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Parent Corporation Liability for Subsidiary Violations Under § 107 of CERCLA: Responding to United States v. Cordova Chemical Co.

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Parent Corporation Liability for Subsidiary Violations Under § 107 of CERCLA: Responding to *United States v. Cordova Chemical Co.*

I. INTRODUCTION

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)[1] to combat the emerging difficulties associated with the clean-up costs of hundreds of leaking hazardous waste disposal sites across the nation.[2] In the complex world of environmental torts under CERCLA, the often overwhelming cost of liability has generated a new set of legal problems as government enforcement actions against hazardous waste sites have advanced. One particular area of CERCLA liability that has progressed over the past decade concerns parent corporation liability. Under CERCLA's liability scheme, courts have extended liability to the parent corporation of an immediately responsible subsidiary corporation.[3] The issue of parent corporations' liability for the environmental violations of their subsidiaries has intensified as a result of the Sixth Circuit's recent ruling in *United States v. Cordova Chemical Co.*[4] In an en banc decision, the court held that a parent corporation is liable for contamination caused by a subsidiary only if its control over the subsidiary warrants piercing the corporate veil under state law.[5]

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1. 42 U.S.C. §§ 9601-9675 (1995).

2. The House Report on H.R. 7020, which eventually developed into CERCLA, articulated the aims of the bill as:

> an inventory of inactive hazardous waste sites in a systematic manner, establishment of priorities among the sites based on relative danger, a response 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 hazardous waste sites to assure protection of public health and the environment in a cost-effective manner.

H.R. REP. NO. 96-1016, pt. 1, at 25 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6128.

3. *See infra* note 6.

4. 113 F.3d 572 (6th Cir. 1997), *cert. granted sub nom.* United States v. CPC Int'l, Inc., 66 U.S.L.W. 3194, 66 U.S.L.W. 3411, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997) (No. 97-454).

5. *See id.* at 580. *See generally infra* Part II.A.

The decision is favorable to shareholders and parent corporations that were banking on the time-honored concept of limited liability protection of the corporate form. However, the majority of circuits that have considered this issue have allowed imposition of liability under § 107 of CERCLA on parent corporations and shareholders without first finding that the corporate veil can be pierced.[6] The Sixth Circuit has thrown itself into the clear minority on the issue of parent corporation liability under CERCLA.

With the federal circuits in direct conflict, the issue of what legal standard applies in determining whether a parent corporation can be liable under CERCLA is ripe for Supreme Court review. Although the Court has repeatedly denied government and industry petitions for certiorari, choosing in effect "to acquiesce in the lower courts' imposition of an expansive program of joint and several liability,"[7] the issue of parent corporation liability under § 107 is "a core question"[8] that warrants the Court's scrutiny.

This Note examines the *Cordova* decision and the legal standards for holding parent corporations liable for the environmental violations of their subsidiaries. Part II discusses the common law doctrine of corporate limited liability and the enactment of CERCLA, summarizing the dichotomous background against which *Cordova* was decided. Part III contains a description of the facts in *Cordova* and the court's analysis. Part IV analyzes

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6. *See* Certain Underwriters at Lloyds, London v. St. Joe Minerals Corp., 90 F.3d 671 (2d Cir. 1996); Schiavone v. Pearce, 79 F.3d 248 (2d Cir. 1996); United States v. TIC Inv. Corp., 68 F.3d 1082 (8th Cir. 1995); Landsford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209 (3d Cir. 1993); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, (11th Cir. 1993); John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993); Nurad, Inc. v. William E. Hooper & Sons, Co., 966 F.2d 837 (4th Cir. 1992); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990). *But cf.* Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990) (ruling that a parent corporation's liability must be established by piercing the corporate veil). The remaining vitality of *Joslyn* is open to question because the Fifth Circuit later decided that individual officers and employees may be held directly liable as Superfund operators when they actually participate in wrongful conduct and that "[t]his personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" Riverside Mkt. Dev. Corp. v. International Bldg. Prods. Inc., 931 F.2d 327, 330 (5th Cir. 1991) (quoting United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 744 (8th Cir. 1986)).

7. Richard Lazarus, *An End to the Court's Superfund Silence?*, ENVTL. F., Sept.–Oct. 1997, at 8, 8.

8. *Id.*

the problematic modes of analysis currently adopted by courts in determining parent corporation liability under CERCLA, recognizes the need for uniformity among the courts, and suggests a new approach. Part V concludes that determining parent corporation liability should be based on uniform factor-based standards that balance traditional notions of corporate limited liability with CERCLA's underlying purpose of efficient environmental clean-up.

II. BACKGROUND

A. Common Law Corporate Limited Liability

Historically, corporate owners have been safeguarded by limited liability.[9] The notion of limited liability was created to protect corporate owners from the risks inherent in owning a business, thus allowing commerce and free enterprise to thrive.[10] Corporate shareholders—individuals and parent corporations—are generally viewed as entities separate from the corporation itself. Shareholders are therefore protected from the corporation's liabilities by the corporate veil "unless specific, unusual circumstances" dictate that the veil be pierced and that the corporate form be ignored.[11]

Common law principles prescribe that a parent corporation can be liable for the actions of its subsidiary under circumstances that justify "piercing the corporate veil." Simply stated, the doctrine of piercing the corporate veil refers to the process of disregarding the corporate entity to hold either corporate shareholders, directors, or parent corporations liable for acts of the

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9. *See Schiavone*, 79 F.3d at 252-54; Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994); *Lansford-Coaldale*, 4 F.3d at 1220; International Bhd. of Painters & Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546, 1550 (D.C. Cir. 1988) ("Limited liability is a hallmark of corporate law . . . a universal and time-honored concept.").

10. *See* David H. Barber, *Piercing the Corporate Veil*, 17 WILLAMETTE L. REV. 371, 371 (1981).

11. Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967) ("[A]ny court must start from the general rule that the corporate entity should be recognized and upheld, unless specific, unusual circumstances call for an exception."); *see* United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905) ("[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears . . . ."); 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 25 (perm. ed. rev. vol. 1990) (noting that, notwithstanding the relationship between a parent and a subsidiary, "each is deemed to have an independent existence").

corporation or subsidiaries.[12] In terms of parent corporations, courts will generally pierce the corporate veil and hold the parent liable for the actions of the subsidiary if the subsidiary was formed to perpetrate a fraud or if the parent is found to have controlled the subsidiary.[13] Congress enacted CERCLA against the backdrop of this common law pedigree favoring limited liability for parent corporations unless the corporate veil is pierced.

B. Enactment of CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act in 1980[14] "to address the increasing environmental and health problems associated with inactive hazardous waste sites."[15] The statute accomplishes this purpose by placing the supreme financial burden for clean-up on those responsible for the pollution.[16]

Imposition of liability under CERCLA requires that the government show: (1) the contaminated property or site is a "facility;" (2) a "release" or "threatened release" of a "hazardous substance" has occurred; (3) "response costs" have been incurred as a result of the release or threatened release;[17] and (4) the party

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12. See generally HENN & ALEXANDER, *supra* note 11, § 146, at 344-52 for a full discussion of "piercing the corporate veil."

13. *See, e.g.*, United States v. Jon-T Chems., Inc., 768 F.2d 686 (5th Cir. 1985) (holding parent liable for subsidiary's fraudulently obtaining farm subsidies); Milgo Elec. Corp. v. United Bus. Communications, Inc., 623 F.2d 645 (10th Cir. 1980) (holding parent liable for subsidiary's patent infringement); Sabine Towing & Transp. Co. v. Merit Ventures, Inc., 575 F. Supp. 1442 (E.D. Tex. 1983) (holding parent liable for subsidiary's breach of a maritime agreement); Anderson v. Kennebec River Pulp & Paper Co., 433 A.2d 752 (Me. 1981) (finding corporate veil pierced to allow attachment of parent corporation's property); Seasword v. Hilti, Inc., 537 N.W.2d 221, 224 (Mich. 1995); Herman v. Mobile Homes Corp., 26 N.W.2d 757 (Mich. 1947) (holding parent liable for subsidiary's breach of contract)(finding corporate veil may be pierced where the subsidiary is "'a mere instrumentality' of the parent" and the separate corporate existence is used to subvert justice or cause result contrary to clearly overriding public policy) (quoting Maki v. Copper Range Co., 328 N.W.2d 430, 433 (Mich. Ct. App. 1982)).

14. 42 U.S.C. §§ 9601-9675 (1995).

15. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 841 (4th Cir. 1992).

16. *See* United States v. Alcan Aluminum Corp., 964 F.2d 252, 259 (3d Cir. 1992); *see also* J.V. Peters & Co. v. Administrator, 767 F.2d 263, 264 (6th Cir. 1985).

17. CERCLA provides definitions of "facility," "hazardous substance," and "release" in 42 U.S.C. § 9601(9) (1995) which states:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area

to be held responsible falls within one of the four classes of potentially responsible parties (PRPs) described in § 107(a) of CERCLA.[18] These four classes of PRPs under § 107(a) include entities who are or have been engaged in: (1) present ownership or operation of a hazardous waste disposal site, (2) past ownership or operation when the hazardous substance was disposed, (3) the generation of hazardous waste (generator or arranger liability), or (4) transportation of such waste.[19]

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where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id. Title 42 U.S.C. § 9601(14) (1995) states:

> The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C. 6901 *et seq.*] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Id. In addition, 42 U.S.C. § 9601(22) (1995) states, in part:

> The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident . . . .

Id.

18. *Id.* § 9607(a).

19. Title 42 U.S.C. § 9607(a) (1995) states, in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section–
>
> (1) the owner and operator of a . . . 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,

Parent corporations are primarily affected under the "owner or operator" language of § 107(a). CERCLA defines "owner or operator" to mean "any person owning or operating such facility."[20] The term "person" is defined to include individuals and corporations, but does not expressly refer to parent corporations.[21] When considering the liability of parent corporations for the environmental violations of their subsidiaries, courts have been faced with the task of determining whether the applicable standard of liability derives from specific application of the statutory definitions of CERCLA or from common law principles of corporate law.[22]

C. Interpretation by the Courts

Courts have allowed CERCLA liability to be imposed on parent corporations for the environmental violations of their subsidiaries using two different frameworks: first, a parent corporation may be held directly liable through the statutory "operator" language of CERCLA; second, a corporation may be held indirectly liable as an "owner" through common law veil-piercing principles.[23]

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . .
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substances, shall be liable for–
> (A) all costs of removal or remedial action . . . .

Id.

20. *Id.* § 9601(20)(A)(ii).

21. *See id.* § 9601(21) (defining "person" as an "individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body").

22. *See* Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 301 (1992).

23. *See, e.g.*, Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1224-25 (3d Cir. 1993) (recognizing that the veil-piercing test is the correct test to apply in the "owner" liability context, but holding that the supposed "parent corporation" was actually a sister corporation to the violating subsidiary for the bulk of the period in question, so "owner" liability not applicable); United States v. Kayser-Roth Corp., 910 F.2d 24, 25-28 (1st Cir. 1990) (recognizing that a parent corporation can be indirectly liable as an "owner" by piercing the corporate veil, but holds the parent corporation liable as an "operator," and subsequently declines to consider arguments advanced regarding the parent corporation's liability as an "owner").

To find direct statutory liability, federal appellate courts have developed two different standards for considering a party's liability as an "operator" under CERCLA. First, the majority standard provides that direct liability will only occur if the parent corporation is found to have actually controlled the environmental operations of the offending facility.[24] The second standard, which has been articulated by two circuit courts, imposes liability on parent corporations for merely having the authority to control the operations of their subsidiary.[25]

Under the indirect liability mechanism, courts have generally examined two primary elements in determining whether the corporate veil should be pierced. First, courts inquire whether the corporation and the shareholder share such a unity of interest and ownership between them that the two no longer exist as distinct entities.[26] Second, courts determine whether failure to disregard the corporate form would create an inequita-

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24. *See, e.g.*, Schiavone v. Pearce, 79 F.3d 248, 254-56 (2d Cir. 1996) (holding actual control test should be applied, remanded to trial court to make factual determinations concerning the level of control the parent corporation exerted over its subsidiary); *Lansford-Coaldale*, 4 F.3d at 1220-23 (stating actual control test should be applied in "operator" liability context, but corporations maintained a sister corporation relationship instead of a parent-subsidiary relationship and one did not control the other because the two corporations: maintained separate corporate minutes, funds, assets, and personnel policies; were separately audited; produced independent financial statements; and paid bills separately); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) (holding parent corporation not liable as "operator" because it did not exert necessary actual control over subsidiary even though parent corporation: owned all or almost all subsidiary's stock; dictated the terms of employment of president and other executive officers of subsidiary; created profit-sharing plan for subsidiary's officers; and received reports on status of subsidiary's operations); *Kayser-Roth*, 910 F.2d at 27 (finding that parent corporation exerted total control over subsidiary through: total monetary control, including collection of accounts payable and restriction on financial budget; directive that government contact be funneled directly through parent; requirement that all leasing, buying, or selling of real estate be approved first by parent; policy that parent approve any capital transfer or expenditure greater than $5000; and placing parent personnel in almost all subsidiary's director and officer positions).

25. *See* Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341 (9th Cir. 1992); Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992).

26. *See* FMC Fin. Corp. v. Murphree, 632 F.2d 413, 422 (5th Cir. 1980); United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774 (9th Cir. 1977). The first element can be established by showing that the corporation was controlled by an alter ego. *See* Berger v. Columbia Broad. Sys., Inc., 453 F.2d 991, 995 (5th Cir. 1972). This would not include "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." *Id.*

ble result.[27] Notwithstanding these general elements, in cases involving the enforcement of federal statutes, federal courts have employed a less rigorous test: whether it is "in the interests of public convenience, fairness and equity" to disregard the corporate form in light of the statutory purposes.[28] A conflict currently exists as to whether state or federal veil-piercing doctrines should apply in CERCLA liability situations.[29]

Thus, the courts' decisions concerning parent corporation liability under CERCLA have produced not only a dichotomous body of case law, but also one that is inconsistent.[30] The following diagram shows the various approaches courts have used to determine parent corporation liability under CERCLA.

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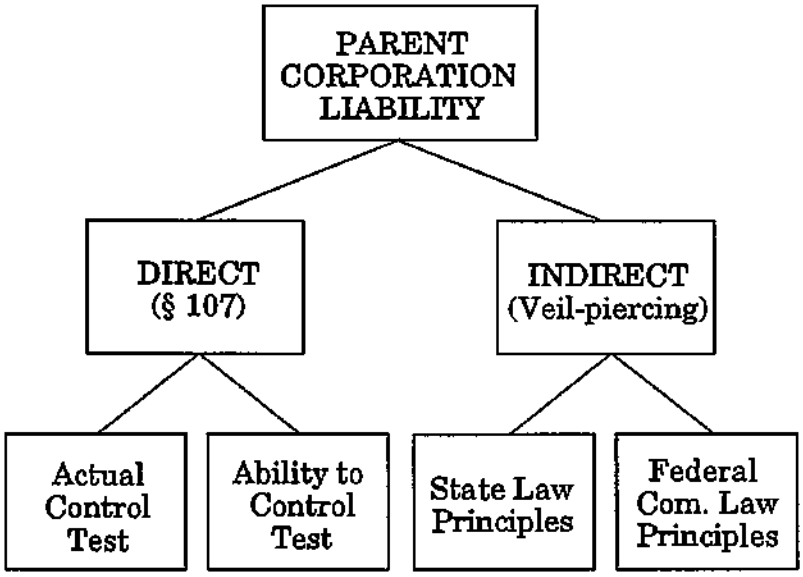
27. *See* DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681, 689 (4th Cir. 1976); Automotriz Del Golfo de Cal. S.A. v. Resnick, 306 P.2d 1, 3 (Cal. 1957). This second element is satisfied when the failure to disregard the corporate entity would result in fraud or injustice. *See DeWitt Truck Brokers*, 540 F.2d at 684; Chengelis v. Cenco Instruments Corp., 386 F. Supp. 862, 885 (W.D. Pa. 1975), *aff'd mem.*, 523 F.2d 1050 (3d Cir. 1975).

28. Capital Tel. Co., v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974); *see* Taylor v. Standard Gas & Elec. Co., 306 U.S. 307, 322 (1939). In applying this rule, "federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form." Town of Brookline v. Gorsuch, 667 F.2d 215, 221 (1st Cir. 1981).

29. *Compare* United States v. Cordova Chem. Co., 113 F.3d 572, 581 (6th Cir. 1997) (applying state law), *cert. granted sub nom.* United States v. CPC Int'l, Inc., 66 U.S.L.W. 3194, 66 U.S.L.W. 3411, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997) (No. 97-454), *with In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp 22, 30-31 (D. Mass. 1987) (applying federal law).

30. The court in *In re Acushnet River & New Bedford Harbor Proceedings* noted CERCLA's "inartful draftsmanship" makes the court's task of determining the law's meaning "tougher and increases the chances that courts around the country will adopt differing approaches to major, national anti-pollution legislation." 675 F. Supp. at 26 n.2. Indeed, this observation has proven prophetic.

LEGAL DICHOTOMY FOR PARENT CORPORATION LIABILITY UNDER CERCLA



Against this legal background, the Sixth Circuit decided *United States v. Cordova Chemical Co.*[31]

III. *UNITED STATES V. CORDOVA CHEMICAL CO.*

A. Facts

From 1957 to 1977, a series of companies utilized a Dalton Township, Michigan site to manufacture chemicals.[32] The initial owner, Ott Chemical Company (Ott I), controlled the site from 1957 to 1965. In 1965 CPC International, Inc. (CPC) acquired Ott I by incorporating a new subsidiary that assumed the name of Ott Chemical Company (Ott II). In 1972, Story Chemical Company (Story) acquired the site from Ott II and operated it until 1977.[33] Throughout this twenty-year period, pollution resulted from several sources including: (1) chemical waste disposal in unlined lagoons, (2) chemical spills from train cars, (3)

31. 113 F.3d at 572.
32. *See id.* at 575.
33. *See id.* at 575-76.

leaking chemical drums, and (4) overflows of chemicals contained in a cement-lined equalization basin and other sources.[34]

Active governmental response to the pollution problems began in 1977, when Story declared bankruptcy.[35] The Michigan Department of Natural Resources (MDNR) actively pursued potential buyers for the site and eventually secured Cordova Chemical Company (Cordova), a wholly-owned subsidiary of Aerojet-General Corporation (Aerojet), as a buyer for the site.[36] While MDNR and Cordova agreed that Cordova would eliminate the gas waste and pay MDNR $600,000 to cure the waste containers, sludge, and residential walls, the agreement left the clean-up of groundwater contamination unresolved.[37] Because the groundwater contamination problem was not remedied, the Environmental Protection Agency (EPA) brought an action against the site's current and former owners in 1981 to determine responsibility for past and future clean-up costs of the site's soil, surface water, and groundwater.[38]

The district court ruled that "operator" liability under § 107(a)(2) could attach to parent corporations in two different ways.[39] First, liability could be directly imposed on parent corporations under the "operator" language of § 107(a)(2).[40] Second, parent corporations could be held vicariously liable for waste disposal during their subsidiary's tenure at the site under the common law concept of piercing the corporate veil.[41] In determining if a parent corporation "operated" the site, the district court adopted a "new, middle ground" standard that imposed liability when a parent corporation "has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste."[42] The district court applied this

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34. *See id.* at 576.

35. *See id.*

36. *See id.* Cordova transferred ownership of the site to a wholly-owned subsidiary, Cordova Chemical Company of Michigan, who operated the manufacturing facility until 1986, and retained ownership thereafter. *See id.*

37. *See id.*

38. *See id.* at 577; CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991).

39. *See CPC Int'l*, 777 F. Supp. at 571-72.

40. *See id.* at 572.

41. *See id.*

42. *Id.* at 573. This is an articulation of the "actual control" test. *See supra* Part II.C.

standard and found CPC directly liable under § 107(a)(2) as an "operator" at the time of disposal "because CPC actively participated in and exerted significant control over Ott II's business and decision-making."[43] Because the court found CPC directly liable as an operator, it declined to rule on the common law veil-piercing theory.[44] The court likewise held Aerojet directly liable under § 107(a)(2) because of Aerojet's "participation and control over the board, management and decision-making at Cordova" during past waste disposal.[45]

On appeal, the Sixth Circuit rejected the district court's ruling, holding "where a parent corporation is sought to be held liable as an operator . . . based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met."[46] Applying Michigan state law, the court found that the corporate veil had not been pierced;[47] thus, parent corporations CPC and Aerojet could not be held liable for their subsidiaries' operation at the Dalton Township site.[48]

B. The Sixth Circuit's Reasoning

The *Cordova* court first examined the remedial purpose of CERCLA.[49] The Sixth Circuit noted that CERCLA was enacted

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43. *Id.* at 574.

44. *See id.* at 575.

45. *Id.* at 580.

46. United States v. Cordova Chem. Co., 113 F.3d 572, 580 (6th Cir. 1997), *cert. granted sub nom.* United States v. CPC Int'l, Inc., 66 U.S.L.W. 3194, 66 U.S.L.W. 3411, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997) (No. 97-454).

47. Michigan follows "the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil." *Id.* at 580. The *Cordova* court stated: "There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Id.*

48. *See id.* at 582. The court held that the district court erred when it pierced the corporate veil to assign liability to Aerojet as an owner because even though Aerojet took an "active interest" in its subsidiary, Cordova, the record does not show that Cordova "was a mere instrumentality of Aerojet in the sense that the separate corporate personalities of the parent and subsidiary ceased to exist." *Id.* at 582. Concerning CPC, the court also found that the separate personalities of the corporations did not cease to exist, even though CPC actively participated in Ott's business dealings. *See id.* at 581. Moreover, the court stated CPC and Aerojet did not "utilize[] the corporate form to perpetrate the kind of fraud or other culpable conduct required before a court [could] pierce the corporate veil." *Id.* at 581-82.

49. *See id.* at 577; *see also supra* Part II.B.

by Congress as a "remedial statute designed to protect and preserve public health and the environment."[50] While the court noted that generally courts will not interpret a remedial statute "in a way that apparently 'frustrates' the statute's goals in the absence of specific congressional intent to the contrary," the court maintained that the specific goals of Congress with respect to CERCLA are "difficult" to define.[51] Therefore, the court reasoned that the liability provision concerning operators should be "construed so that financial responsibility for clean-up operations falls upon those entities that contributed to the environmental problem."[52] However, the court noted, "the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue."[53]

The court stated that it was not at all persuaded that Congress intended to abandon "traditional concepts of limited liability associated with the corporate form" when it enacted CERCLA.[54] The court reached this conclusion by comparing two provisions of CERCLA. To begin with, the "owner or operator" of an onshore facility is designated as "any person owning or operating such facility."[55] However, when the facility has been conveyed to the government, the definition of an "owner or operator" is different. Under this provision, an "owner or operator" is defined as "any person who owned, operated, or otherwise controlled activities at such facility immediately [before the transfer to the governmental authority]."[56] Thus, the court determined that Congress "distinguished an operator from a person who 'otherwise controlled' the facility."[57] Making this distinction, the court concluded that "when a parent corporation actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporations law," nothing in CERCLA evidences that the parent has undertaken the role of operator.[58]

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50. *Cordova*, 113 F.3d at 577 (citing United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990)).
51. *Id.* at 577-78 (citation omitted).
52. *Id.* at 578.
53. *Id.*
54. *Id.* at 579.
55. 42 U.S.C. § 9601(20)(A)(ii) (1995).
56. *Id.* § 9601(20)(A)(iii).
57. *Cordova*, 113 F.3d at 579.
58. *Id.*

The court then concluded that the district court's ruling presented a number of difficulties. First, the district court supplanted the relatively bright-line test afforded by the veil-piercing doctrine, which typically requires a fraudulent purpose, opting instead for "a nebulous 'control' test."[59] The court found this problematic because of the difficulty presented in determining "[w]hen . . . a parent [is] acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability."[60]

Second, the court was concerned that the threat of unlimited liability would probably "deter private sector participation in the cleanup of existing sites."[61] In *Cordova*, MDNR actively pursued a private sector entity to assist in the remediation of the Dalton Township site.[62] Aerojet manifested its interest so long as it could cap its potential liability for clean-up costs.[63] The Sixth Circuit concluded, "To scuttle such sensible and legitimate precautions in favor of an unpredictable 'control' test would actually contravene the public interest by discouraging businesses from being involved in such projects."[64]

Therefore, the Sixth Circuit insisted in *Cordova* that the only way to hold a parent corporation liable for the environmental violations of its subsidiary, as an owner or operator, is to pierce the corporate veil using state law principles.[65] The analysis adopted by the Sixth Circuit is diagrammed on the following page.

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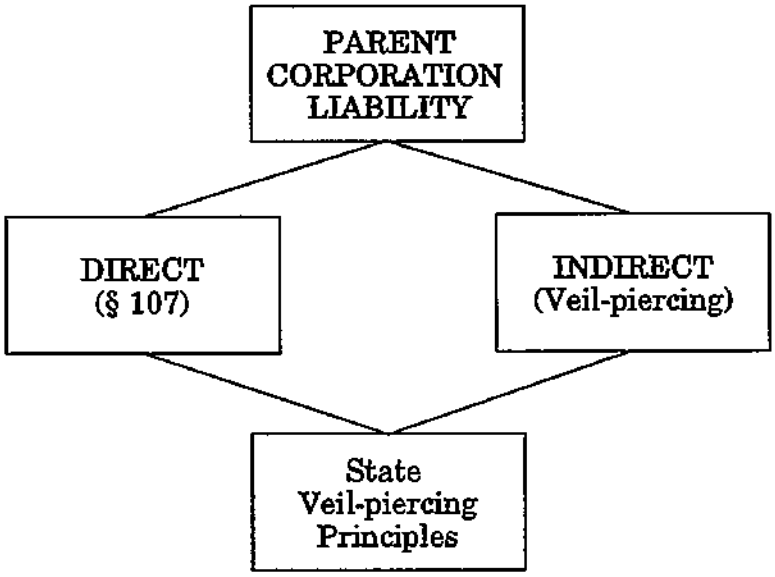
59. *Id.* at 580.
60. *Id.*
61. *Id.*
62. *See id.* at 576.
63. *See id.* at 580.
64. *Id.* at 580.
65. *See id.*

SIXTH CIRCUIT'S LEGAL ANALYSIS OF PARENT CORPORATION LIABILITY IN *CORDOVA*



IV. ANALYSIS

Cordova highlights the inconsistencies throughout the courts in determining parent corporation liability under CERCLA. The existing split among the federal appellate courts regarding to the legal standards applicable to holding a parent corporation liable for the environmental violations of its subsidiaries fosters "inconsistent and inequitable enforcement of CERCLA's liability scheme, increases the uncertainty faced by companies assessing their potential liabilities under the Act, and impedes expeditious cleanup of Superfund sites by deterring settlement and encouraging litigation."[66] As the liability scheme presently exists, it promotes a state of confusion and inadequacy.

This Part discusses why the existing modes of analysis that have been adopted by the courts are all troublesome to some extent, and resolves that new uniform standards for determining parent corporation liability should be adopted to carry out the national Superfund program. Approaches for both the direct

66. Evelyn F. Heidelberg, Comment, *Parent Corporation Liability Under CERCLA: Toward a Uniform Federal Rule of Decision*, 22 PAC. L.J. 854, 907 (1991).

and indirect liability modes, which would balance the time-honored concept of traditional corporate liability with the enormous pollution problems that harm society, should be uniformly adopted. This Part concludes by suggesting new approaches for both the direct and indirect liability modes to determine the financial responsibility of parent corporations.

A. Problems with Current Modes of Analysis Adopted by Courts

All the current modes of analysis currently adopted by courts are problematic to some degree. Whether the adopted legal standard is too broad, too limited, or wholly inconsistent with the purposes of CERCLA, no individual standard is ideal. An examination of the problems triggered by each of the current legal modes of analysis is revealing.

1. Direct/operator liability

a. Piercing the corporate veil test. The piercing the corporate veil standard, which was adopted by the *Cordova* court, is the most problematic of all the tests used by courts to determine direct parent corporation liability. It is far too limited and inconsistent with the purposes of CERCLA when considered outside of the indirect owner liability context. While this approach may be consistent with common law notions of corporate liability, it completely undermines the purposes of CERCLA by attempting to make an end-run around the statutory "operator" language.[67] This rule would act to protect parent corporations that actively participate in the management of their subsidiaries and profit from that involvement.

In *Cordova*, the Sixth Circuit inferred from Congress's use of the "otherwise controlled" language that the statute drafters distinguished an operator from a person who "otherwise controlled" a facility.[68] However, the text of the original Act and the amended provision both show that such an interpretation is

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67. The Supreme Court directed in *Anderson v. Abbott* that "the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement." 321 U.S. 349, 363 (1944) (citations omitted).

68. *See* United States v. Cordova Chem. Co., 113 F.3d 572, 579 (6th Cir. 1997), *cert. granted sub nom.* United States v. CPC Int'l, Inc., 66 U.S.L.W. 3194, 66 U.S.L.W. 3411, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997) (No. 97-454).

entirely erroneous. When Congress originally enacted CERCLA in 1980, § 101(20)(A) provided:

> "[O]wner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.[69]

As the text of the statute indicates, Congress saw the need to address the unique problem posed by abandoned facilities. Congress comprehended that abandoned facilities were likely to be nonoperational and therefore made it clear in § 101(20)(A)(iii) that the term "owner or operator" includes persons who "otherwise controlled activities" at a nonoperational site before its abandonment.

Congress later amended CERCLA in 1986, retaining the original version of § 101(20)(A)(i) and (ii), while modifying (iii) to address the question of state liability for abandoned facilities.[70] This amendment provided that if a state or local government received "title or control" of a facility through an involuntary mechanism, such as abandonment, the "owner or operator" would be the "person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."[71] Again recognizing that those facilities may be nonoperational, Congress preserved the "otherwise controlled" language found in the original version.[72] The "otherwise controlled" language in (iii) was thus preserved by Congress to make clear that the term "owner or operator" includes corporations who "controlled activities" at an inactive facility. This language supplies no support for the illogical determination that the term "owner or operator" excludes corporations who controlled the operations of an active facility. Therefore, the piercing the corporate veil approach mis-

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69. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, § 101(20)(A), 94 Stat. 2767, 2769.

70. *See* Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101(b)(2), 100 Stat. 1613, 1615.

71. *Id.*

72. *See* 42 U.S.C. § 9601(20)(A)(iii) (1995).

interprets the plain language of § 107(a)(2), as the *Cordova* decision illustrates.

The *Cordova* court's reasoning is also flawed because it fails to realize the difference between the "owner" and "operator" standards of liability. The court states, "a parent corporation incurs operator liability pursuant to § 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met."[73] This conclusion is skewed because a parent corporation can be found directly liable as an operator, or indirectly liable as an owner, as other courts have recognized.[74] The *Cordova* court failed to separate direct operator liability from indirect owner liability, and instead used the doctrine of piercing the corporate veil for both liability modes. Direct operator liability should not be equated with indirect owner liability.[75]

b. Actual control test. While the Sixth Circuit could have employed the actual control test as the district court did, this test is problematic. Under the actual control test, a corporation will only be held liable for the environmental violations of its subsidiary when there is evidence of substantial control exercised by one corporation over the activities of another.[76] Four federal courts of appeals have adopted this test.[77] The actual control test is too limited in many situations and therefore inconsistent with the purpose of CERCLA. In other words, this test allows some entities who are related to the illegal environ-

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73. *Cordova*, 113 F.3d at 590.

74. *See, e.g.*, Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1220 (3d Cir. 1993) ("There is general agreement that under CERCLA, 'owner' liability and 'operator' liability denote two separate concepts and hence require two separate standards for determining whether they apply.") (citing John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 408 (1st Cir. 1993); Richard B. Stewart & Bradley M. Campbell, *Lessons from Parent Liability under CERCLA*, 6 NAT. RESOURCES & ENV'T 7 (1992)); *see also* Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 630 (1993).

75. *See Cordova*, 113 F.3d 572, 588 (Ryan, J., dissenting) ("The majority opinion conflates and confounds the two types of liability, which are analytically distinct, and erroneously concludes that the latter is the exclusive basis for liability.") (citations omitted); *see also* John M. Brown, Comment, *Parent Corporation's Liability Under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries*, 31 TULSA L.J. 819, 836-37 (1996).

76. *See* United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990).

77. *See* Schiavone v. Pearce, 79 F.3d 248, 254-55 (2d Cir. 1996); *Lansford-Coaldale*, 4 F.3d at 1220-25; Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993); *Kayser-Roth*, 910 F.2d at 27.

mental releases to escape liability, thereby evading CERCLA's design to place the supreme financial burden for clean-up on those responsible for the pollution.[78]

First, the actual control approach fails to adequately consider issues of equity and fairness,[79] as well as public health and safety. For example, the actual control test does not consider the extent to which a parent corporation benefitted from the illegal environmental activities of its subsidiary. If a parent has profited from such activity, fundamental fairness requires that the parent help cover clean-up costs in the interest of public health and safety.

Second, the actual control test releases parent corporations who have been "involved" in the subsidiary's activities but who have not "actually controlled" these activities.[80] This allows "involved" but noncontrolling parent corporations to slip out the back door when it comes to CERCLA liability.

c. Authority to control test. The *Cordova* court might have selected the authority to control test, but this test presents its own difficulties. While the actual control test is too limited, the authority to control test, on the other hand, is too broad. Under the authority to control test, operator liability is imposed so long as the parent corporation had the capability to control its subsidiary, even if it was never utilized.[81] The authority to control test was originally articulated by a federal district court in *Idaho v. Bunker Hill Co.*,[82] and later praised in another federal district court opinion, *United States v. Nicolet, Inc.*[83] This stan-

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78. *See, e.g., Jacksonville*, 996 F.2d at 1110-11 (finding that even though parent corporation owned all or almost all subsidiary's stock, dictated the terms of employment of president and other executive officers of subsidiary, created profit sharing plan for subsidiary's officers, and received reports on status of subsidiary's operations, parent corporation did not exert the necessary control over its subsidiary and was therefore not liable as an "operator").

79. *See* Erika Clarke Birg, Comment, *Redefining "Owner or Operator" Under CERCLA to Preserve Traditional Notions of Corporate Law*, 43 EMORY L.J. 771, 809 (1994).

80. *See, e.g., Jacksonville*, 996 F.2d at 1110-11. *But see Kayser-Roth*, 910 F.2d at 27-28 (suggesting the actual control test does not require actual control over the subsidiary's facility itself; the parent's control over the subsidiary's business activities has been held to be enough).

81. *See* Nurad, Inc., v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992).

82. 635 F. Supp. 665 (D. Idaho 1986).

83. 712 F. Supp. 1193, 1204 (E.D. Pa. 1989).

dard has been adopted by the Fourth Circuit[84] and supported in dicta by the Ninth Circuit.[85]

Yet the authority to control test tends to reach "too far across the boundaries of traditional corporate law."[86] Applying this standard, nearly every parent corporation could be held liable under CERCLA regardless of the extent to which the parent engaged in or knew of the illegal environmental activities of its subsidiary.[87] Explaining the ease of meeting the authority to control standard, one commentator has stated:

> Every parent corporation, by virtue of the power it wields over its subsidiary, could control that subsidiary's activities, including those activities relating to its environmental matters and the operation of a facility. A literal application of the capacity to control test would thus lead to a finding of parent liability in every case involving a CERCLA violation by a subsidiary.[88]

Because this standard is so easy to meet, its application essentially obliterates the idea of limited liability for parent corporations. Normal activities of a parent with respect to its subsidiary without more ought not warrant an automatic finding of liability.[89]

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84. *See Nurad*, 966 F.2d at 842. This was a private cost-recovery action that actually involved a lessor/lessee, not a parent/subsidiary, but the same standard would presumably apply to parent corporations. *See* Brief for Appellant at 25, United States v. Cordova Chem. Co., 113 F.3d 572 (6th Cir. 1997) (No. 97-454); *see also* Cindy A. Schipani, *Infiltration of Enterprise Theory into Environmental Jurisprudence*, 22 J. CORP. L. 599 (1997).

85. *See* Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341-42 (9th Cir. 1992). The *Kaiser Aluminum* Court stated the capacity "to control the cause of the contamination" was the proper standard. *Id.* at 41.

86. Constance S. Chandler & Rebecca J. Grosser, *An Issue Ripe for Supreme Court Review: Whether Congress Intended to Alter the Common Law Principles of Corporate Limited Liability When Enacting CERCLA*, 4 MO. ENVTL L. & POL'Y REV. 14, 24 (1996).

87. *See id.*

88. Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U. L.Q. 223, 260 (1994) (footnote omitted).

89. *See* Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986) ("[C]are 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.").

2. Indirect/owner liability

In contrast to direct liability holdings, the conflict fostered by the indirect liability framework concerns whether state or federal common law theories of veil-piercing should apply. Currently, some courts apply state standards for veil-piercing,[90] while others advocate applying federal standards for veil-piercing.[91] The fact that the requirements for veil-piercing vary from state to state[92] poses additional complexity. Only adding to the confusion is the reality that courts who use a federal standard are "a long way from agreeing on the components of such a standard."[93] This conflict promotes forum shopping and prevents uniform application of owner liability under CERCLA.

B. Need for Uniformity

The need for national uniformity to carry out the federal Superfund program has been clearly stated in *United States v. Chem-Dyne Corp.*[94] In *Chem-Dyne*, the court asserted that the principal purpose of CERCLA was to ensure the development of a uniform rule of law.[95] The court pointed out the dangers of a variable standard on interstate hazardous waste disposal practices.[96] The *Chem-Dyne* court stated that "[t]he improper disposal or release of hazardous substances is an enormous and complex problem of national magnitude involving uniquely fed-

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90. *See, e.g.*, United States v. Cordova Chem. Co., 113 F.3d 572, 581 (6th Cir. 1997), *cert. granted sub nom.* United States v. CPC Int'l, Inc., 66 U.S.L.W. 3194, 66 U.S.L.W. 3411, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997) (No. 97-454); New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985).

91. *See* United States v. Nicolet, Inc., 712 F. Supp. 1193, 1201-02 (E.D. Pa. 1989); United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988); *In re* Acushnet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 31 (D. Mass. 1987).

92. Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 855 (1982) ("The [veil-piercing] law itself varies, as different states have adopted widely divergent and sometimes contradictory standards under the general rubric of the alter ego doctrine.") (citing 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (rev. perm. ed. 1974) (collecting cases)).

93. Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 460 (1990).

94. 572 F. Supp. 802, 809 (S.D. Ohio 1983) ("Federal programs that by their nature are and must be uniform in character throughout the nation necessitate the formulation of federal rules of decision.").

95. *See supra* Part II.B.

96. *See Chem-Dyne*, 572 F. Supp. at 808-09.

eral interests."[97] The court further stated that "[a] driving force toward the development of CERCLA was the recognition that a response to this pervasive condition at the state level was generally inadequate,"[98] and that the United States has a unique federal financial interest in the trust fund that is funded by general and excise taxes.[99]

Moreover, the court in *In re Acushnet River & New Bedford Harbor Proceedings* has stated: "In attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection."[100]

Inconsistent enforcement of CERCLA is unfair to parent corporations because it is impossible for them to ascertain their potential liability and act accordingly. This uncertainty spawns litigation and thwarts settlement, thereby obstructing expeditious clean-up of Superfund sites. For these reasons, and because CERCLA is a "national program of compelling national importance,"[101] a uniform interpretation of liability under its provisions is vital to the achievement of its purposes.

C. Suggested Approach

The difficulties associated with taxpayers paying millions of dollars for the investigation and remediation of thousands of hazardous waste disposal sites across the country introduces concerns that traditional common law rules cannot appropriately address. Furthermore, CERCLA was enacted to remedy an emergency situation that did not exist at the time traditional notions of corporate limited liability were formed. This is not to say, however, that time-honored principles of corporate limited liability should be completely thrown out the window when it comes to parent corporation liability under CERCLA.

While the legislative history of CERCLA suggests that the statute should receive the broadest possible interpretation to promote its remedial purposes,[102] imposing unlimited liability on

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97. *Id.* at 808.
98. *Id.* (citation omitted).
99. *See id.*
100. 675 F. Supp. 22, 31 (D. Mass. 1987).
101. Aronovsky & Fuller, *supra* note 93, at 455.
102. *See* Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283, 287

parent corporations would present serious economic policy concerns. For example, the risk of unlimited liability "could have a chilling effect on investment in corporations that generate, transport or dispose of hazardous wastes."[103] Moreover, costs for clean-up borne by a parent who is "innocent" could very well be "passed on to consumers through higher prices for the parent's products, and not absorbed by more 'culpable' businesses and their customers."[104] This would stymie the concept of holding parent corporations liable to avoid forcing the taxpayers who played no part in the disposing of a hazardous substance to foot the bulk of the bill.[105]

The new liability dichotomy should effectively balance the traditional corporate limited liability theory with the intent behind CERCLA in order to combat the nation's huge pollution problem. Therefore, the new dichotomy should specifically consider the issues of (1) fairness and equity to corporations; and (2) health and safety to the public at large. A separate uniform approach should be adopted for each liability scheme: direct operator liability and indirect owner liability.

1. Direct liability: a factor-based prevention standard

a. Need for a factor-based approach. The unyielding complexities bound up with parent corporation liability under CERCLA—the existence of several legal standards, multi-faceted competing interests, and differing factual scenarios found in each case—demonstrate the need for a direct liability approach that takes into account various factors. A bright-line rule

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(N.D. Cal. 1984) (CERCLA's legislative history "is not very helpful" but "the courts that have addressed the question of the scope of CERCLA have erred on the side of giving a broad reading to the Act."); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("CERCLA should be given a broad and liberal construction. The statute should not be narrowly interpreted to frustrate the government's ability to respond promptly and effectively, or to limit the liability of those responsible for cleanup costs beyond the limits expressly provided.").

103. Aronovsky & Fuller, *supra* note 93, at 436.

104. *Id.*

105. CERCLA expresses a fundamental policy that those who are responsible for creating hazardous conditions should bear the costs of responding to those hazards, not the innocent public. *See* H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6128; *see also* United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 167 n.8 (4th Cir. 1988); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

will not appropriately address these complexities. As some commentators point out:

> The problem the courts must resolve is not only legal in nature, but is also deeply rooted in the social policies underlying both CERCLA and the principle of limited liability. For this reason, . . . bright lines and crisp criteria may be inherently futile because of the fact-specific nature of the courts' inquiry and because of the changing factual setting in which CERCLA cases arise.[106]

Thus, the bright-line tests adopted in the direct liability context by the courts are inadequate.[107] Considering only whether the parent actually controlled or had the authority to control its subsidiary does not allow for consideration of the unique factual scenarios within which CERCLA issues arise. The problem with courts uniformly adopting the actual control test is that this standard does not contemplate situations where parent corporations are well aware of the environmental activities of their subsidiaries, but deliberately turn a blind eye in order to avoid liability. By contrast, the problem with courts adopting the authority to control test is that simply by virtue of a parent owning a subsidiary who engaged in environmental activities, the parent would be held liable even if a subsidiary deliberately did not disclose their environmental activities to the parent.

Moreover, the current bright-line standards lack precision in application, and a new factor-based approach could be formulated in a manner that would add precision to the direct liability mode. For example, when considering whether a parent has exercised "actual control," courts must determine whether this means actual control over the subsidiary in general, actual control over environmental activities as a whole, or actual control over the subsidiary's waste handling practices. Likewise, the "authority to control" test forces courts to determine whether this means authority to control the subsidiary in general, authority to control its environmental activities, or authority to control its waste handling practices. Thus, while these standards seem to be catchy legal phrases which are easily applied,

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106. Aronovsky & Fuller, *supra* note 93, at 461.
107. *See supra* Part IV.A.

in reality they are not. Precise factors could be established to pinpoint several different areas for the court to examine.

While bright-line tests in general might arguably have the upper hand as far as predictability and certainty in comparison to factor-based approaches, bright-line tests are inflexible.[108] A factor-based approach advances the countervailing benefit of being far less arbitrary. Because of its flexibility, a factor-based approach is better situated to enable a court to consider the particular facts of any given case in the context of parent corporation liability.[109]

Nevertheless, some may criticize a factor-based approach as being too potentially evasive.[110] However, a factor-based approach in the parent corporation liability context, adopted across the board would, at the very least, establish clear and uniform criteria for courts to consider in determining parent liability. This is a marked improvement from the current state of the law, where entirely different legal standards are applied and parent corporation liability essentially depends upon which area of the country the parent resides. If there is no uniformity in the legal standard, predictable results will be impossible. Not only would an established factor-based approach provide stability in the application of a legal standard, it would also promote predictability in result.[111] Courts should be directed to weigh each factor equally, not favoring one over another to reach a particular end.

Having established the benefits of a factor-based approach in determining parent corporation liability, a determination must be made as to what type of elements a factor-based approach

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108. *See* William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 140 ("There is a constant tension in the law between the need for clear guidance in the private and public sectors in order to determine what is permissible and the desire to maintain flexibility to deal appropriately with individual situations.") (footnote omitted).

109. *See* Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1493 (D.C. Cir. 1984) ("However tempting . . . a 'bright line' test may be, it cannot be used as the divining rod . . . .").

110. *See* Luneburg, *supra* note 108, at 140 ("A case-by-case balancing analysis inevitably creates uncertainty . . . .").

111. *See* Rebecca S. Fellman-Caldwell, Note, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.: *The Supreme Court Clarifies ERISA Preemption*, 45 CATH. U. L. REV. 1309, 1345 (1996) ("The multi-factor approach applies tangible factors that produce a more ascertainable result than the literal, yet abstract, [bright-line] approach.").

should consider. As previously discussed, a new approach should consider issues of (1) fairness and equity to corporations; and (2) health and safety to the public at large. A superior approach would incorporate the strengths of both the actual control and authority to control standards. The actual control test is good in a fairness sense because it looks more to the actions of the parent corporation in relation to the environmental activities of its subsidiary than simply mere ownership. The authority to control test has a positive effect to the extent that it spreads the cost among as many parties as possible, thereby allowing for rapid clean-up of contaminated sites by raising revenue. Thus, a new factor-based test that focuses primarily on prevention and incorporates these strengths is desirable.

b. Factors of the prevention test. In 1989, a Michigan federal district court articulated a standard whereby a corporate officer could be held personally liable under CERCLA in *Kelley ex rel. Michigan Natural Resources Commission v. Arco Industries Corp.*[112] Under this standard, which embodies the strengths emphasized above, a corporate officer is liable under CERCLA if the individual "could have prevented or significantly abated the hazardous waste discharge that is the basis of the claim."[113] Under this prevention test, the court weighs the factors of the "corporate individual's degree of authority in general and specific responsibility for health and safety practices, including hazardous waste disposal."[114] Consistent with CERCLA's goals, this standard encourages "increased responsibility with increased authority within a corporation."[115] The court first determines whether the individual was in a position to prevent the environmental harm, then weighs any efforts taken to avoid or alleviate the harm, whether or not successful, in assessing liability.[116]

This prevention test should be modified to fit the parent corporation direct liability scheme as well. Courts should adopt a test whereby parent corporations are liable if they could have

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112. 723 F. Supp. 1214 (W.D. Mich. 1989). In *Kelley*, the court rejected the strict liability imposed by CERCLA, stating it was too harsh to impose across the board. *See id.* at 1219.

113. *Id.* at 1219.

114. *Id.*

115. *Id.* at 1220.

116. *See id.*

"prevented or significantly abated the hazardous waste discharge that is the basis of the claim."[117] Streamlining the authority to control and actual control tests, courts should engage in a four-factor test in order to determine whether the parent corporation was in a position to have prevented the environmental harm. Courts should consider whether the parent had: (1) authority to control waste handling practices, (2) undertaken responsibility for waste disposal practices, (3) neglected that responsibility, and (4) made any affirmative attempts to prevent unlawful hazardous waste disposal. Applying these factors to parent corporation liability would synthesize the ability to control test and the actual control test.

This new test incorporates traditional limited liability concerns of fairness and equity on one hand, and CERCLA's goals of health and safety on the other. As to fairness and equity, although parent corporation liability creates an additional source of clean-up funds, a parent corporation "should not be subject to CERCLA liability merely because it provides a convenient deep pocket."[118] Applying the prevention test to parent corporations is fair and equitable because parent corporations would be shielded from liability so long as they took reasonable steps to prevent environmental violations. If parent corporations take steps to prevent environmental violations, the overall health and safety of society will benefit. Adopting this test would also promote the adoption of "Environmental Management Systems" by parent corporations and their subsidiaries, which would assist in the avoidance of environmental violations in the first place.

c. Adoption of Environmental Management Systems. An "Environmental Management System" (EMS) is a "comprehensive set of procedures for assessing environmental performance, identifying problems (including violations of applicable legal requirements), solving them and, in general, inculcating within the entire work force a commitment to improved environmental performance as an ongoing part of the company's operations."[119] An EMS institutes procedures for a parent corporation to monitor the environmental activities of its subsidiaries on a regular

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117. *Id.* at 1219.

118. Aronovsky & Fuller, *supra* note 93, at 466.

119. Stephen L. Kass, *The Lawyer's Role in Implementing ISO 14000*, NAT. RESOURCES & ENV'T, Spring 1997, at 3, 3.

basis. Such programs focus their efforts on preventing environmental problems and coming up with plans and programs for eliminating such problems.[120]

To implement an Environmental Management System, parent corporations should: (1) carefully define, articulate, and adopt a formal corporate environmental policy standard;[121] (2) implement routine and systematic environmental auditing;[122] and (3) adopt procedures for systematic remediation corrective measures.[123] An EMS creates a mechanism enabling parent corporations to have access to information and thereby identify, isolate, and remedy an environmental problem. Having an environmental management system aids parent corporations in avoiding liability for the environmental violations of their subsidiaries under the suggested prevention test, and promotes health and safety in general.

2. Indirect liability: federal common law veil-piercing standard

a. The need for a federal common law veil-piercing standard. Although some have acknowledged the difficulty in applying veil-piercing principles,[124] common law veil-

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120. Richard S. Gruner and Louis M. Brown relate:

> Ordinarily, organizations with larger numbers of operating facilities or pollution control activities and obligations should have more extensive and sophisticated environmental management systems, programs and resources . . . than would be expected of similar, but smaller organizations. Similarly, organizations whose business activities may pose significant risks of harm to human health or the environment from non-compliance with environmental requirements (e.g., manufacture, use or management of hazardous products, materials or wastes) should have more extensive and sophisticated systems, programs and resources than would be expected of comparably sized organizations in less risky types of business.

Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731, 735 n.10 (1996) (citations omitted).

121. *See* Christina C. Benson, *The ISO 14000 International Standards: Moving Beyond Environmental Compliance*, 22 N.C. J. INT'L L. & COM. REG. 307, 325 (1996).

122. *See id.* at 325-30; *see generally* Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365 (1992).

123. *See* Benson, *supra* note 121, at 325-30.

124. *See* Cargill Investor Servs. v. Cooperstein, 587 F. Supp. 13, 15 (S.D.N.Y. 1984) (stating New York law in the area of piercing the corporate veil is "hardly as clear as a mountain lake in the springtime") (quoting Justice H. Hughes Mulligan in Brunswick Corp. v. Waxman, 599 F.2d 34, 35-36 (2d Cir. 1979)); Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926) (Justice Cardozo stated this area of the law was "enveloped in

piercing is a device firmly established in the law that protects corporations but also allows courts to circumvent the inequitable results that could arise from strict application of limited liability. Because veil-piercing is so embedded in American jurisprudence, courts ought not eliminate the veil-piercing requirement when dealing with owner liability. However, a uniform veil-piercing standard should apply to achieve consistency across the board.

The United States Supreme Court articulated several factors for courts to consider in determining whether federal common law should apply in a given context in *Boyle v. United Technologies, Corp.*[125] Under this decision, federal common law principles should control where: (1) there is "an area of uniquely federal interest," and (2) "a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law.'"[126]

Although establishing federal common law is not favored,[127] development of a uniform federal rule of decision concerning veil-piercing requirements under CERCLA is not only consistent with Supreme Court standards for developing federal common law rules according to *Boyle*, but warranted. First, there is a unique federal interest because: (1) CERCLA is a "national program of compelling national importance;"[128] (2) the federal program by its nature should be uniform in application; and (3)

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the mists of metaphor."); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) ("There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.").

125. 487 U.S. 500 (1988). In *Boyle*, the Court considered the liability of independent contractors performing work for the federal government. The Court concluded that such liability is an area of uniquely federal concern and state law holding government contractors liable for design defects in military equipment may present significant conflict with federal policy; thus, establishing federal common law was proper in this situation. *See id.* at 504-512.

126. *Id.* at 507 (citing Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).

127. *See, e.g.*, Gregory C. Sisk & Jerry L. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After* O'Melveny & Myers, 16 VA. ENVTL. L.J. 505, 507 (1997) ("Federal courts should not deviate from the straight and narrow path of limited federal jurisdiction and enter into the unfamiliar territory of common-law judging, except in the most unusual of circumstances . . . ."). The Supreme Court has warned against "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable . . . federal policy." O'Melveny & Myers v. Federal Deposit Ins. Co., 512 U.S. 79, 89 (1994).

128. Aronovsky & Fuller, *supra* note 93, at 455.

federal uniform interpretation of CERCLA's liability provisions is important to further its objectives. Second, a significant conflict exists between federal policy and the operation of state law because "CERCLA enforcement should not be hampered by subordination of its goals to varying state law rules of alter ego theory and limited liability."[129] Undoubtedly, application of inconsistent state law would frustrate special objectives of CERCLA.[130]

Moreover, a uniform standard would eliminate the incentive for parties to forum shop by destroying any possible benefit of getting a better result in another forum. As the court in *In re Acushnet River & New Bedford Harbor* advocated, "[t]he need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under [CERCLA] must not depend on the particular state in which a defendant happens to reside."[131] It should be noted that if federal courts adopted general state common law veil-piercing rules, state law may be inadequate to enforce specific policies underlying this important statute.[132]

For these reasons, a federal common law governing the indirect owner liability scheme must become a matter of settled law. Courts should articulate one set of federal factors to apply when piercing the corporate veil in the CERCLA context. If a single

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129. *Id.*

130. *See* United States v. Cordova Chem. Co., 113 F.3d 572, 584 (6th Cir. 1997) (Merritt, J., concurring in part and dissenting in part), *cert. granted sub nom.* United States v. CPC Int'l, Inc., 66 U.S.L.W. 3194, 66 U.S.L.W. 3411, 66 U.S.L.W. 3416 (U.S. Dec. 12, 1997) (No. 97-454). Justice Merritt advocated a federal common law approach to pierce the corporate veil:

> Congress intended for CERCLA to cast a wide net of responsibility for the costs of environmental cleanup. Uniform national standards of liability are necessary to effectuate this goal. Following state law in this area would allow corporations te easily evade their environmental responsibilities under CERCLA by incorporating subsidiaries in states witb stringent standards for piercing the corporate veil.

Id. Justice Merritt also noted that, "[a]dditional support for using a federal common law standard comes from cases involving successor corporation liability under CERCLA." *Id.* at 585 (citing B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996); United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992); Lousiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988)).

131. 675 F. Supp. 22, 31 (D. Mass. 1987).

132. *See* Note, *supra* note 93, at 863 ("General application of unrelated state alter ego doctrines will often frustrate a federal statute or policy.").

set of factors is applied, the confusion found in the case law would be minimized and uniformity achieved.

b. Components of a federal common law veil-piercing standard. Having determined the need for a uniform rule concerning a veil-piercing standard, the content of that rule must be ascertained. The problem with the federal standards promulgated by the courts that have chosen to take the federal common law route is that they have relied on generalized federal substantive law and precedent and have declined to fashion a specific rule for piercing the corporate veil under CERCLA based on the Act's policies.[133] Traditional common law veil-piercing looks to factors such as fraud and insufficient capitalization that do not necessarily advance environmental goals. It addition, veil-piercing encourages corporate owners to focus on insulating themselves from the corporation's actions rather than taking steps to avoid the improper release of hazardous substances. The standard suggested in this Note, by contrast, takes into account CERCLA's policies (health and safety) without casting aside the time-honored concept of limited liability for the corporate form (fairness and equity). This new standard represents a method by which the facts of any particular case will ultimately control the outcome, as they should in complicated CERCLA situations.[134]

Because of CERCLA's strong policies favoring prompt and effective governmental response against parties responsible for improper hazardous substance disposal, courts should pierce the corporate veil "in the interests of public convenience, fairness, and equity."[135] To overcome the vagueness of this standard and

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133. *In re Acushnet River & New Bedford Harbor Proceedings* employed general federal veil-piercing standards using these factors:

> (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) nonfunctioning officers or directors.

675 F. Supp. 22, 33 (D. Mass 1987); *see also* Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1109-11 (9th Cir. 1979).

134. The facts of the *Cordova* case demonstrate how complex the factual scenarios of environmental violations and liabilities can be. Because every situation will be different, a balancing test using these factors will allow for a just determination.

135. Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986) (citing Capital Tel. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974)); *see also* United States v. Mottolo, 695 F. Supp. 615,

to promote precision in application, courts should consider specific factors or guidelines, giving each one equal weight, to determine whether or not this standard is met. This Note suggests that courts consider these five factors: (1) the extent to which the parents' contact with the subsidiary transcends a pure investment relationship,[136] (2) the extent to which the parent acted to create the environmental hazard, (3) the extent to which the parent financially benefitted from the subsidiary's disposing of hazardous substances, (4) the extent to which holding the parent liable will facilitate the expeditious clean-up of the contaminated site, and (5) the extent to which the parent knew or had reason to know about the hazardous substance activities of the subsidiary.

These five factors specifically address fairness and equity, as well as public health and safety. The first factor is a fairness factor, allowing consideration for and protection of the objectives of the limited liability doctrine. The second factor also relates to fairness as it addresses the parent's direct activities that helped create the environmental violation. The third factor deals with both fairness and safety, following the court's observation in *Northeastern Pharmaceutical* that "Congress has determined that the persons who bore the fruits of hazardous waste disposal also bear the costs of cleaning it up."[137] The fourth factor addresses the safety objectives of CERCLA by expediting response to the nationwide threats posed by thousands of improperly managed hazardous waste sites that substantially endanger public health and the environment.[138] The fifth and final factor, dealing with fairness and equity, allows consideration for and can assist in the protection of the parent corporation who unwittingly played a role in the affairs of the subsidiary that affected hazardous waste disposal. A parent may participate in a variety of activities affecting the subsidiary, such as employment decisions or budget approval, without appreciating the implications of those actions on hazardous waste disposal activities.[139] Under

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624 (D.N.H. 1988).

136. *See In re Acushnet River*, 675 F. Supp. at 31-32.

137. United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 848 (W.D. Mo. 1984).

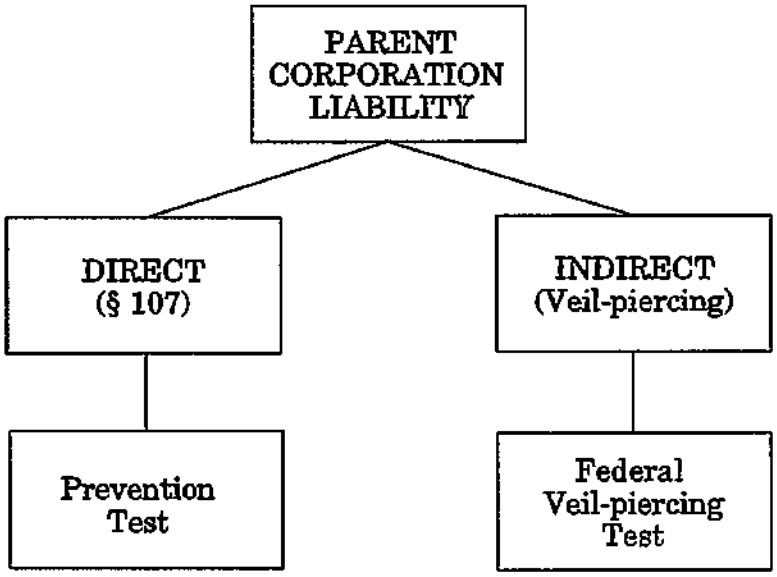
138. *See* United States v. Chem-Dyne Corp., 572 F. Supp. 802, 805 (S.D. Ohio 1983) (citing 1980 U.S.C.C.A.N. 6119, 6119-20).

139. *See* Aronovsky & Fuller, *supra* note 93, at 461.

such circumstances, the parent perhaps should not be deemed to have been converted from a passive investor into a heavy-handed controller of a hazardous waste facility. This factor allows for consideration of such a situation. In applying these factors, courts should hold no one factor to be more important than any other.

Implementing the suggested factor-based approaches to the direct operator liability and indirect owner liability modes would present a harmonious and consistent dichotomy for determining parent corporation liability under CERCLA. The new proposed dichotomy is diagrammed below.

PROPOSED UNIFORM DICHOTOMY FOR DETERMINING PARENT CORPORATION LIABILITY UNDER CERCLA



3. Applying the suggested approaches to Cordova

This Part will illustrate how the suggested approaches would work by applying the proposed standards to the *Cordova* case with regards to CPC, the parent corporation of Ott II. Ott II used the Dalton, Michigan site to manufacture chemicals from 1965 to 1972.[140]

a. Direct operator liability. In the direct liability mode, the overall question the court would consider is whether the parent corporation could have prevented the subsidiary's environmental violations. To make this determination, the court would engage in the five-factor balancing test.

The court should first consider whether CPC had the authority to control the waste handling practices of Ott II. Important points with regard to this first factor are: (1) "CPC's active participation in, and at times majority control over, Ott II's board of directors, which was an active decision-making body chaired by a CPC official throughout the Ott II era;" and (2) "the active participation of and control by CPC officials in Ott II environmental matters," particularly through G.R.D. Williams, CPC's environmental director, who "helped formulate Ott II policies, participated in regulatory meetings and issued directives regarding Ott II's responses to regulatory inquiries."[141] These facts show that CPC did have the authority to control the waste handling practices of Ott II.

Second, the court should consider whether CPC has undertaken responsibility for waste disposal practices. The fact that high-ranking CPC officials served as managers at Ott II, who "formulated and implemented the company's day-to-day operating policies, including . . . environmental matters"[142] seems to show that CPC had undertaken responsibility for waste disposal practices. Additionally, "[d]iscussions of waste disposal problems and potential solutions was a major topic of discussion within the Ott II management structure and board that CPC at times dominated and controlled."[143] Moreover, as mentioned above, the director of governmental and environmental practices for CPC,

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140. *See supra* Part III.A.

141. CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 575 (W.D. Mich. 1991).

142. *Id.* at 559.

143. *Id.* at 561.

Williams, "coordinated all pollution activities for CPC and its divisions and subsidiaries and became heavily involved in environmental issues at Ott II."[144]

Assuming the court would find that CPC has undertaken responsibility for waste disposal practices, the court should next determine whether CPC neglected that responsibility. The actions of employee Williams are telling in regard to this factor. In a meeting with the Water Resources Commission, Williams failed to include a presentation formulated by Ott II of plans for a biological waste treatment facility because Williams "did not feel that Ott II should mention the option because he did not think it would be needed as a waste disposal alternative."[145] Furthermore, Williams "instructed Ott II officials to limit cooperation with state and federal regulators regarding waste disposal and to consult with CPC before responding to regulatory questionnaires or other inquiries."[146]

In addition to this instruction, a series of memoranda disclose Williams' policies concerning governmental environmental inquiries: (1) "'delaying tactics are almost always advisable;'" (2) any unannounced visit by regulators "'should be stalled for advice from N.Y. [CPC headquarters]'" and "'[a]ny questionnaires should be filled in promptly in pencil and forwarded to Air & Water Programs [at CPC headquarters] for review and decision on reply;'" (3) before the visit of a state regulator, "'[w]e answer questions that are not self-incriminating, but we do not volunteer information;'" and (4) if survey test results "'meet acceptable levels, then the survey should be completed and forwarded by the plant manager. If they do not for any reason meet such levels, then this office should be queried with the details before the survey request is answered.'"[147] These findings show that CPC neglected its responsibility for waste handling practices through avoidance and apathy.

Next, the court would ascertain whether CPC made any affirmative attempts to prevent unlawful hazardous waste disposal. It should first be noted that CPC/Ott II's waste was disposed of before CERCLA was enacted in 1980. Nonetheless, virtually nothing was done to circumvent any pollution accord-

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*

ing to MDNR's report of the extreme severity of the existing environmental problems. From the opinion of the district court, there does not seem to be any evidence of a good faith effort made by CPC/Ott II to dispose of the waste in any safe or sanitary manner. In fact, the MDNR officials found "[h]undreds of chemical drums, many piled atop each other, lay[ing] around the site, randomly strewn among trees, across pavement and into sandy pits. Many of the drums and barrels were crushed, corroded, and leaking . . . . Chemical waste by-products, including thousands of broken bottles, littered the land."[148]

Deliberating over these four factors, it seems likely that a court would find that all factors weigh heavily in favor of holding CPC directly liable as an operator for the waste on the Dalton, Michigan site. If the court did find that CPC was directly liable, it would not need to go on to consider the theory of indirect liability. However, application of the indirect liability factors will similarly be evaluated in this Part for the purpose of illustration.

b. Indirect owner liability. In the indirect liability context, the court will determine whether or not the corporate veil has been pierced. Under the new federal common law standard, the veil should be pierced in the "interests of public convenience, fairness, and equity."[149] To determine if this standard has been met, the court will consider five specific factors or guidelines.

The court should begin its veil-piercing analysis by considering the extent to which the parents' contact with the subsidiary transcends a pure investment relationship. The following facts are helpful in this regard: (1) CPC planned rapid growth for Ott II, and contributed millions of dollars specifically to expansion efforts; (2) CPC actively participated in and at times controlled the policy-making decisions through its representation on Ott II's board of directors, "[f]ar more than a rubber stamp for management, the Ott II board functioned as a major source of power and decision-making at the company;"[150] (3) CPC executives who were not Ott II board members occasionally attended Ott II

148. *Id.* at 563.

149. Alman v. Danin, 801 F.2d 1, 3 (1st Cir. 1986) (citing Capital Tele. Co. v. FCC, 498 F.2d 734, 738 (D.C. Cir. 1974)); *see also* United States v. Mottolo, 695 F. Supp. 615, 624 (D.N.H. 1988).

150. CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 558 (W.D. Mich. 1991).

board meetings, including CPC's president and its chairman of the board; (4) the site of Ott II board meetings regularly alternated between Ott II and CPC headquarters; (5) CPC participated actively and exerted control over day-to-day management since CPC officials served in Ott II management positions; and finally, (6) the President of Ott II reported directly to CPC's president.[151]

Next, the court would determine the extent to which the parent acted to create the environmental hazard. The district court points out that millions of dollars worth of expansion increased production which in turn "created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons."[152] As previously discussed, CPC officials who were top officers at Ott II "exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in the areas including waste disposal,"[153] and "discussions of waste disposal problems and potential solutions was a major topic of discussion within the Ott II management structure and board that CPC at times dominated and controlled."[154] CPC's director of governmental and environmental affairs was heavily involved in Ott II's environmental activities. Also, a CPC attorney negotiated with the state regarding Ott II's use of a county wastewater treatment system.[155]

The next factor addresses the extent to which the parent financially benefited from the subsidiary's disposing of hazardous substances. Unfortunately, the decisions do not discuss profit margins. A court considering this factor ought to consider what profits CPC received from its relationship with Ott II.

Another factor is the extent to which holding the parent liable will facilitate the expeditious clean-up of the contaminated site. The decisions do not indicate the solvency of CPC. If CPC were solvent, holding CPC liable would likely facilitate the expeditious cleanup of the site. If the opposite were true, holding CPC liable would probably not promote expeditious clean-up at all.

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151. *See CPC Int'l*, 777 F. Supp. at 557-61.
152. *Id.* at 558.
153. *Id.* at 559.
154. *Id.* at 561.
155. *See id.* at 557-61.

Finally, the court should consider the extent to which the parent knew or had reason to know about the hazardous substance activities of the subsidiary. Given the fact that CPC regularly received reports and presentations of mounting problems with waste disposal and was so intimately involved with the overall operation of Ott II, as previously discussed, a court would likely conclude that the parent knew significant details surrounding the hazardous substance activities of Ott II.

How much CPC profited from its relationship with Ott II and whether CPC is solvent enough to help expedite the clean-up of the Dalton, Michigan site are unknown. However, the other three factors seem to warrant piercing the corporate veil. Without the needed information pertaining to two of the factors, a prediction of how the court would rule in terms of indirect owner liability is difficult.

Notwithstanding this limitation, it is likely that the *Cordova* decision would have turned out differently if the Sixth Circuit would have applied the suggested direct liability approach. Instead of absolving CPC of liability, this parent corporation would have been held liable for the environmental violations of Ott II.

V. CONCLUSION

The *Cordova* decision illustrates the problematic state of the law concerning parent corporation liability for the environmental violations of their subsidiaries under § 107 of CERCLA. By holding that direct operator liability can be imposed upon corporate parents only when the corporate veil is pierced, the Sixth Circuit not only fails to recognize the distinction between direct operator liability and indirect owner liability, but also adds another test to the already inconsistent body of law concerning parent corporation liability.

With the present confusion in the courts regarding parent corporation liability under CERCLA and the significant environmental liabilities facing corporations, development of a more principled approach to determining whether a parent corporation must pay for its subsidiary's environmental violations is currently needed. The courts should choose a truly uniform rule for both the direct operator liability mode and the indirect owner liability mode. A factor-based prevention test for determining direct operator liability, and a factor-based federal veil-piercing test for indirect owner liability, would balance common law no-

tions of corporate limited liability with the underlying purposes of CERCLA.

Using multi-factored tests instead of bright-line rules when considering parent corporation liability under CERCLA allows the fact-finder to impose liability on a case-by-case basis, but also provides for the evaluation of specific criteria instead of nebulous actual control or authority to control tests. This approach provides more certainty for corporations, courts, and the public at large. Specific criteria that consider various elements are desirable because of the seriousness of potential liability for potentially responsible parties, and the imminent need to clean-up harmful hazardous waste sites across America. The proposed tests for direct and indirect liability require an evaluation of the "totality of the situation;"[156] any basis for liability is intensely fact-specific, while the law is definite and uniformly applied.

Kamie Frischknecht Brown

156. Kelley *ex rel.* Michigan Natural Resources Comm'n v. ARCO Indus. Corp., 723 F. Supp. 1214, 1220 (W.D. Mich. 1989).