the bill that eventually passed.


460. 572 F. Supp. at 809. For a further discussion of this aspect of the Chem-Dyne decision, see supra notes 429-32 and accompanying text.

461. 805 F.2d 1074 (1st Cir. 1986). Dedham Water Company filed an action under CERCLA against a company whose operations had polluted Dedham's water source. Id. at 1075. Dedham failed, however, to comply with the 60-day statutory notice requirement. Id. at 1076. The Court of Appeals for the First Circuit held, based on the legislative intent behind CERCLA, that Dedham did not have to comply with the notice requirement. Id. at 1082.
cess 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.\textsuperscript{462}

According to the district court in \textit{Mobay Corp. v. Allied-Signal, Inc.},\textsuperscript{463} the principal goal of CERCLA is "decisive action to begin remediation of the nation's major hazardous waste sites."\textsuperscript{464} The court then identified as a "fundamental policy" of CERCLA that responsible private parties bear the cost of such remediation, rather than taxpayers.\textsuperscript{465}

Imposing liability on those responsible for releases of hazardous substances is undoubtedly an essential objective of CERCLA. Unfortunately, merely identifying imposition of liability on responsible parties as an objective of CERCLA does not provide much help in determining whether state rules should be adopted. The difficulty arises in that the rules of liability that are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{462} Id. at 1081 (quoting United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)); see also \textit{Mobay Corp. v. Allied-Signal, Inc.}, 761 F. Supp. 345, 354 (D.N.J. 1991). The \textit{Mobay} court observed that imposing liability on corporate parents under the capacity to control rule "serves the broad remedial purpose underlying CERCLA to facilitate the fast, efficient cleanup of hazardous waste sites" by placing the risk on "those who elect to invest in a corporation, share in its profits and control its activities." 761 F. Supp. at 354.
\item \textsuperscript{463} 761 F. Supp. 345 (D.N.J. 1991). \textit{Mobay} owned an environmentally polluted site. To recover cleanup costs, it brought suit against several companies that had previously been involved with the site. \textit{Id.} at 348. The court arrived at two primary holdings based on CERCLA's sweeping remedial goals. First, it permitted \textit{Mobay} to proceed against a parent corporation that had been actively involved in the management of its subsidiary, which was the actual owner of the site. \textit{Id.} at 354. Second, the court held that a party may only escape CERCLA liability pursuant to an assumption agreement where the agreement either explicitly calls for the assumption of environmental liabilities by the other party, or is so broadly worded as to encompass all liabilities of any type. \textit{Id.} at 358 & n.15. Since \textit{Mobay} had only assumed explicit, non-environmental liabilities from the prior owner of the site, \textit{Mobay} was not deemed to have assumed all CERCLA liability and could proceed against the prior owner. \textit{Id.} at 358.
\item \textsuperscript{464} \textit{Id.} at 349. The court quoted legislative history of CERCLA that described the goals as an inventory of inactive hazardous waste sites in a systematic manner, establishment of priorities among the sites based on a relative danger, a responsive program to contain dangerous releases from inactive hazardous waste sites, acceleration of the elimination of unsafe hazardous waste sites, and a systematic program of funding to identify, evaluate and take responsive actions at inactive waste sites to assure protection of public health and environment in a cost-effective manner. \textit{Id.} n.3 (quoting H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1 at 25, \textit{reprinted in} 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6128).
\item \textsuperscript{465} \textit{Id.} at 349.
\end{itemize}
\end{footnotesize}
chosen will directly affect identification of "responsible" persons under CERCLA. This creates an element of circularity. To illustrate, assume that Corporation X is responsible for a release of hazardous substances. The president of Corporation X has actively participated in the management of the corporation, or perhaps even the facility from which the release issued. Suppose further that the president did not actively participate in the activity that led to the release; the activity occurred without her knowledge. Whether or not the president is "responsible" for the release would therefore depend upon whether the court uses state direct liability rules or the capacity to control rule used in certain CERCLA cases.466 If the objective of the statute is to hold all responsible persons liable, then to the extent that the president is "responsible," a state law that allows her to escape liability will frustrate this objective. By hypothesis, however, she is not "responsible" unless the court has rejected state law in favor of the capacity to control rule. Therefore, any proof that the state rules frustrate CERCLA objectives must come from some other objective of the statute.

The argument that the economic defense of the Superfund is a significant objective of CERCLA, the protection of which requires adoption of a federal rule of decision to maximize recovery against individuals who might not otherwise be liable under traditional state law, is also problematic. No such objective is set out in either the statute or its legislative history. Although CERCLA does instruct the President of the United States to take into account numerous factors before deciding on any removal or remedial action, the ultimate prospect of recovery from the responsible party or, in the case of a corporation, its officers, directors and stockholders, is not among the factors listed.467 The legislative history provides some clues to the objectives of the statute, but does not support advocates of the economic defense argument. Nothing in the statute or the legislative history suggests that keeping a large balance in the Superfund is of special significance.

466. The president in the hypothetical would satisfy the capacity to control test, and therefore would be liable if this test were used. For discussion of the capacity to control theory of direct liability, see supra notes 42-96 and accompanying text. Since the president did not actively participate in the release of the hazardous substances, however, she would escape liability under the traditional common law. For a survey of California, New York and Texas law concerning the liability of corporate officers and directors, see supra notes 191-202 and accompanying text.

467. See CERCLA § 121(b), 42 U.S.C. § 9621(b) (1988).
Notwithstanding the absence of express language in the statute of the legislative history identifying the economic defense of the Superfund as a priority of CERCLA, it could be argued that because the Superfund is essential to the operations of the President under the statute, it must at least be an implied objective of CERCLA that the Superfund be maintained at maximum levels. If adoption of state rules risks depleting the Superfund, then a federal rule increasing the number of potentially liable persons should instead be created. 468 The problem with this "implied objective" argument is that it assumes that the risk of financial loss should fall not on the United States, but rather on stockholders—despite the fact that stockholders are less likely to be in a position to bear it.

Concern regarding the added financial burdens to the United States from the adoption of state law has often been subordinated to the more important social objectives of the federal program. 469 Here the discussions in United States v. Kimbell Foods, Inc. 470 and United States v. Ellis 471 provide ready instruction. In Kimbell Foods, the Supreme Court distinguished between collecting general revenues from taxes and recovering monies advanced under a federal loan program, and held that the latter did not encompass objectives that need to be protected from state laws. 472 Monies advanced from the Superfund, like loans under the SBA and FHA programs, are limited funds advanced under a "carefully circumscribed program." Therefore, the federal government should have no special claim in CERCLA cases for extraordinary meas-

468. See generally Note, Parent Liability, supra note 301, at 1002 (arguing that parent corporation's potential ability to escape liability under state law undermines CERCLA statutory scheme by delaying or reducing recovery of funds on which federal government depends for cleanup and restoration).

469. For a discussion of decisions emphasizing social objectives of a program over monetary objectives, see supra notes 434-41 and accompanying text.

470. 440 U.S. 715 (1979). For a further discussion of Kimbell Foods, see supra notes 308-16 and accompanying text.

471. 714 F.2d 953 (9th Cir. 1983). For a further discussion of Ellis and its analysis of the social objectives of a federal program, see supra notes 452-57 and accompanying text.

472. 440 U.S. at 734-35. For a discussion of the Kimbell Foods Court's comparison between collecting tax revenues and recovering federal loans, see supra notes 448-51 and accompanying text.

473. 440 U.S. at 734. Although the Superfund is certainly a part of the federal purse, the money available for the Superfund comes in large part from various excise taxes on hazardous substances levied specifically for use in the cleanup of hazardous substance disposal facilities. For a discussion of the Superfund and the relevant authorizing statutes, see supra notes 17-21 and accompanying text.
ures to protect the federal purse. The government has no more right to such extraordinary measures than it had in the context of recovery of monies advanced from the SBA and FHA programs. The financial objectives of CERCLA, like those of the SBA and FHA programs, should be subordinated to the non-monetary objectives of the statute.

The holding in *Ellis* also sheds some light on this issue. In *Ellis*, the circuit court squarely rejected the government’s arguments that protection of the FHA credit fund was essential to permit the program to continue making loans and that added operating costs jeopardized the ability of the program to perform. Added costs to the credit fund that resulted from the adoption of state law redemption rights would not defeat the objective of the program, the court reasoned, because maintaining the credit fund was not the objective; it was a means to an end. The “end” was to provide assistance to farmers, and adoption of state law would not interfere with this objective. The same logic applies to the argument that protection of the Superfund is essential to permit the President to respond to future releases of hazardous substances. Maintaining the Superfund is not the objective; it is a means to achieve the objective of coping with hazardous substance releases. It follows, therefore, that while the adoption of state law might frustrate one of the means of achieving CERCLA’s objective, it would not necessarily frustrate the statute’s actual objective.

In summary, identification of the objectives of CERCLA has a direct impact on the determination of whether to adopt state law rules for liability of officers, directors and stockholders. CERCLA cases and legislative history have variously cited as objectives of the statute the prompt remediation of hazardous waste sites, the imposition of liability on “responsible” parties, and the need to fund and maintain a healthy Superfund for remediation and for compensation of victims. The courts then derive arguments to show that a federal rule is essential to avoid the frustration of these objectives. As discussed above, however, reference to the concept of “responsible” parties in choosing between federal and

---

474. 714 F.2d at 955 (noting that previous decisions from both Ninth Circuit and Supreme Court “have adopted state law despite added costs to loan programs when state law did not jeopardize other federal interests”).

475. *Id.* at 955-56. The court showed that it was unwilling to accept any government argument that attempted to confuse the true objectives of a program with factors affecting, and even inconveniencing, the operation of the program. *Id.* at 956.
state law is useless, because ascertaining who is “responsible” will require a prior determination of whether to adopt federal or state rules. Furthermore, the objectives relating to maintaining an economically viable fund for implementation of the statute, while not insignificant, do not lead inevitably to the adoption of federal rules of decision. Courts in analogous situations have subordinated concerns as to the costs of programs to the non-monetary goals that can be achieved without the aid of new federal rules. Therefore, the determination whether adoption of state law rules of liability for officers, directors and stockholders would frustrate the objectives of CERCLA requires a fresh look at the remediation objective and the Superfund viability objective to ascertain if they are in fact federal, rather than merely national, and if they would be frustrated by the state rules. It is to this inquiry that we now turn.

2. Are the Objectives Really Federal?

Once the actual objectives of a federal statute or program have been identified, the next step requires a determination whether such objectives are in fact federal in scope, or merely national. Jackson v. Johns-Manville Sales Corp. and National Audubon Society v. Department of Water clearly illustrate the distinction between federal and national goals.

In Johns-Manville, the Court of Appeals for the Fifth Circuit held that state law governed the appropriateness of awarding specific types of damages in asbestos litigation. The court rejected the defendant’s argument that a uniquely federal interest existed in assuring compensation to persons injured by asbestos and in maintaining government asbestos suppliers. In rejecting the defendant’s argument, the court provided guidance concerning the nature of the uniquely federal interest requirement:

“Uniquely federal interests” are not merely national interests, and the existence of national interests, no matter

476. 750 F.2d 1314 (5th Cir. 1985).
477. 869 F.2d 1196 (9th Cir. 1988).
478. Johns-Manville, 750 F.2d at 1323, 1327. Specifically, the court found that the availability of punitive damages, mental anguish damages and damages for cancer as a proper future consequence of asbestos exposure was not an appropriate issue for the creation of a federal common law. Id. at 1327.
479. Id. at 1324. The defendant’s rationale was that the interests of both the government and the injured parties would be significantly served by creating federal rules restricting the types of damages recoverable in asbestos litigation. Id.
their significance, cannot by themselves give federal courts the authority to supersede state policy . . . It is well established instead that to be "uniquely federal" and thus a sufficient predicate for the imposition of a federal substantive rule, an interest must relate to an articulated congressional policy or directly implicate the authority and duties of the United States as sovereign.480

In National Audubon Society, the Court of Appeals for the Ninth Circuit also provided a definition of "uniquely federal interests." The court defined such interests as those that exist "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relation with foreign nations, and in admiralty cases."481 The court then held that because the Clean Air Act provided that each state should have primary responsibility for its own air quality, it did not involve a uniquely federal interest.482

The identity of the parties involved in the litigation also affects whether the objectives will be viewed as federal in nature. Many courts have held that a dispute among private parties does not implicate federal interests to an extent that gives rise to a "federal objective."483 The courts' treatment of cases concerning

480. Id. at 1324-25 (citations omitted). In dicta, the court recognized the desperate need for federal legislation in the field of asbestos litigation. Id. at 1327. The court stated, however, that "Congress' silence on the matter . . . hardly authorizes the federal judiciary to assume for itself the responsibility for formulating what essentially are legislative solutions." Id. But see Beverly v. Macy, 702 F.2d 931, 937 (11th Cir. 1983) (holding that federal law rules were needed for National Flood Insurance Act because of, inter alia, "national scope" of program).


482. Id. at 1203. The court found, in effect, that the Audubon Society could not rely on the federal common law of nuisance to state its air pollution claim. Id. at 1200; cf. Powers v. United States Postal Serv., 671 F.2d 1041, 1045 (7th Cir. 1982) (declining to adopt federal law governing lease of real property by United States Post Office, in part because "there is nothing distinctive about the lease of premises for a local post office. It is not different from the leasing of commercial space by any large nationwide enterprise.").

483. See, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-647 (1981) (declining to create federal rule of contribution among antitrust wrongdoers); Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33-34 (1956) (declining to create federal rule to govern issues of good faith and lack of knowledge or notice in conversion suit between private parties with respect to United States bonds); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1459 (9th Cir. 1986) (declining to create federal rule to govern interpretation of releases and contribution agreements among private parties with respect to CERCLA liability); In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987, 993-
CERCLA LIABILITY

private parties’ rights of contribution provides a good example. In *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the United States Supreme Court declined to create a federal right of contribution among antitrust defendants. The Court recognized that there is a federal interest in private enforcement of the antitrust laws. It nevertheless reasoned that because contribution does not actually implicate the duties of or distribution of power within the federal government, it “does not implicate ‘uniquely federal interests’ of the kind that oblige courts to formulate federal common law.”

Courts have similarly held that contractual agreements apportioning CERCLA liability between private parties were “essentially tangential to the enforcement of CERCLA’s liability provisions,” and, therefore, governed by state law rather than federal law. The Court of Appeals for the Ninth Circuit in *Mardan Corp. v. C.G.C. Music, Ltd.* took special note of the fact that if state law were applied, the federal government would retain rights to full recovery and could still recover from any of the private parties. State law would affect only the determination of who among the private parties ultimately had to pay, which did not impact any federal objective.

95 (2d Cir. 1980) (declining to create federal common law right of action in suit by United States armed forces veterans against manufacturers of herbicides used by United States during Vietnam War), cert. denied, 454 U.S. 1128 (1981). The court in *In re “Agent Orange”* summarized its position succinctly: “Since this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest in uniformity for its own sake.” 635 F.2d at 993 (footnote omitted). But see *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-13 (1988) (creating federal law rule regarding defenses that may be asserted by United States defense contractors for design defects in military equipment); *Bynum v. FMC Corp.*, 770 F.2d 556, 568 (5th Cir. 1985) (holding that federal common law “government contractor” defense applied in product liability suit by member of armed forces against military contractor).


485. Id. at 646. The Court pointed out that regardless of the strength of the arguments in favor of or opposed to contribution, “this is a matter for Congress, not the courts, to resolve.” Id.

486. Id. at 642 (citations omitted). The Court recognized the implication of “a federal interest in the sense that vindication of rights arising out of these [antitrust statutes] supplements federal enforcement and fulfills the objects of the statutory scheme.” Id. This interest was simply not sufficient to constitute a federal interest. Id.

487. *Mardan*, 804 F.2d at 1459. The court noted that “Congress seems to have expressed an intent to preserve the associated body of state law under which agreements between private parties would normally be interpreted.” Id. at 1458.

488. 804 F.2d 1454 (9th Cir. 1986).

489. Id. at 1459. The court recognized that because the government would
The social and economic objectives of CERCLA are, at least insofar as the United States government is concerned, federal, and not merely national. Congress has charged the federal government, in its capacity as sovereign, with enforcing the liability provisions contained in the statute. Unlike the Clean Air Act at issue in National Audubon Society, CERCLA does not leave to the states primary responsibility for hazardous substances in their jurisdictions. Although the statute does call for cooperation between the President and the states on a number of issues, the ultimate responsibility for deciding on the need for removal or remedial action, and on the particular action to be taken, rests with the federal government. The rights and obligations of the United States that CERCLA implicates are unquestionably federal, rather than national.

The issue is not so clear, however, when third parties become involved. Consider, for example, a hypothetical situation in which a party that retains full rights to recovery, application of state law to interpret agreements would not frustrate CERCLA objectives or implicate federal interests. *Id.* But see Wiegmann & Rose Int'l Corp. v. NL Indus., 735 F. Supp. 957 (N.D. Cal. 1990) (holding that federal law, rather than state law, governed whether "as is" clause in deed between private parties would release grantor from liability under § 107(a) of CERCLA).


Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

*Id.* § 104(a), 42 U.S.C. § 9604(a).

491. See, e.g., *id.* § 104(c)-(d), 42 U.S.C. § 9604(c)-(d). The statute directs the President to "consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section." *Id.* § 104(c)(2), 42 U.S.C. § 9604(c)(2). In addition, state cleanup standards may under certain circumstances be used to establish the minimum level of cleanup that the federal government must attain. *Id.* § 121(d), 42 U.S.C. § 9621(d).

492. *Id.* §§ 104, 121, 42 U.S.C. §§ 9604, 9621. The President must "promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State." *Id.* § 121(f), 42 U.S.C. § 9621(f). If the state objects to the federal plan, it can intervene, as of right, through the court system. *Id.* § 121(f)(2), 42 U.S.C. § 9621(f)(2). The statute allows the President, however, to "conclude settlement negotiations with potentially responsible parties without State concurrence." *Id.*
which CERCLA would impose joint and several liability on several corporations for a hazardous substance release, but the government declined to name Corporation X in its suit against the other corporations. This situation poses the question of whether the named defendants may then sue the officers, directors and stockholders of Corporation X for contribution under the CERCLA liability standards, or whether they are confined to traditional state law remedies because no federal interests are present. No reported case has yet addressed this issue.

The opinions in *Texas Industries* and, more particularly, *Mardan* suggest that a federal court should adopt state law to govern the liability of individuals in such a situation. The rationale that state law should be utilized is based on the notion that because the chosen rule would affect only private parties, it would be "tangential to the enforcement of CERCLA's liability provisions." The application of state law would, however, greatly disturb the concept of uniformity with respect to CERCLA liability. Under the legal rules articulated in *Texas Industries* and *Mardan*, liability of the officers, directors and stockholders of a corporation would depend on whether the corporation is being sued by the United States directly, or by some other responsible party whom the United States has sued. The federal government has discretion concerning the responsible corporations against which it will file suit. Given the power of the government in this respect, it is the individual officers, directors and stockholders, rather than the government, who bear the full brunt of the lack of uniformity. The diversity and uncertainty that the officers, directors and stockholders face results not only from the varying state laws, but also from the discretion vested in the federal government as to which of the responsible corporations it might seek to hold liable. Whether officers, directors and stockholders are in a better position than the United States to bear the burden of such diversity seems dubious, at best.

493. *Mardan*, 804 F.2d at 1459 ("Such [releases] cannot alter or excuse the underlying liability, but can only change who ultimately pays that liability.").

494. See generally United States v. A & F Materials Co., 578 F. Supp. 1249, 1255-57 (S.D. Ill. 1984) (responsible corporations may be jointly and severally liable under CERCLA; cautioning moderate approach to such liability); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808-10 (S.D. Ohio 1983) ("The term joint and several liability was deleted from the express language of the [CERCLA] statute in order to avoid its universal application to inappropriate circumstances;" joint and several liability will nonetheless be imposed where two or more persons cause a single and indivisible harm).

495. See *Mishkin*, *supra* note 109, at 830-33. Professor Mishkin wrote that the use of federal law in *Clearfield Trust Co. v. United States*, 318 U.S. 363...
The dichotomy between those federal interests underlying CERCLA that implicate the United States as sovereign and others in which the United States has no interest creates a paradox for those who seek uniformity in CERCLA liability. The essence of this paradox is that even if frustration of the federal interests would justify adoption of "uniform" federal rules of liability, state law would still be an appropriate choice for resolving liability issues arising in contribution contexts among private parties. This leads to the anomalous possibility of federal courts' employing two different liability standards to the various parties with respect to a single CERCLA violation. Thus, although adoption of a uniform federal rule of liability of officers, directors and stockholders may reduce diversity in one respect (by creating a single standard of liability for cases of government enforcement) it could increase diversity within a single case by imposing a federal rule on some potentially responsible parties and not others.

3. Are the Federal Objectives Really Frustrated?

After identifying the federal objectives of a United States statute, it is necessary to examine whether the objectives would be frustrated by the application of state law. In applying this inquiry to CERCLA, the cases traditionally cite as potential frustration the possibility that individual states would create safe havens for polluters by imposing rigid limited liability rules.

One commentator argues that state limited liability rules would allow stockholders to escape liability, thereby impairing the government's ability to keep the Superfund replenished and undermining effective governmental response to environmental problems. He adds that state rules providing limited liability to stockholders would promote overly risky activities such as the placement by corporate parents of hazardous substance operations in poorly capitalized subsidiaries without proper controls.

In evaluating the claims that CERCLA objectives will be frustr-
treated by the application of state law, it is important to remember that "Congress acts . . . against the background of the total corpus juris of the states." Furthermore, a finding that a state rule would frustrate the objectives of a federal statute or program requires more than a mere showing that the United States would lose the litigation in question. There are three general areas of inquiry relevant to determining if frustration exists: (1) whether the adverse effects alleged to follow from the state rule are remote or speculative; (2) whether the burden imposed by state law on the federal statute or program will be material; and (3) whether the United States will retain the ability to protect its interests in some way other than through state law.

a. Is the Frustration Too Remote or Speculative?

The cases applying the Kimbell Foods test consistently feature passionate claims by the United States that adoption of a state rule would have dire consequences for the federal statute or program in question. In nonenvironmental contexts, federal corporations from overseeing hazardous waste disposal carried out by their subsidiaries.

499. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (quoting H. Hart & H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 435 (1953)); accord Burks v. Lasker, 441 U.S. 471, 478 (1979) (in field of corporate law, "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute" (citations omitted)); see also FDIC v. Braemoor Assocs., 686 F.2d 550, 554 (7th Cir. 1982) (absence of "ready-made" federal law and lack of "explicit statutory or constitutional direction" support presumption that courts should generally apply state law to federal statutes), cert. denied, 461 U.S. 927 (1983).

500. Robertson v. Wegmann, 436 U.S. 584, 593 (1978). The Supreme Court continued: "If success of the [litigation] were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." Id.

501. For a discussion of whether the frustration of CERCLA objectives through adoption of state law is too remote or speculative to justify a federal law, see infra notes 504-20 and accompanying text.

502. For a discussion of whether the adoption of state law would frustrate federal objectives or merely create a small burden, see infra notes 521-58 and accompanying text.

503. For a discussion of whether the United States can protect itself if state law were adopted in cases involving CERCLA liability, see infra notes 559-75 and accompanying text.

504. See, e.g., Miree v. DeKalb County, 433 U.S. 25 (1977); Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804 (1st Cir. 1983). For a discussion of Miree, see infra notes 505-10 and accompanying text. For a discussion of Chicago Title, see infra notes 511-14 and accompanying text.
courts have rejected the government's claims. One ground for rejecting the government's contention is that the ill effects alleged to result from the state rule are simply too remote from the objectives of the statute or program to justify creation of a federal rule. At other times, the courts have held that insufficient evidence exists to prove that the predicted ill effects will in fact result from adoption of the state rule, and that mere speculation is not enough to justify a federal rule.

The United States Supreme Court ruled on the remoteness issue in *Miree v. DeKalb County*. The case presented the question of whether state law would govern a claim against the Federal Aviation Administration (FAA), by persons injured in an airplane crash, under maintenance contracts between the FAA and the airport owners. The Court held that the use of state law to determine whether the injured parties were third party beneficiaries of the FAA contracts threatened no substantial federal interests. To reach this conclusion, the Court reasoned that the outcome of the litigation would not directly affect either the United States or the federal Treasury, and would not burden operations of the United States in connection with FAA grants. The government then argued that it had a cognizable federal interest in regulating and promoting air travel, and that adoption of state law would frustrate this interest. The Supreme Court rejected this argument. It instead held that the federal interest in air travel identified by the government was too remote and too speculative to justify creating a federal rule in what was essentially a matter of


506. Id. at 27-29. Petitioners were survivors of persons who were killed in the crash, and sought, as third-party beneficiaries of the contracts, to impose liability on the county. Id. at 26-27. The contracts restricted the use of the land in the vicinity of the airport to purposes compatible with normal airport operations. Id. at 27. The petitioners claimed that the county breached the FAA contracts by maintaining a garbage dump adjacent to the airport. Id. The petitioners further asserted that the crash had been caused by the ingestion into the aircraft of birds that were swarming from the dump. Id.

507. Id. at 29. In its holding, the Court distinguished the facts of the case from those in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *Miree*, 433 U.S. at 29. The Court noted that the application of federal law in the case at bar "would promote no federal interests even approaching the magnitude of those found in *Clearfield Trust,*" Id.

508. 433 U.S. at 29-30. The Court concluded that "[s]ince only the rights of private litigants are at issue" in the case at bar, federal interests would not be burdened by the application of state law. Id. at 30.

509. Id. at 31. The Court stated that, even assuming the importance and correctness of this federal interest, "the issue of whether to displace state law on an issue such as this is primarily a decision for Congress," which had chosen not to take any action. Id. at 32.
local concern, and applied state law.\textsuperscript{510}

In cases in which the adverse consequences alleged to follow from the adoption of a state rule are not remote, but are sufficiently related to the federal interests at issue, courts have sometimes been skeptical of whether such consequences will actually occur. Such skepticism was evident in \textit{Chicago Title Insurance Co. v. Sherred Village Associates}.\textsuperscript{511} The government argued that state law rules of lien priority for mechanics' liens should not be adopted in cases involving mortgages insured by or assigned to the United States Department of Housing and Urban Development (HUD).\textsuperscript{512} The government was concerned that the adoption of state law would precipitate the demise of the entire program.\textsuperscript{513} The Court of Appeals for the First Circuit dismissed this argument. It found that the government had submitted insufficient evidence to show that the "HUD program would collapse if the linchpin of absolute federal priority were removed," and that state law should therefore govern.\textsuperscript{514}

Claims about the drastic effects that may result from adopting state law to determine the liability of officers, directors and stockholders under CERCLA should be examined in light of the \textit{Miree} and \textit{Chicago Title} cases. CERCLA liability cases differ from the factual settings of \textit{Miree} and \textit{Chicago Title} in that CERCLA liability cases involve the enforcement by the United States of federal law and the recovery of federal funds.\textsuperscript{515} The United States does have a strong federal interest in enforcing the remediation of hazardous waste sites and preventing the creation of "safe havens" for polluters. It also has a strong federal interest in preventing exhaustion of the Superfund. Thus, the effects al-

\textsuperscript{510}. \textit{Id.} at 32-33. The Court noted that "[a]part from the highly abstract nature of [the federal] interest, there has been no showing that state law is not adequate to achieve it." \textit{Id.} at 32 (quoting \textit{Wallis v. Pan Am. Petroleum Corp.}, 384 U.S. 63, 71 (1966)).

\textsuperscript{511}. 708 F.2d 804 (1st Cir. 1983).

\textsuperscript{512}. \textit{Id.} at 811. The mechanics' lien, under Maine law, would have been entitled to priority over the federal mortgages, because the contract from which the mechanics' lien arose had been executed before the government had recorded its mortgage. \textit{Id.} at 807.

\textsuperscript{513}. \textit{Id.} at 811. The government "envision[ed] a domino-like progression of calamities" if a state rule of decision was adopted to govern this federal program. \textit{Id.}

\textsuperscript{514}. \textit{Id.} The Court was unpersuaded by the government's argument that if government mortgages were subordinated to subsequent mechanics' liens, "[t]itle insurance companies [would] be unwilling to write lien coverage for HUD projects." \textit{Id.}

\textsuperscript{515}. For a discussion of the legal principles behind CERCLA, see \textit{supra} notes 7-23 and accompanying text.
leged by the government, if true, would have an acute impact on the objectives of CERCLA.

Even though the predicted consequences are not too remote, there has not been sufficient evidence produced thus far to indicate that the consequences will actually ensue. None of the CERCLA opinions refer to testimony or other evidence to support the claims that state liability rules will, in fact, interfere with federal cleanup efforts, or create "safe havens" for polluters or threaten the Superfund. Furthermore, none of the commentators who advocate creating federal law have offered evidence for their arguments that state law would frustrate the federal objectives. The arguments rest on mere speculation, which the Miree and Chicago Title courts held insufficient to support the creation of a federal rule.

Development of the evidence needed to support or contradict the government's claims concerning the consequences of adopting state law would require empirical studies, and is beyond the scope of this Article. Several reasons for the lack of evidence on the frustration issue suggest, however, that it would be exceptionally difficult, or even impossible, for the United States to meet its burden of proof and secure a federal rule.

First, the argument that polluters would flock to "safe haven" states would be extremely hard to defend, because no such safe havens currently exist. Each of the fifty states currently recognizes common law exceptions to limited liability of officers, direc-

516. See, e.g., Note, Parent Liability, supra note 301, at 1002-03. The arguments presented in the note are supported primarily by references to the literature of modern economic theory, purporting to show the economic inefficiency of limited liability for parent corporations. Id. at 1002 nn.90-96. At the risk of underestimating the efficacy of such economic arguments, it should be noted that the issue of limited liability is still in controversy in the economic literature, and the debate is so far inconclusive. See generally Landers, supra note 301 (advocating significant curtailment of limited liability protection); Posner, The Rights of Creditors of Affiliated Corporations, 43 U. Chi. L. Rev. 499 (1976) (responding to Landers, and defending limitations on liability by using economic approach); Easterbrook & Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89 (1985) (defending both limited liability and piercing corporate veil in light of economic analysis).

517. One example of evidence that could be presented in this regard is general data concerning government expenditures for cleanup costs, and the government's general success in recovering such expenditures from responsible parties. These data would be useful in ascertaining whether the viability of the Superfund is actually currently in jeopardy. It would also be useful, in determining whether state liability law would adversely affect CERCLA, to calculate the incremental amount of money that has been recovered from officers, directors and stockholders to date that would not have been recovered under traditional state rules.
tors and stockholders. It is possible, of course, that one or more states could abolish the extant exceptions in the future. Given the long history of these exceptions and their ubiquitous character, however, there is little reason to believe they will cease. Moreover, it is difficult to believe that any state would long tolerate being a known “safe haven” for polluters or otherwise interfere with enforcement of CERCLA. Regardless of who pays for the cleanup, the state’s environment and its citizens would sustain significant damage. For these reasons, the government may have great difficulty meeting its burden of showing the alleged frustration of CERCLA objectives to be more than speculative, and thus the courts should not create a federal rule of liability.

b. Does Adoption of State Law Frustrate Federal Objectives or Merely Create a Small Burden?

In cases where the United States is able to prove that the adoption of state law will adversely affect federal objectives, the next question is whether this in fact creates a significant conflict with federal objectives, or merely adds a small burden to the operations of the federal program. A brief survey of cases that have examined the sufficiency of the burden on federal objectives will assist in analyzing this question with respect to CERCLA.

State rules that impose nondiscriminatory procedural practices on federal programs do not usually frustrate the objectives of the programs unless the practices create substantial compli-

518. For cases recognizing direct and indirect liability for corporate directors, officers and stockholders in each of the 50 states, see supra notes 191 and 233.

519. Section 104(c) of CERCLA requires the President to take steps to involve states in the cleanup. These steps include a requirement that a state in which a spill has occurred pay a portion of the costs of the remedial action. CERCLA § 104(c), 42 U.S.C. § 9604(c) (1988). Thus, one would expect the executive and legislative branches of any state that had become a “safe haven” to take steps to loosen the limits on liability in order to decrease the state’s potential financial obligation.

520. Judge Kennedy made this argument in Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring). In Anspec, the Court of Appeals for the Sixth Circuit adopted a state law rule of liability in a CERCLA case. Id. at 1246. Judge Kennedy, in concurrence, discounted the possibility that, absent a uniform federal rule, states would compete to create safe havens for polluters. He noted that the states “have a substantial interest in protecting their citizens and state resources,” adding that most states have counterparts to CERCLA and “share a complimentary interest with the United States in enforcement of” such laws. Id. at 1250 (Kennedy, J., concurring).
Villanova Law Review, Vol. 36, Iss. 6 [1991], Art. 2

1490

Villanova Law Review [Vol. 36: p. 1367

ance problems. In Wallis v. Pan American Petroleum Corp.,521 for example, the Supreme Court held that a provision of state law relating to the proper form of conveyances should govern conflicting private claims to oil and gas leases on property owned by the United States and issued under the Mineral Leasing Act of 1920.522 The Court first noted that the Mineral Leasing Act contained nothing expressly inconsistent with the state law in question.523 It then held that the state law provision in question did not interfere with transfers of federal leases. The state law merely required that such transfers be made in writing, and thus did not present a significant conflict sufficient to require the creation of new federal law.524

In Dupnik v. United States,525 the Court of Appeals for the Ninth Circuit refused to create federal common law to override an Arizona notice procedure that was required prior to foreclosure.526 Although adoption of the state law resulted in an unfavorable result for the SBA in the case at bar, the court ruled that compliance with the notice requirement would not generally place an undue burden on SBA operations.527 The adoption of state law would, at most, cause an administrative inconvenience for the SBA.528

522. Id. at 69-72. Under Louisiana law, which the Court eventually found to be controlling, mineral lease contracts could only be conveyed by a written instrument. Id.
523. Id. at 69.
524. Id. at 68-72. The Court terminated its inquiry after finding that the application of state law would pose "no significant threat" to federal objectives. Id. at 68. It declined to make further inquiries concerning the strength of the state interest in having its own law govern or the feasibility of creating a judicial substitute. Id. at 68-69.
525. 848 F.2d 1476 (9th Cir. 1988).
526. Id. at 1485. The Arizona statute at issue voided redemption rights that were not preserved by a notice of intent to redeem property within six months of the foreclosure sale. Id. at 1477. The federal SBA contended that a federal statute giving the SBA the right to redeem within one year of a foreclosure sale preempted the Arizona statute. Id. at 1479. The SBA had given notice more than eleven months, but less than one year, after the foreclosure sale. Id. at 1477-78. Therefore, the notice was timely under federal law, but not under Arizona law. Id. at 1478. The court held that the federal statute did not demonstrate congressional intent to preempt the Arizona statute, and then declined to create a federal common law to exempt the SBA from the Arizona statute. Id. at 1485.
527. Id. at 1483; cf. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 84-87 (1987) (possibility that state anti-takeover statute would delay some tender offers held insufficient to conclude that statute is preempted by federal securities laws).
528. Dupnik, 848 F.2d at 1483. The court explained:
Several courts have found that minor financial burdens created by state law also do not frustrate the objectives of federal programs in most cases. In Georgia Power Co. v. Sanders, the Court of Appeals for the Fifth Circuit decided that "the interests of the United States in the determination of the amount of compensation a private licensee must pay a landowner in a condemnation proceeding under Section 21 [of the Federal Power Act] are not sufficient to warrant displacement of state law on that issue." Similarly, in United States v. Ellis, the Court of Appeals for the Ninth Circuit held that increased costs, which would result to the United States from adoption of a state law concerning redemption rights after foreclosure, were not inconsistent with the FHA loan program. The court recognized the FHA loan program as a "form of social welfare legislation" for farmers, the purpose of which was to support farming and ease the financial burden on farmers in financial difficulty. Creating the federal rule requested by the government would have had the effect, the court noted, of giving the United States "the unchecked powers of a credit bidder at [a] foreclosure sale." The court commented that such an effect might defeat the purpose of helping farmers through financial difficulty, and declined to create a federal rule.

The federal interest at stake here is convenience in being freed from the shackle of a state notice procedure. Our previous decisions indicate that convenience normally is not sufficient justification to create a uniform federal rule rather than to adopt state law. Moreover, we previously have adopted state procedures as federal law even though the SBA's failure to comply with those procedures can extinguish its rights. Id. (citation omitted). 529. 617 F.2d 1112 (5th Cir. 1980), cert. denied, 450 U.S. 936 (1981). 530. Id. at 1118. The court noted that the Federal Power Act was concerned with maximizing hydroelectric development, reducing energy costs and minimizing the government's cost to exercise its right to acquire a project once the license term has expired. Id. at 1120. The state law, however, was concerned only with "the narrow question of the determination of the amount of compensation a licensee must pay a landowner." Id. at 1121. As a result, the state law neither nullified federal objectives nor created a conflict precluding the application of state law. Id. 531. 714 F.2d 953 (9th Cir. 1983). 532. Id. at 955. The government specified that if the state law right of redemption were applied, it would incur costs in that bidding would be chilled at foreclosure sales and the United States would be required to purchase the property and hold it during the redemption period. Id. 533. Id. at 955-56. The court found that this "overriding federal purpose is not adversely affected, and may even be advanced, by adopting state law." Id. at 956. 534. Id. at 956. 535. Id. at 956-57.
Quantification of the additional procedural or financial burdens that would result from the adoption of a state rule requires a long-term perspective. In *Powers v. United States Postal Service*, Judge Posner pointed out that protecting the low rent paid by the Postal Service with a federal rule would not save the government any money in the long run, because landlords would in the future seek compensation at the inception of each lease in the form of higher rents. Thus, the court found that the purported increase in cost was not a rationale for applying federal common law.

The Court of Appeals for the Ninth Circuit in *United States v. Crain* also considered possible burdens on federal policy in holding that the state law doctrine of equitable subrogation should be adopted in a case where the United States had sued to recover on a personal guarantee of an SBA loan. The court

536. 671 F.2d 1041 (7th Cir. 1982).
537. *Id.* at 1044. The state law permitted a landlord to terminate a lease for failure to pay rent. *Id.* at 1046. The Postal Service had withheld $1600 for costs it incurred to repaint the leased premises when the landlord refused to repaint at his expense. *Id.* at 1042. If the landlord were permitted to terminate the lease, the Postal Service would lose the benefit of a fixed rent negotiated in 1964. *Id.* at 1044. As a result, application of the state law would result in an increase in cost to the federal program. *Id.* The court recognized that the case was an issue of first impression in that no court above the district court level had addressed the question of which law governs the interpretation of Postal Service leases. *Id.*

538. *Id.* at 1044. Judge Posner explained:
Knowing that they would have fewer rights under federal leases than state law (if applicable) would have given them, Indiana landlords would in the future drive harder bargains with the Postal Service. Concretely, the more difficult a lease is to terminate, the higher will be the rent demanded by the landlord; there will be no net saving to the tenant in the long run. *Id.*

539. *Id.* The court also looked to other considerations, such as the value of uniformity obtained by applying federal common law and the fact that a federal common law of landlord and tenant did not exist, in its determination that state law was to be adopted. *Id.* at 1045. As the court noted, while federal courts have the power to create federal common law, they are not bound to do so, especially where state law would provide equivalent or better rules of decision. *Id.* at 1043.

540. 589 F.2d 996 (9th Cir. 1979).
541. *Id.* at 1000. The doctrine of equitable subrogation relieves a loan guarantor of liability if a creditor does not act to protect the value of security given by the primary debtor. *Id.* In the case at bar, the defendant loan guarantors argued that the SBA had allowed the primary debtor's collateral to be dissipated. *Id.* at 998. If this were found to be true, the SBA could be barred from
observed that although the United States might lose under state law in the *Crain* case itself, there would not be any overall adverse effect on the federal program. In fact, the court reasoned, recognition of state law provisions protecting guarantors would make it easier in the future for the SBA to find guarantors for its loans, thereby facilitating the federal objectives.

The United States Supreme Court used the long-term economic outlook to rule out adoption of a state rule in a recent case. The facts in *Boyle v. United Technologies Corp.* involving a wrongful death action against an independent contractor who built a Marine helicopter that crashed, resembled those in *Miree v. DeKalb County* in which the Supreme Court had adopted state law. The *Boyle* Court, however, by taking the analysis one step further than it had in *Miree*, found long-term federal interests. The *Boyle* Court noted that if tort suits could be brought under state law against independent contractors doing business for the United States, there would be an adverse effect on the United

enforcing any obligation against the defendant guarantors. *Id.* at 1000. The equitable doctrine could be applied even though the SBA loan guarantee form specifically provided that the SBA could proceed directly against the guarantors upon default of the primary debtor without first pursuing its rights against the primary debtor. *Id.* at 998, 1001. If the court allowed the defense of equitable subrogation, the SBA could only recover against the defendant guarantors upon a showing that the guarantors had waived the defense. *Id.* at 1001.

*542.* *Id.* at 1000. The court noted that the doctrine of equitable subrogation would not jeopardize the government's ability to enforce loan repayment, but would simply require the government to look to the primary debtor's collateral first. *Id.*

*543.* *Id.* The court reasoned that by protecting guarantors, it would be easier to find private guarantors. *Id.* These private sureties relieve the SBA of a measure of financial risk it would have to take on in their absence. *Id.*


*Boyle* stemmed from a helicopter crash that resulted in the death of the helicopter's United States Marine copilot. 487 U.S. at 502. The decedent's personal representative sued the manufacturer of the helicopter for defective design and repair. *Id.* at 503. The jury found in favor of the plaintiff, but the Court of Appeals for the Fourth Circuit reversed on the ground that, under federal law, the manufacturer was protected by the military contractor defense. *Id.* (citing *Boyle v. United Technologies Corp.*, 792 F.2d 413, 414-15 (4th Cir. 1986)).

*Boyle* and *Miree* both concerned claims based on aircraft crashes involving a breach by a party to a federal contract. The *Boyle* court distinguished *Miree*, however, by noting that the *Miree* petitioners sought to enforce a contractual duty imposed by the government contract. *Boyle*, 487 U.S. at 508. In *Boyle*, by contrast, the petitioners sought to enforce a state-imposed duty of care that was "precisely contrary to the duty imposed by the Government contract" to manufacture helicopters only pursuant to the government specifications. *Id.* at 509.
The Court deduced that the long-term impact would be negative because contractors would likely increase their prices to cover their liability, thereby passing on the financial burden of such suits to the United States and resulting in significant additional costs.

It is doubtful that the additional procedural and financial burdens that the United States would incur if state law liability rules were applied in CERCLA cases rise to the level necessary to constitute frustration of the federal objectives of CERCLA. This doubt increases when the long-term effects of the federal and state rules are considered. From a procedural standpoint, the evidentiary requirements of traditional state rules for liability of officers, directors and stockholders are undeniably much more demanding on the federal government than the evidentiary requirements of the federal CERCLA rules. By jettisoning traditional state requirements such as a showing of active participation in the tortious action for direct liability and complete domination and inequity for piercing the corporate veil, the federal government is relieved of the burden of presenting a great deal of evidence. The government’s case is much easier to prove, from a procedural standpoint, if the courts use federal rules.

Notwithstanding the apparent procedural benefits available to the government under the federal rules, proponents of creating federal rules concerning officer, director and stockholder liability have not demonstrated that the additional procedural burden arising from state rules would frustrate CERCLA objectives. Each state has rules that provide a workable means for im-

547. 487 U.S. at 511-12. The Court reasoned that:
The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs.

Id.

548. Id.

549. Compare Lowendahl v. Baltimore & O.R.R., 247 A.D. 144, 154-57, 287 N.Y.S. 62, 72-76 (requiring finding of complete control, use of control to commit fraud, and injury resulting from fraud for stockholder to be held liable for acts of corporation), aff’d, 272 N.Y. 360, 6 N.E.2d 56 (1936) with United States v. Nicolet, Inc., 712 F. Supp. 1193, 1203-04 (E.D. Pa. 1989) (requiring only finding that parent corporation was familiar with, had capacity to control and benefitted from subsidiary’s waste disposal practices for parent corporation to be held liable).

550. See generally Wallace, supra note 25, at 873-74 (heavy burdens of proof in piercing corporate veil cases would add to already considerable burden of proof required in CERCLA cases).
posing liability on officers, directors and stockholders of corporations, subject to the limitations and defenses built up over many decades of corporate law.\textsuperscript{551} Both state courts and federal courts sitting in diversity jurisdiction are frequently required to apply traditional state common law rules.\textsuperscript{552} Nothing in these many cases indicates that in CERCLA cases the United States would be unable to comply with the state rules or that compliance would be burdensome to the federal cleanup effort. There has been no manifestation that any of the state rules discriminates against the United States. It is not material that the United States may not be able to meet the extra burdens of state law in a particular case. Although it would be significant if the United States could not meet the increased burden of making a substantial evidentiary showing in many or most cases, such a conclusion seems completely unwarranted.\textsuperscript{553}

Furthermore, no evidence indicates that the additional financial burdens that may arise from adoption of state rules of liability would frustrate the CERCLA objectives in maintaining a viable Superfund. The objectives of the statute should not be interpreted solely in economic terms.\textsuperscript{554} The economic price of applying state liability rules would be an increase in the costs of enforcement and an increase in nonrecoverable disbursements from the Superfund. The mere fact that these costs will be higher under state rules than under federal rules does not prove that state law frustrates the federal objectives. It simply shows that some of the financial burden resulting from cleanup costs would be shifted from officers, directors and stockholders of corporations to the United States. In fact, because taxes on hazardous

\textsuperscript{551} For cases recognizing direct and indirect liability for corporate directors, officers and stockholders in each of the 50 states, see supra notes 191 and 233.

\textsuperscript{552} See 1 W. Fletcher, supra note 70, §§ 41-48.10 (expansive list of federal and state cases concerning different aspects of the "disregard of the corporate entity").

\textsuperscript{553} For example, the court in United States v. Kayser-Roth Corp., 724 F. Supp. 15 (D.R.I. 1989), aff'd, 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991), recited a number of facts that would be relevant in making a federal piercing the corporate veil determination. \textit{Id.} at 20. In framing the federal rule for piercing the corporate veil in CERCLA cases, the court noted that the federal common law borrowed heavily from state law. \textit{Id.} In fact, "courts confronting this choice of law issue have observed that the distinction between state law and a federal rule of decision is of little practical difference." \textit{Id.} (citing In re Acushnet River, 675 F. Supp. 22, 33 (D. Mass. 1987)).

\textsuperscript{554} For a discussion and rejection of the argument that the economic defense of the Superfund is a significant objective of CERCLA, see supra notes 467-75 and accompanying text.
substances constitute the primary source of funds for the Superfund, it is arguable that the financial burden would shift not to the United States government, but rather to hazardous substance-related industries.

The argument that the additional burdens that state law would impose on the United States are not sufficiently serious to frustrate the CERCLA objectives becomes even stronger when the consequences of the state rules, and the CERCLA alternatives, are examined from a long-term economic perspective. The state rules of liability may allow some officers, directors and stockholders to escape liability and thereby add to the drain on the Superfund. The federal rules developed in the CERCLA cases, however, will start in motion a chain of events that may also affect both the cost of enforcing CERCLA and the viability of the Superfund. A detailed discussion of the economic effects of state and CERCLA rules of liability is beyond the scope of this Article. Nevertheless, it is clear that expanding the exceptions to limited liability of officers, directors and stockholders will significantly impact the costs of removal and remedial actions and the viability of the Superfund. This impact, which has largely been ignored in the cases and by advocates of the CERCLA rules, could make the federal rules even less attractive when compared to the traditional state law.

Further examination may reveal long-term adverse effects of the CERCLA rules on those industries that use, store or transport hazardous substances. For example, it has been pointed out that, in general, eliminating the limited liability of corporate parents would create a "perverse incentive" for "corporate dis-integration" in order to minimize liability accruing to the parent from a subsidiary corporation. This would put potential victims of

555. For a discussion of the various sources of money for the Superfund, see supra notes 17-18 and accompanying text. Representative Florio noted during the House debate prior to passage of the statute that CERCLA would raise 87.5% of the necessary funding from the industry tax, and 12.5% from general revenues. Cong. Rec. 31,964 (1980).

556. CERCLA contains a statutory limitation on the liability of "response action contractors" for work performed under certain circumstances in connection with the cleanup of facilities. CERCLA § 119(a), 42 U.S.C. § 9619(a) (1988). Such persons may also be entitled to indemnification by the United States. Id. § 119(c), 42 U.S.C. § 9619(c). Under certain circumstances, however, the contractor's liability will not be limited. Id. § 119(a)(2), 42 U.S.C. § 9619(a)(2) (imposing liability on contractor in instances of negligence). Therefore, even officers, directors and stockholders of response action contractors will have substantial concerns about their liability under CERCLA in certain situations.

557. Easterbrook & Fischel, supra note 516, at 111.
CERCLA LIABILITY

torts in a worse position than they currently stand, because smaller non-integrated corporations are less likely to carry insurance than are larger multi-leveled enterprises. An increase in uninsured and underinsured corporations engaged in handling or cleaning up hazardous substances would presumably have a negative impact on the Superfund, as well as on federal remediation efforts. The consequences of the new rules created by federal courts in CERCLA cases must be evaluated and incorporated into the analysis when determining whether a federal rule is justified.

In summary, despite claims in the CERCLA cases that adoption of state law rules of liability of officers, directors and stockholders would frustrate objectives of the statute, the claims have not been substantiated with persuasive evidence. It is clear that the traditional state rules impose evidentiary and financial burdens on the federal government that are mitigated under the federal rules. No showing has been made, however, that these burdens rise to the level of frustration of CERCLA objectives, particularly when the long-term effects of the state rules and the CERCLA rules are examined. Absent some evidence of frustration, the case for creating new federal rules has not been made.

c. Can the United States Protect Itself?

The third consideration in determining whether adoption of state law would frustrate the federal objectives of a program or statute examines whether the United States would retain any means through which to protect its interests if state law were adopted. Several cases have held that the potential adverse impact of state laws upon federal objectives was mitigated by other opportunities available to the United States to protect its interest. Usually this protection is in the form of precautions that the government can take in the ordinary course of the program in question prior to the onset of litigation. Examples of actions the government can take to protect its interests, so that state law will not have a completely adverse impact, include negotiating favorable terms in a procurement agreement or mortgage as-

558. Id.
559. In re Murdock Mach. & Eng’g Co., 620 F.2d 767, 772-73 (10th Cir. 1980). In Murdock, the court adopted the state enactment of the Uniform Commercial Code in lieu of a federal procurement contract clause which would have given the government a priority claim to the disputed steel in question. Id. at 772. The court held that the state commercial code did not frustrate the objectives of government procurement programs, because “the government is capable of protecting itself within the framework of state commercial law.” Id. The
assignment contract.\textsuperscript{560}

Even when no opportunity exists for the United States to take advance precautions, the government often has one ultimate weapon available to insure that its interests will not suffer unfairly upon adoption of the state rule—the jurisdiction of the federal courts. In \emph{Wilson v. Omaha Indian Tribe},\textsuperscript{561} the United States Supreme Court acknowledged the importance of the right to be heard in federal court.\textsuperscript{562} The case concerned a dispute over whether changes in the course of a river that affected land owned or possessed by the United States or an Indian tribe were avulsive or accretive.\textsuperscript{563} By applying the Kimbell Foods test, the Court determined that the application of state law would not frustrate federal interests.\textsuperscript{564} The Court reasoned that because the federal courts had exclusive jurisdiction over the issue in question, "[a]dequate means are thus available to insure fair treatment of tribal and federal interests."\textsuperscript{565} Thus, even when the potential court reasoned that the government was able to take precautions by negotiating specific contract terms through its superior bargaining position. \textit{id.} at 772-73.

\textsuperscript{560} Chicago Title Ins. Co. v. Sherred Village Assocs., 708 F.2d 804, 811 (1st Cir. 1983). In this case, the Court of Appeals for the First Circuit pointed out that Housing and Urban Development (HUD) required that an initiating lender warrant that a mortgage assigned to HUD is prior to all other liens. \textit{id.} If HUD were to enforce the warranty requirement, the risk of a prior lien would shift to the lender. The lenders could easily protect themselves with title insurance. \textit{id.} As a result, lenders under the HUD program did not need a rule of absolute federal priority of government mortgage liens to protect themselves from prior liens (in the case at bar, a mechanics' lien). \textit{id.} For a discussion of Chicago Title, see \textit{supra} notes 511-14 and accompanying text.

\textsuperscript{561} 442 U.S. 653 (1979).

\textsuperscript{562} \textit{id.} at 670. The Court stated: "It is rudimentary that 'Indian title is a matter of federal law and can be extinguished only with federal consent' and that the termination of the protection that federal law, treaties, and statutes extend to Indian occupancy is 'exclusively the province of federal law.'" \textit{id.} at 670-71 (quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974)).

\textsuperscript{563} \textit{id.} at 660. Iowa residents had been dispossessed by the Omaha Indian Tribe, assisted by the Bureau of Indian Affairs. \textit{id.} at 659-60. The dispossessed parties filed suit, alleging that the changes in the course of the river at issue had eroded Indian land on the west side of the river, and new land that formed on the eastern, Iowa side belonged to the east-bank riparian owners, not the Tribe. \textit{id.} at 660. The United States government and the Tribe contended that the river's movement had been avulsive, and that the shift in the river's location to the west had not affected the boundary of the reservation. \textit{id.}

\textsuperscript{564} \textit{id.} at 673-74. In considering the dispute, the Court saw no need to create a general body of federal common law to decide the issue. \textit{id.} at 673. The Court determined that state law was to be borrowed as the federal rule of decision. \textit{id.}

\textsuperscript{565} \textit{id.} at 674. In addition, the Court regarded as important that this is an area in which the states have a substantial interest in having their own law resolve such disputes. \textit{id.} The Court reasoned that private landowners rely on state real property law and that their expectations should not be upset. \textit{id.}
exists for frustration of government objectives, courts may still adopt state law upon a showing that the United States retains ample opportunity to protect itself.

Although the government does not typically have any opportunity to negotiate protection of federal interests prior to CERCLA recovery or enforcement actions, such actions will be heard in federal courts. As in the Wilson case, federal jurisdiction provides the federal government with a significant advantage in the protection of federal interests. Since federal courts control the process of adopting state law rules, the United States will always be able to turn to the federal courts to assure protection of the federal interests reflected in CERCLA—and to prevent frustration of the federal objectives of the statute.

The weapon of exclusive federal jurisdiction helps the United States protect its interest and prevent frustration of its objectives primarily because of the ability of the federal judiciary to reject particular state laws that are inconsistent with the federal interests. The federal judiciary is able to do this even after state law has in general been adopted to supply the rule of decision. In De Sylva v. Ballentine, the Supreme Court adopted state law to provide the definition of the word "children" for purposes of construing rights under the federal Copyright Act. The Court opined that if a federal rule were applied, reasonable expectations could be upset whenever landowners live adjacent to land in which the United States has a substantial interest.

566. CERCLA § 113(b), 42 U.S.C. § 9613(b) (1988) ("[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.").

567. It is arguable that Congress, by granting exclusive jurisdiction over CERCLA matters to the federal courts, was showing its intent to have only federal rules apply. This argument is based on the fact that state law, if adopted, would be applied without any opportunity for state courts to ever hear the specifics of a CERCLA-type case. Cf. Mishkin, supra note 109, at 819 (opining that in cases heard exclusively by federal courts, if "state law is adopted, it must of necessity be applied without any possibility of state court consideration of the precise type of case").

This argument is easily answered, however, by noting that the state law rules of liability for officers, directors and stockholders are employed regularly by federal courts sitting in diversity jurisdiction. Thus, the federal courts hearing CERCLA liability cases would be intimately familiar with the state law rules if they were asked to apply the state rules.


569. Id. at 580-81. The Court noted the special importance of its ability to apply state law in this context, citing the fact that the pertinent "statute deals with a familial relationship [and] there is no federal law of domestic relations, which is primarily a matter of state concern." Id. at 580.
reserved the right, however, to exclude definitions that it found unacceptable:

This does not mean that a State would be entitled to use the word “children” in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of “children” we deem state law controlling.570

Seventeen years later, the Court reaffirmed this principle in United States v. Little Lake Misere Land Co.571 The Court first declined, as unnecessary, the government’s argument that federal law should govern all acquisition of land by the United States.572 It then refused to adopt Louisiana law governing conveyances of mineral rights reserved in land conveyed to the United States, on the grounds that this particular state statute would frustrate the objectives of the Migratory Bird Conservation Act.573 Although the Court did not apply state law to the transaction in question, it made clear that it was not creating a new federal rule.574

The right of the federal courts to reject aberrant state rules, while maintaining a general policy of following state law, provides a powerful tool for making sure that states do not create “safe havens” for escaping CERCLA liability or otherwise create significant drains on the Superfund. In the event that the common law rule of any state precluded the liability of officers, directors or stockholders even when the individual actively participated in the tortious activity or engaged in conduct that would otherwise sat-

570. Id. at 581.
572. Id. at 595. The Court disagreed with the government: “We find it unnecessary to resolve this case on such broad terms.” Id.
573. Id. at 594-99, 601-03. The Court held that “[t]o permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act.” Id. at 597. The state statute in question would have rendered mineral rights on two land parcels imprescriptible. Id. at 584. The United States had acquired the parcels pursuant to the Migratory Bird Conservation Act as part of a local wildlife refuge. Id. at 582. By the terms of the act, at the end of a given period, all mineral rights reserved to prior owners terminated and complete fee title vested in the United States. Id. at 582-83. Respondents, as prior owners of the two land parcels, argued that state law prohibited any extinguishment of the reservation of mineral rights. Id. at 584. In fact, in reliance on the state law, the respondents had made various arrangements disposing of their mineral rights. Id. Nevertheless, the Court refused to apply state law. Id. at 597.
574. Id. at 603-04. The Court simply rejected the state law in question because it was “plainly not in accord with the federal program.” Id. at 604. Accordingly, the Court decided the cases as if the law never existed. Id.
CERCLA LIABILITY

isfy the traditional piercing the corporate veil rules, a federal
court may reject that rule, while at the same time leaving in place
the rules of liability of the other states. In this way, federal inter-
est may be protected with the least amount of intrusion into state
law matters.575

Therefore, the ability of the federal government to use the
federal courts as a weapon against particular state laws is a final
blow against the argument that adoption of state liability rules
would frustrate the federal objectives of CERCLA. If the United
States can employ the federal courts to reject any state law that
demonstrably interferes with its ability to enforce the provisions
of the statute or that creates a safe haven for polluters, then the
federal objectives of CERCLA will not be frustrated by the hypo-
thetical possibility that such offensive state laws may someday
exist.

* * *

The foregoing discussion has questioned the proposition
that adoption of traditional state law rules of liability of officers,
directors and stockholders will frustrate the federal objectives of
CERCLA. The analysis began by examining the various objec-
tives found in the legislative history or ascribed to the statute by
courts and commentators. From this review two objectives were
ultimately identified as relevant to the inquiry: the identification
and remediation of major hazardous waste sites throughout the
country, and the protection of the Superfund as a source of fund-
ing for these cleanup efforts by recovering from responsible par-
ties. The analysis then looked at various arguments raised in the
CERCLA cases and by various commentators aimed at showing
that these objectives could not be attained if state law were
adopted, and found these arguments generally unpersuasive.
Claims that adoption of state law would lead to the creation of
“safe havens” for polluters and would quickly exhaust the
Superfund were shown to be too speculative to meet the eviden-

J., Spring-Summer 1978, at 1, 3 (describing how federal courts can prevent
choice of certain state rules without foreclosing selection of other state rules or
taking rulemaking power away from states); Field, supra note 353, at 963-73
(comparing state law that applies by federal choice with state law that applies
pursuant to Erie Railroad v. Thompkins, 304 U.S. 64 (1938), and describing how
former remains under control of federal courts). Mr. Broad identifies two com-
promise approaches that the Supreme Court has used to minimize federal intru-
sion into state law: creation of a federal “floor” or “ceiling” that may prohibit
certain substantive law alternatives, but otherwise would leave the state free to
set governing standards; and adoption of particular aspects of state law that sup-
plement the overall federal legal framework. Broad, supra, at 2-6.
tiary standards established in other cases. In addition, the procedural and economic difficulties that incontrovertibly would result from adopting state law were found to be minor burdens not rising to the level of frustration. In fact, because the economic objectives are properly subordinated to the remedial objective of the statute, the financial burdens that may arise from adopting state law must be discounted significantly. Finally, in the event that a particular state law does frustrate the remedial goal of CERCLA or threatens to drain the Superfund, the federal government will still have recourse to have that state law rejected, without disturbing the adoption of the remaining state laws.

C. Will the Adoption of a Uniform Federal Rule Disrupt Commercial Relationships?

The third and final element of the Kimbell Foods test is the consideration of whether the adoption of a uniform federal rule of decision would disrupt commercial relationships predicated on existing state law. In the In re Acushnet River opinion, the court stated that adopting a federal rule of decision would not frustrate commercial relationships based on state law because piercing the corporate veil "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 regard to the internal affairs of the corporation." 

One commentator has similarly argued that although the law of the state of incorporation should regulate the internal affairs of a corporation, the law of the forum should govern external affairs. The commentator noted that application of the law of the state of incorporation to external affairs could pose problems if the litigation involved several different corporations in an integrated corporate structure, each having a different state of incorporation. These arguments essentially suggest that officers,

578. Id. at 31. For a further discussion of In re Acushnet River, see supra notes 152-55 and accompanying text.
579. Note, supra note 109, at 862-63. The commentator refers to this argument as the "internal affairs doctrine." He states that this doctrine governs despite the wide variations among jurisdictions and the possibility that the standards of the state of incorporation may have little connection to the corporate law of the forum state. Id.
580. Id. at 863 ("It is difficult to argue for the preservation of a state's corporate law when litigation involves several members of a corporate family, each incorporated in a different jurisdiction.") (footnote omitted).
directors and stockholders of a corporation can have no reasonable or legitimate expectations that the law of the state of incorporation will protect them in CERCLA liability cases.

In non-CERCLA liability cases, courts have held that disruption of commercial relationships predicated on state law may occur in several different ways. The first way in which courts have examined disruption considers actions taken prior to the creation of the uniform federal rule, and recognizes the difficulties created for entities who thought they would be governed by traditional state law. In United States v. Brosnan, the United States Supreme Court declined to create a federal rule to protect federal tax liens from being extinguished in state foreclosure proceedings. The Court recognized that uniformity might be beneficial to the interests of the United States, but then addressed the possible adverse effects of adoption of a federal rule: "Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt." The Court concluded that it would be "more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area" to forego creating a new federal rule and instead allow the state law to continue governing the foreclosure proceedings.

The Court of Appeals for the Tenth Circuit in Sierra Club v. Hodel similarly refused to replace state standards for certain roads with a new federal standard. The court rejected the proposed federal standard in part because a new federal standard would require thousands of rights of way across the country to be remeasured and marked. The court also noted that over the years numerous property relationships have developed around

582. Id. at 241-42. The Kimbell Foods Court cited Brosnan as authority for the third element of the Kimbell Foods test. See Kimbell Foods, 440 U.S. at 729 n.24.
583. Brosnan, 363 U.S. at 242. The Court recognized the importance of the objective of uniformity in that federal tax liens form part of the machinery for the collection of taxes. Id. at 241. At the same time, however, the Court realized that Congress' regulation of such liens implicates complex property relationships regulated by state law. Id. at 242.
584. Id. at 242.
585. 848 F.2d 1068 (10th Cir. 1988).
586. Id. at 1083. The facts of the case involved an environmental group's action against federal and county officials, seeking to enjoin the county's plan to improve a road that ran through federal land. Id. at 1073-74.
587. Id. at 1082. The court regarded adoption of this federal standard as having little practical value, and predicted that it would cause "an administrative
state-defined rights of way, and that substitution of a federal standard would disturb the expectations of all such parties.588

A second line of cases analyzing the disruption that would occur to commercial relationships with the creation of a new federal rule has focused on the effects that the federal rule may have on actions taken after the federal rule has become well known. Typically, the problem arises because the federal rule grants to the United States some special rights that are not available to others. For example, in \textit{In re Murdock Machine \\& Engineering Co.},589 the Court of Appeals for the Tenth Circuit declined to create a special priority for liens held by the United States in government procurement contracts.590 The special right would have arisen solely as a result of the government's interest in the property, even if such interest were not known to the general public. The federal government, under the requested right, would have had priority over liens created in favor of other parties under the Uniform Commercial Code.591 The court viewed this secret lien as disruptive of the marketplace, due to the increased investigation that a seller would have to undertake in a transaction by forcing him to determine if the United States were involved.592 State law
duststorm that would choke the [Bureau of Land Management's] ability to manage the public lands." \textit{Id.}

588. \textit{Id.} at 1082-83; see also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 674 (1979) (purchasers of real property rely on state real property law; reasonable expectations should not be upset by virtue of land's proximity to Indian reservation or other property in which United States had interest).

589. 620 F.2d 767 (10th Cir. 1980).

590. \textit{Id.} at 772. In Murdock, a seller of steel to a government contractor reclaimed a shipment of steel after the contractor filed for bankruptcy. \textit{Id.} at 769. The government asserted a superior right to the steel under a title-vesting clause in its procurement contract with the contractor that gave the government title to all materials as of the date of the contract. \textit{Id.} The government argued that no creditor should be allowed to obtain a lien against any public work to which the government had taken title without the government's prior consent. \textit{Id.} at 770.

591. \textit{Id.} at 769.

592. \textit{Id.} at 772. The Court declared that this added burden on commerce was not justified:

\begin{quote}
In our view, if the government is allowed greater rights in the marketplace than others, then in every sale, including those between private parties, it becomes for the seller relevant, and perhaps critical, to probe whether the government is somehow secretly involved. Once government involvement is discovered, the peculiar legal effect of such involvement as it bears on the seller's risks must be ascertained. . . . Mindful of the burdens of time and expense such investigations would impose on our nation's commerce, and the injustice which would result by dealing government "wildcards" to businessmen at random, we are not inclined to create a special commercial law for the government's benefit.
\end{quote}
CERCLA LIABILITY

was therefore applied.

The Court of Appeals for the Ninth Circuit articulated a similar concern in Dupnik v. United States, and proceeded to adopt state redemption procedures as the governing federal common law. In Dupnik, the SBA, as junior lienholder on a property sold at foreclosure sale, failed to comply with state law redemption notice procedures. The court declared that the notice provision was designed to protect the redemption rights of all lien creditors. Therefore, the court reasoned that if it relieved the SBA of the notice requirements for redemption after foreclosure, the result would be a disruption of the expectations of lien creditors. Thus, the court declined to create a federal rule that would relieve the SBA of its duties.

The third way in which courts have found disruption of commercial relationships is in the uncertainty created by the infusion of a new federal law. In Mardan Corp. v. C.G.C. Music, Ltd., the Court of Appeals for the Ninth Circuit described two ways in

Id. But cf. United States v. Haddon Haciendas Co., 541 F.2d 777, 785 (9th Cir. 1976) (federal rule allowing post-foreclosure actions for damages was not unduly intrusive on state’s laws protecting debtors, because protection afforded by state laws to debtors would be supplied in substantial measure by federal rule and by other aspects of federal program).

593. 848 F.2d 1476 (9th Cir. 1988).

594. For a further discussion of the facts of Dupnik, see supra notes 525-28 and accompanying text.

595. Dupnik, 848 F.2d at 1484. But see Ayers v. Philadelphia Hous. Auth., 908 F.2d 1184, 1191-93 (3d Cir. 1990) (declining to adopt state law and regulations governing default notices and foreclosure procedures for use in connection with federal Housing and Urban Development program), cert. denied, 111 S. Ct. 1003 (1991). The Ayers court distinguished United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) and United States v. Walter Dunlap & Sons, Inc., 800 F.2d 1232 (3d Cir. 1986) on the basis that both cases had taken into account the disruption that creation of a new federal rule would have on third parties, such as creditors of the defendants, who were depending on state law to govern their business dealings. Ayers, 908 F.2d at 1191. In distinguishing those two cases, the Ayers court held that where the matter concerned only the United States and federal program participants and there were no other third parties who would normally rely on state law, as in the case at bar, the rationale of Kimbell Foods and Dunlap was not controlling. Id. at 1191; accord United States v. Spears, 859 F.2d 284, 289-91 (3d Cir. 1988); United States v. Pisani, 646 F.2d 83, 87 (3d Cir. 1981).

Ayers is distinguishable from the issue of CERCLA liability of officers, directors and stockholders. The relevant CERCLA question to be answered by either the state or federal rule is whether the officers, directors and stockholders of a responsible corporation are third parties or whether they are liable for the cleanup costs. Moreover, the commercial relations affected by the rules created in the CERCLA cases will affect others who are without question third parties, such as creditors of corporate parents and other stockholders of responsible corporations.

596. 804 F.2d 1454 (9th Cir. 1986).
which a federal rule governing CERCLA releases would result in confusion and uncertainty for commercial relationships predicated on state law:

One, buyers and sellers would face greater confusion about which body of law to turn to. Two, the creation of a federal rule, as opposed to incorporating a ready-made and fully fleshed out body of state law, would, during the development of that federal rule, leave parties very uncertain about what rule governed CERCLA releases. 597 Therefore, the court declined to create a uniform federal rule of decision to govern settlements among private parties over contribution rights in CERCLA liability disputes, opting instead to adopt existing state law. 598

The federal rules of direct liability and piercing the corporate veil articulated in the CERCLA cases will disrupt the commercial relationships in each of the three ways identified in existing jurisprudence. First, although the state laws are not exactly settled, they have never gone quite as far as the position adopted in the CERCLA cases. The state law rules typically require evidence of some link between the harm that has occurred and the actions or wrongful omissions of the officer, director or stockholder who is potentially liable. 599 The CERCLA cases have generally dispensed with this link. 600 Therefore, a stockholder who has invested in a corporation prior to the advent of the new CERCLA rules, believing that his liability would be limited except in alter ego situations, now would find himself potentially personally liable under the CERCLA rules simply by virtue of his participation in management of the corporation. He would not have contemplated or evaluated potential liability of this nature prior to investing in the corporation.

As in Kimbell Foods, the new federal rule of expanded indirect liability for stockholders in CERCLA cases will thwart the ability of a stockholder to evaluate the risk before investing. Further-

597. Id. at 1460. Therefore, the Mardan court refused to fashion a federal rule because it would undermine the stability of the state law which would usually govern commercial transactions. Id.
598. Id.
599. For a discussion of the state law requirement of a connection between the harm and the conduct of the officer, director or stockholder, see supra notes 274-75, 295-96, 300 and accompanying text.
600. For a discussion of the CERCLA cases' failure to require a connection between the harm and the conduct of the officer, director or stockholder, see supra notes 276-78, 297-99 and accompanying text.
more, creditors who finance a parent corporation will now have to concern themselves with the parent’s liability for damages incurred by the subsidiary. This represents a risk they did not have to consider when they originally priced and made loans to the parent.

With respect to liability expectations, the district court in In re Acushnet River601 missed the issue entirely. The In re Acushnet River court opined that, because only the internal affairs of a corporation are governed by the state of incorporation, stockholders did not expect that the law of that state would govern liability to third parties, and therefore the application of a federal rule concerning stockholders’ liability to third parties would not interfere with settled expectations. That the law of the state of incorporation governs the internal relations between a corporation and its stockholders, as the In re Acushnet River court noted, holds no significance here. It is true that the law of the forum state, not that of the state of incorporation, governs direct liability and piercing the corporate veil. The fact remains, however, that officers, directors and stockholders do enter into commercial relationships with third parties through the vehicle of the corporation, and that these relationships have been predicated on state laws, including laws of the states where they are doing business, that date back long before the enactment of CERCLA. Thus, for example, although a stockholder may look to the law of the state of incorporation to determine his rights vis-a-vis the corporation, a mountain of precedent points to the law of the state in which the corporation is doing business when issues of his liability to third parties are raised.602 This precedent, as well as the law of the state of incorporation, provides the foundation on which the commercial relations are built.

Some commentators have questioned the usefulness of the precedent that dictates that the law of the forum state be applied in determining the liability of an officer, director or stockholder to a third party.603 One distinguished critic of traditional piercing the corporate veil doctrine, Professor Blumberg, has argued...

601. 675 F. Supp. 22 (D. Mass. 1987). For the In re Acushnet River court’s statements concerning disruption of commercial relationships, see supra note 578 and accompanying text.

602. For a discussion of cases concerning indirect liability under state law, see supra notes 231-73 and accompanying text.

603. See, e.g., P. Blumberg, supra note 108, § 2.04.4, at 61 (“The deficiencies in ‘piercing the veil jurisprudence’ make reference to state law undesirable . . . .”).
forcefully that courts should not necessarily apply decisions concerning the piercing doctrine in one field of law to other areas of the law.\textsuperscript{604} The problem, according to Professor Blumberg, is that any case involving the statutory liability of a parent corporation should be controlled by the specific objectives and policies of the statute in question—not by principles from common law torts or contracts.\textsuperscript{605} Universal principles, he argues, should be eschewed in favor of judicial interpretation of the scope of the statutes. In the case of federal statutes, the task of judicial interpretation falls squarely within the province of the federal courts.\textsuperscript{606}

Professor Blumberg’s admonition against using, in statutory contexts, piercing the corporate veil rules developed in other areas of the law underestimates the flexibility of piercing the corporate veil as an equitable remedy. As noted in connection with the need for uniformity, equity depends “upon the particular circumstances of each individual case.”\textsuperscript{607} This aspect of the doctrine destroys the possibility of achieving uniformity. It provides, on the other hand, precisely the quality that makes piercing the corporate veil a powerful tool with universal application across all

\begin{itemize}
  \item \textsuperscript{604} Id. \textsuperscript{\$} 2.02.2, at 40 (“[T]he conceptual standards of entity law are frequently regarded as universal principles and applied indiscriminately across the entire range of law.”).
  \item \textsuperscript{605} Id. Professor Blumberg refers to such arbitrary application of law as “unacceptable.” He states that “[i]n any area of law, the particular objectives and policies of the area under consideration should control.” Id.
  \item \textsuperscript{606} Cf. id. \textsuperscript{\$} 2.03, at 47-58. The statutory interpretation method of expanding liability of stockholders favored by Professor Blumberg, absent some clear expression of congressional intent, would still frustrate reasonable commercial expectations in the CERCLA context. An express statutory provision imposing liability on officers, directors or stockholders puts such persons on notice of their potential risks, thus allowing them to plan their business relationships. It is true that even if such legislation does not exist at any given time, Congress can always amend its statutes or enact new legislation which extends liability to parties not previously included. Amendment or enactment, however, would usually happen slowly. Accordingly, the public could track the legislation as it approaches enactment and reassess its potential liability.
\end{itemize}
areas of law. In its equity jurisdiction, a federal court has the power to take into account the objectives and policies of the particular statute in question. At the same time, however, the court may consider other important factors, such as the conduct of the individual whose liability is at issue. Questions of justice can be treated on an individual basis.

Creation of a new federal rule of liability for officers, directors and stockholders would therefore result in significant disruption of commercial relations that have previously developed under the governance of traditional state law rules of liability. The disruption would arise from the fact that a much higher level of risk of liability radiates out to affect others such as lenders who deal with such individuals and corporations.

Commercial relationships would also be disrupted with respect to actions taken after the CERCLA liability rules have been adopted. To the extent that the courts give the United States greater rights than other creditors in reaching the assets of a corporate stockholder, a potential post-CERCLA-rules creditor of that stockholder would have to investigate corporations in which the stockholder owned substantial stock. It would be necessary for the creditor to make such an appraisal in order to determine if the United States could possibly have a claim against the stockholder for CERCLA liability. Thus, under CERCLA liability rules granting enhanced rights to the United States, a bank making a loan to a corporate parent would have to conduct an environmental investigation of all of the subsidiaries of that parent in order to ascertain the likelihood of any CERCLA liability that may flow...
through to affect the parent. The difficulties posed by such a scenario are enhanced because of the number of problems that even a thorough environmental investigation cannot uncover. Even worse, the parent's creditor would have no way to predict environmental disasters that could befall one or more of the subsidiaries after the creditor makes the initial loan.

Ultimately, the new CERCLA rules will require the creditor to factor into its costs the risks of CERCLA liability not only to the parent corporation, but also to the subsidiaries. Under traditional rules, the maximum loss that the parent corporation could suffer would not exceed the amount that the parent invested in the subsidiary, absent some basis for piercing the corporate veil. Under the CERCLA rules, however, this exposure would expand greatly as the traditional safeguards are abandoned. Under the traditional state rules, the creditor could further protect itself by imposing covenants on the corporate parent and monitoring its behavior. Under the uniform federal rule, however, the potential for exposure of the corporate parent would exist even if the parent has acted properly and no element of injustice or inequity is present. Thus, the commercial relationships predicated on traditional state piercing the corporate veil and direct liability laws would be disrupted on an ongoing basis, as creditors would be forced to analyze the cost of potential liability of corporate parents to the United States.

Finally, new federal rules of liability would create a tremendous amount of confusion and uncertainty about whether federal or state law governed. In situations with multiple parties and numerous contribution and indemnification claims growing out of the government's claim, it would be extremely difficult to determine which rule ought to regulate the various aspects of the litigation.\footnote{For a discussion of the multiplicity of parties and claims the government can invoke in CERCLA litigation, see supra notes 8-12, 493-95 and accompanying text.} Furthermore, as discussed in connection with the need for uniformity, the federal circuits will not agree on the liberal environmental rules for quite some time. This is particularly true in light of the great diversity that presently exists in the area of federal piercing the corporate veil law.\footnote{For a discussion of the diversity among the circuit courts concerning the federal doctrine of piercing the corporate veil, see supra notes 418-24 and accompanying text.} In the interim, corporate officers, directors and stockholders must continue to create and maintain their commercial relations, without knowing...
whether the existing state law or a much different federal law will apply.

In summary, the third element of the *Kimbell Foods* test also weighs in favor of adoption of state liability rules for officers, directors and stockholders. The analysis of this part of the test shows that substituting a new federal rule for the existing state law would adversely affect commercial relationships that have developed, and will in the future develop, under such state law. The cases and commentators advocating the creation of a federal rule have consistently underestimated the disruptive effects of changing the law. They have tended to minimize the reliance that officers, directors and stockholders, and creditors, employees and others with a stake in the viability of the corporation, have placed on the state laws governing the corporation's place of business. Anyone working for, investing in or extending credit to a corporation (or to a corporation's officers, directors or stockholders) will certainly have a substantial body of expectations concerning the law of liability, based on long traditions and precedent. By injecting a new federal rule of CERCLA liability to accompany traditional state law, the CERCLA cases create havoc for these expectations. Accordingly, the third element of the *Kimbell Foods* test also supports adoption of state law liability rules.

**IV. CONCLUSION**

Despite the attempts by the federal courts to link the CERCLA rules of liability for officers, directors and stockholders to common law precedent, the CERCLA rules represent judicial lawmaking that transcends the present state of the law. The evolution in the law that has taken place thus far, coupled with the continuing need for money to resolve the problem of environmental dangers, provide good reason to presume that the evolution any process will continue. The power of the federal courts to create new law in interpreting federal statutes is not, however, unlimited. The penchant of the federal courts for creating new federal rules to fill in the gaps of a federal statute should occasionally be curbed in favor of adopting the existing background of state law. The liability of officers, directors and stockholders under CERCLA presents such an occasion.

State law on the liability of officers, directors and stockholders has received tremendous criticism. The rules of liability, particularly with respect to piercing the corporate veil, are difficult to formulate and apply. At times, no doubt, courts have applied the
traditional laws unevenly. The traditional laws, however, will cer-
tainly keep growing as courts continue to struggle with the issues. 
The critical question is how this development of the law should 
take place. May federal courts, in their allotted function of creat-
ing federal common law in federal question cases, attempt to fix 
or replace the rules of liability? Or are the federal courts rele-
gated to the role of following state courts on this issue, except for 
extraordinary circumstances?

In the case of CERCLA, federal courts have answered this 
question by asserting hegemony over the state courts. This is 
perhaps in recognition of, or frustration with, the almost incom-
prehensible cost of remedial action and the comprehensibly finite 
amount of government resources available for the job. The fed-
eral courts have fashioned new rules for use in deciding liability in 
this small corner of the law.

The right of federal courts to take this initiative, however, as 
some CERCLA opinions have recognized, is governed by the 
holding of United States v. Kimbell Foods, Inc. The three-part test set 
out in Kimbell Foods provides a balancing test by which the federal 
judiciary is to decide whether to subordinate its role in the growth 
of particular areas of law not expressly committed to them by stat-
ute. In the case of liability of officers, directors and stockholders 
under CERCLA, the test dictates that this area is best left to the 
state courts. Existing state laws of direct liability and piercing the 
corporate veil, with all of their latent defects, remain powerful 
tools to make officers, directors and stockholders answerable for 
their actions. Improvements to this law should reflect general 
changes in attitudes toward corporations and the individuals who 
own and work in them, not localized attempts to perfect federal 
statutes.