CHAPTER 4

Piercing the Corporate Veil -- Is There A Safe Harbor Under CERCLA and RCRA?

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§ 4.01. Introduction – Changing the Traditional View of Liability.

Twenty-five years ago, the idea that real property could be other than an asset was almost unimaginable. Today, because the growing body of environmental law is changing the way we look at things, not only may a parcel of real estate be a liability, but that liability may run into the million dollar range.

Since the enactment of the National Environmental Policy Act\(^1\) in 1969, there has been a virtual explosion of environmental laws at both the state and national levels. Traditional corporate law doctrine would have made these environmental laws of little consequence to corporate officers, directors, and stockholders. Now, the Resource Conservation and Recovery Act of 1976 (RCRA),\(^2\) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),\(^3\) and the judicial decisions that have interpreted these statutes have dramatically changed the situation. Given the complexity of these statutes and the regulatory framework they have spawned, the risk of personal liability is very real to everyone in
The corporate form has a long and involved history with roots in both the Roman Empire and England. Corporations were used both by the Church to hold property and by municipal governments. A long evolution of peace guilds developing into trade guilds resulted in by "the time of Henry VI the terms guildating and incorporating were practically synonymous."\(^{(4)}\) Only in the last 250 years has the corporation, as we know it today, existed as a moving force in commerce.\(^{(5)}\)

A corporation is an artificial person and a legal entity. It acts through its officers and agents. It can be sued and can sue. It can acquire or transfer property and make contracts in its own name. It has the ability for perpetual succession.\(^{(6)}\)

The provision of an escape from pecuniary liability beyond one's investment provided an incentive for capitalists to accept the risk necessary to further commerce and to create real economic growth. This flew in the face of the common law view of accountability for negligence and its resultant harm to others. Thus began the evolution of the equitable doctrine of "piercing the corporate veil" and such related doctrines as "alter ego."

For a time, because of the requirement of strict construction, criminal statutes were considered inapplicable to corporations unless "corporations" were specifically set out in the terms of the statute.\(^{(7)}\) Corporations had no bodies and could form no intent; therefore, they were incapable of committing a crime. As corporations became an integral part of American business, this view changed to the point that "today it is almost universally conceded that a corporation may be criminally liable for actions or omissions of its agents in its behalf."\(^{(8)}\)

Since it is popularly believed today that fines alone are ineffective in truly deterring future corporate criminal conduct, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice (DOJ) have focused on criminal prosecution of corporate officers and agents.\(^{(9)}\) Likewise, they have often acted against individual corporate employees and officers in civil enforcement actions.

It has been said that a corporation is different from an ordinary trust only through special qualities granted by statute, one of which is its "limitation of liabilities incurred in the transaction of the business to the particular fund voluntarily dedicated to it."\(^{(10)}\) This limitation of liabilities is the focus of this Chapter. More particularly, this Chapter will examine the disintegration of the conventional limitation of liability or "corporate veil" in the context of CERCLA and RCRA.

\section{4.02. Types of Liability Exposure.}

The law recognizes four categories of liability, all of which can apply to both civil and criminal acts:

- **Strict liability** – liability without the necessity of fault (no mental state or fault required).
- **Vicarious liability** – liability for the act or omission of another without regard to the individual's state of mind.
- **Intentional act liability** – a willful or knowing act resulting in liability.
- **Negligent act liability** – liability as a result of an act or omission.

The ideas of strict and vicarious liability are more readily accepted in the context of civil actions for money
damages or penalties than they are in the criminal context, where individual liberty is at stake.

Strict liability usually arises under criminal statutes when the mental state or fault element is difficult to prove. These statutes allow the prosecutor to use discretion in selecting the "truly bad" for the statute's punitive wrath. They often include extensive and emotional language regarding harm to the public, and arguments that the defendant had the best opportunity to ascertain the true facts and prevent the harm. Historically, the statutes have been misdemeanors if they are criminal in nature, meaning exposure to one year or less incarceration. Unfortunately, with environmental statutes, this has changed.\(^{(11)}\)

Vicarious liability statutes, where, for example, an employer is held responsible for the actions of an employee, often are strict liability statutes and vice versa. This is not always true, however, and should not be assumed. The best defense in a vicarious liability case is to establish that the offending employee was not acting within the scope of his or her employment (for example, the evening janitor sells a prohibited product to a minor).\(^{(12)}\)

Because society has become more knowledgeable about dangers to the public, attempting to prevent citizens from hurting themselves and others is politically popular. Thus, the blending of vicarious and strict liability has been justified to prevent those who deal in dangerous articles, substances, and enterprises from escaping liability by having others (agents or employees) accomplish their business for them. Common targets of these statutes are explosives,\(^{(13)}\) drugs,\(^{(14)}\) firearms,\(^{(15)}\) and hazardous waste and hazardous substances.\(^{(16)}\)

Since 1982, with the establishment of the EPA Criminal Investigation Program and the DOJ's Environmental Crime Section, the two agencies have spent a great deal of time and effort building a body of environmental criminal law. Melding cases such as \textit{United States v. Dotterweich}\(^{(17)}\) under the Food and Drug Act with other criminal precedents, they have established a significant record of convictions of corporations, corporate officers, stockholders, and key employees. The developments in these criminal enforcement initiatives have had a spill-over effect into the civil enforcement universe. First, they have created an impression that skulduggery regularly occurs in corporate boardrooms. Second, the fact that officials of corporations have been convicted under the higher criminal burden of proof has made it easier to accept similar results on the civil side. Third, the greater publicity given criminal trials has ingrained this image of corporate officialdom's wrongdoing, not only in the public at large, but also in the eyes of the judiciary.\(^{(18)}\)

\textbf{§ 4.03. Overview of RCRA and CERCLA.}

CERCLA defines a "person" as "an \textit{individual}, firm, \textit{corporation}, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."\(^{(19)}\) RCRA defines "person" as "an \textit{individual}, trust, firm, joint stock company, \textit{corporation} (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a state, or any interstate body."\(^{(20)}\) A comparison beyond the definition of "person" shows that the statutes differ widely — except that if liability is found it will be expensive under either statute.

CERCLA, enacted to facilitate the cleanup of abandoned waste sites and the elimination of attendant health hazards, focuses on definitions concerned with "owner or operator"\(^{(21)}\) and "pollutant or contaminant."\(^{(22)}\) RCRA, enacted to facilitate the prevention of future Superfund sites by regulating hazardous wastes, focuses on "disposal,"\(^{(23)}\) "hazardous waste"\(^{(24)}\) (but not "hazardous substance"), and "treatment."\(^{(25)}\) Additionally, RCRA envisions a "cradle to grave" tracking of hazardous wastes through a manifest system.
§ 4.04. Liability Under CERCLA and RCRA.

[1]--Liability Can Have Civil or Criminal Results.

Liability under CERCLA and RCRA can be viewed from both the civil and criminal perspectives. While the individual is exposed in both perspectives, the ramifications differ widely.

Civil individual liability may be reimbursed by the corporation or its insurer, depending largely on the statutes of the state of incorporation. Listing, suspension, and debarment are discretionary consequences which EPA can impose in appropriate circumstances in criminal or civil cases. Some state criminal convictions and civil penalty actions, as well as RCRA and CERCLA, can be considered by EPA's Grants Administration Division's Compliance Branch for discretionary listing, suspension, or debarment.

Criminal prosecution increases the likelihood that the potential liability attached to the indictment and prosecution will not be indemnable. Likewise, the greater certainty of imprisonment upon conviction due to the rigidity of the federal Sentencing Guidelines assures that punishment does not become simply another "cost of doing business" to be passed on to the consumer.

Courts have long recognized a theory of nondelegable, personal responsibility for assuring compliance with public welfare statutes where criminal conduct was involved. In considering whether to find individual civil liability, recent court decisions have looked well beyond the traditional theories of piercing the "corporate veil" and the doctrine of "alter ego" to find personal liability.

[2]--Who Is at Risk?

The evolving case law has applied a standard of individual civil liability, independent of those protections created by state statutory or case law traditionally regarded as a corporate shield against personal liability. Clearly those corporate officers, directors, shareholders, agents, or employees who are directly involved in wrongful activity may be held personally liable. The individual's participation in a tort or tort-like conduct has been a traditional standard of liability and an exception to the protection provided by the corporate form.

A number of cases in various circuits illustrate this doctrine. In Lobato v. Pay Less Drug Stores, Inc., corporate officers and employees were sued personally in an action alleging product liability for a defective bicycle. The Tenth Circuit found an absence of specific acts by the individual defendants in selling the defective bicycle, and dismissed the claim as to the individuals, stating:

It is the general rule that if an officer or agent of a corporation directs or participates actively in the commission of a tortious act or an act from which a tort necessarily follows or may reasonably be expected to follow, he is personally liable to a third person for injuries proximately resulting therefrom. But merely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation. Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation.

In the context of a civil rights action over a nonprofit community swimming pool, Tillman v. Wheaton-Haven Recreation Association, Inc., the court held that a corporate director who actually votes for the commission of a tort is personally liable even though the wrongful act is performed in the name of the corporation and after consultation with legal counsel. Dissenting, Senior Judge Boreman, noting the then
recent pronouncements of the U.S. Supreme Court and the fact of the advice of counsel, stated: "A positively wrongful act is required to impose individual liability."

Scope of employment does not have great bearing on personal liability in these cases. If personal participation in a tortious action or decision by a corporate officer can be shown which is directly related to the plaintiff's injury, an action will lie.

§ 4.05. The Erosion of Traditional Protections.

The traditional view of liability for acts of the corporation and (where relevant) predecessor and successor corporations was that the shareholder's exposure was limited to the value of his or her investment in the corporation's stock. The relatively restrictive circumstances under which the corporate form could be ignored – as where there was evidence of excessive control or commission of a wrongful act that culminated in an unjust loss or injury – provided further comfort.

If found to have participated in, authorized, or ratified a corporate tort, an employee, shareholder, officer, or director could be held personally liable. This finding of direct, personal liability normally would not be the result of "piercing the corporate veil" but rather because of the person's own participation in the corporation's tortious act.

While generalizations are risky, it can be fairly said that, even in environmental cases, state courts tend to demonstrate the traditional hesitancy to ignore the corporate form. This is changing in some states as environmental activism and elected judges combine to make the corporate veil exceedingly sheer. Federal courts, on the other hand, view federal environmental statutes practically as mandates to implement EPA policies by imposing personal liability on individuals.

The seminal case in the growing body of case law is United States v. Northeastern Pharmaceutical & Chemical Co., Inc. NEPACCO was the manufacturer of disinfectant chemical products. In the manufacturing process, certain hazardous substances, including dioxins, were produced. The president and primary stockholder, Michaels, and another stockholder and vice president, Lee, knew of the hazardous nature of these by-products. In 1971, Lee approved of Denny Farm as a disposal site for the dioxins.

NEPACCO, after paying the then-known obligations of the corporation, liquidated its assets and paid the proceeds to the stockholders in 1974. In 1979, the Denny Farm site came under investigation by EPA, which found dioxin leaking from drums and ordered a cleanup. A cost recovery action was commenced against Lee, Michaels, and NEPACCO (now defunct).

The district court found Lee and Michaels to be "owners and operators" under Section 107(a)(1) of CERCLA and held them derivatively liable as to the Denny Farm site. Finding that the corporate veil would frustrate Congress' intent in CERCLA to hold responsible persons liable for remedial costs, Lee was found liable by the district court because he (1) held the position of vice president, (2) was a large stockholder, and (3) was an "actively participating" manager of NEPACCO.

As president and a major stockholder, with the ability to control NEPACCO's disposal practices, Michaels was also held liable. The district court found relevant his authority to prevent or abate damage from illegal dumping and found that Congress intended that those profiting should bear the burden of the cleanup where a profit resulted from illegal practices.

The district court went on to find Lee a "generator" of hazardous waste directly liable as the "person" who directed the disposal and transportation of the hazardous waste. The court identified five factors that drove...
its decision: (1) "capacity to control," (2) "power to direct," (3) "capacity to prevent and abate," (4) sizeable stock ownership, and (5) active participation in management.\(^{(39)}\)

On review, the lower court was reversed as to the finding that Lee and Michaels were "owners or operators" of the hazardous waste facility; neither actually owned the farm. The Eighth Circuit found that Lee could be held individually liable for his personal participation in the illegal actions of NEPACCO under section 107(a)(3) of CERCLA because he had arranged for the disposal of the dioxin.

Both Lee and Michaels also were found to be individually liable under Section 7003(a) of RCRA\(^{(40)}\). This section authorizes the EPA to bring suit "upon receipt of evidence of past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste . . . found to present an imminent and substantial endangerment . . ." The significance of the case is that, while Lee was liable as an individual under RCRA because of his illegal personal conduct, Michaels' RCRA personal liability was based upon his position as an officer and stockholder rather than on any personal tortious or illegal actions.

The NEPACCO decision is important because it supports the controversial EPA-DOJ policy that liability of individuals should turn on their power and capacity to control, and not merely their participation in a specific act.\(^{(41)}\)

In \textit{New York v. Shore Realty Corp.}\(^{(42)}\), Shore had purchased property that was previously contaminated. The state brought suit against Shore and an officer of the corporation to require the cleanup of hazardous waste on the site. Even though there was no showing of participation in the decision to dump hazardous waste at the site, the officer was found liable. The corporation and officer were shown to have been aware of the contamination before the property had been purchased. The officer had the authority to direct the cleanup and to make sure that future disposal was in accordance with the law, but had failed to do so.\(^{(43)}\)

Among several important cases coming from the Western District of Michigan, \textit{Kelley v. ARCO Industries Corp.}\(^{(44)}\) has received much interest. Judge Enslen has set out guidelines for establishing personal liability of officers and directors.\(^{(45)}\) The thrust of his analysis is to encourage responsible conduct by corporate leadership.

ARCO moved to dismiss or, in the alternative, for summary judgment on the issue of whether its directors and officers could be held personally liable for CERCLA cleanup costs. While indicating that officers and directors, in theory, \textit{could} be held responsible without defining the applicable legal standards, the court denied the motions because the issue presented a question of fact.

In a second opinion, responding to the parties' request for clarification, Judge Enslen set out what he described as a "prevention test" as a vehicle to determine liability.\(^{(46)}\) The test is a two-part determination based upon examining the officer's or director's degree of authority in day-to-day operations. Particular attention should be focussed on the area of health and safety practices and responsibility, these being deemed to include hazardous waste disposal. Likewise, the ability to have lessened or prevented the discharge of CERCLA hazardous wastes that must be cleaned up is to be considered. The next step is to analyze the affirmative responsibilities and actions to be undertaken in the context both of when the waste was disposed and of any post-disposal options. The court felt that as a matter of good public policy an officer's or director's efforts to prevent – or failing that, to clean up – should be accounted for and given consideration.\(^{(47)}\) The court did not discuss how this positive action would ultimately impact CERCLA liability.\(^{(48)}\)

The body of case law is building steadily in the area of stockholder, officer, and director liability under both CERCLA and RCRA.\(^{(49)}\)
§ 4.06. Parent and Successor Corporate Liability.

When it was passed in 1980, many felt that CERCLA would have little effect on them, yet today, CERCLA is recognized as a statute of such expansive coverage that almost no industry or corporation is immune. Officers, directors, and shareholders must be concerned, not only with personal liability, but also with the structuring of transactions to purchase other corporate entities; otherwise, their corporation could find itself liable for past environmental problems of the purchased entity.

[1]-Risks to Corporations in Acquiring Entities.

Acquisitions may come about through stock or asset purchases, consolidation, or merger. In a stock purchase agreement where one corporation purchases the stock of a second corporation, both assets and liabilities are acquired unless other arrangements are negotiated. The acquired corporation is ongoing and is not a "successor." Thus, the questions here would relate to the piercing of the corporate veil since there is no successor corporation. In a statutory merger or consolidation, the surviving corporation acquires all assets and liabilities of the unit which is merged or consolidated, unless the merger or consolidation agreement specifically provides otherwise. In a sale of corporate assets, the purchaser does not receive debts or liabilities associated with the acquired assets. Arguably, an asset purchaser should be able to avoid liability for off-site contamination caused by the seller. If the asset itself is contaminated, the asset purchaser may be held liable as a present owner under Section 107 of CERCLA.

Traditional corporate law recognizes four exceptions to the general rule of an assets purchaser's non-liability as the seller's successor: (1) the buyer expressly or implicitly assumes the seller's liabilities, (2) the transaction is based upon fraud to escape liability, (3) the purchase constitutes a non-statutory or de facto consolidation or merger of buyer and seller, or (4) the buyer is simply a continuation of the seller. The underlying reasoning for the traditional view and its exceptions is to assist in the proper assessment of taxes, to protect creditors and minority shareholders, and to promote free marketing of corporate assets.

If the transaction constitutes "continuity of the enterprise," the successor corporation is exposed. For example, continuity of the seller's management, personnel, and general operations; continuity of shareholders through a stock trade, a disappearance of the sold corporation (liquidation and cessation of business and dissolution by statutory process); and assumption by the buyer of those liabilities and obligations necessary to keep the seller corporation in uninterrupted production can leave the successor corporation exposed.

The criteria for the traditional continuation of the seller's business exception has similar factors. For example, one corporation remains at the end of the asset sale transaction together with common officers, directors, and shareholders. The continuation exception applies if the seller's corporate entity is essentially continued.

[2]-The EPA-DOJ View.

The government – both through the EPA and the DOJ – has adopted and aggressively pushed an expanded view of parent and successor corporate liability under CERCLA. The EPA Liability Memo indicates that the EPA may, in appropriate cases, disregard the corporate form when (1) a corporate shareholder is shown to have controlled or directed hazardous waste activity, and (2) the Agency finds it to be in the interests of public convenience, fairness, and equity. The Memo does not restrict the Agency to the piercing the corporate veil doctrine with its attendant burdens as an alternative method of reaching individuals or successor corporations. Rather, the EPA opines that the statutory language may impose liability on
On the issue of successor liability, the EPA seized upon a theory which is relatively new in the case law, one revolving around "the similarity of business operations." Under this view, as espoused in *Department of Transportation of New Jersey v. PSC Resources, Inc.*\(^{(56)}\) the Agency proposed to hold successor corporations liable even when there is no continuity of structure or ownership. The case is unique in that it involved a purchaser corporation continuing the seller's practice of disposing of hazardous waste into a state-owned lake.

While courts have not rushed to embrace the EPA position, the DOJ has espoused it on EPA's behalf in several cases. Courts generally have chosen to impose CERCLA liability on parent corporations directly. In the context of successor corporations, however, they have looked to the traditional common law principles in order to determine successor corporate liability.

### [3]--Should There Be a Uniform Federal Common Law Rule?

In both parent and successor corporation cases, some courts have concluded that there should be a uniform federal common law for triggering the piercing of the corporate veil. Reasoning that CERCLA liability is controlled by federal law, these courts believe there should be a body of federal substantive law rather than allowing the law of the various states to provide a rule of decision. This view is supported by the fact that Congress, in enacting CERCLA, desired to establish a uniform nationwide program to deal with the remediation of hazardous waste sites independent of the views of a particular state on issues of corporate law.

### [4]--Parent Corporations.

Some cases have proposed that the federal and state tests are identical.\(^{(57)}\) This view is based on the principle that the corporate form may be disregarded "in the interest of public convenience, fairness, and equity."\(^{(58)}\)

The early cases in this area involved fact situations where the sole shareholder of the corporate owner or operator was an individual. Many were easily held liable under Section 107(a) of CERCLA because of their personal conduct with respect to hazardous substances. Thus, the courts could easily find liability without resorting to the more restrictive veil piercing theories.\(^{(59)}\) The jump from this fact situation to one where another corporation was the sole stockholder was not difficult.

In *Idaho v. Bunker Hill Co.*,\(^{(60)}\) the court considered whether a parent corporation should be deemed an "owner" or "operator" of its subsidiary's operation. It looked at the parent's familiarity with the hazardous waste disposal and release history, its ability to control disposal and releases, and its authority to make and carry out decisions to prevent or abate these conditions. As in most of these cases, the decision was fact intensive. The level of control was remarkable – the parent controlled the board of directors, had to approve pollution expenditures over $500, to approve all capital expenditures, and could overrule any management decision or transaction. Additionally, while the authorized capital was only $1,100, there had been $27 million in dividends over a six-year period. While these facts clearly would have supported a piercing of the corporate veil, that issue was never addressed.\(^{(61)}\)

Another case of interest is *United States v. Nicolet, Inc.*\(^{(62)}\) Here the court considered whether a stockholder corporation actively participated in its subsidiary corporation's management. It found no reason to
distinguish between an individual stockholder and a corporate stockholder. The court used the *Bunker Hill*
tests for direct liability ("owner" or "operator"), but then, without looking to CERCLA precedent, brought
forth a new federal test for piercing the corporate veil. This test looked at (1) whether the subsidiary was
within those classes of persons identified in Section 107 of CERCLA as liable; (2) the degree of financial or
ownership interest the parent had in the subsidiary; and (3) the degree of control by the parent over the
management and operation of the subsidiary.

[5]--Successor Corporations.

In the context of the successor corporation, liability under CERCLA has been approached in several ways.
First, some courts have, as in the parent corporation question, expressed the need to apply a uniform rule.
Once it is determined that successor liability is appropriate under CERCLA and is in furtherance of the
statute’s goals, these courts conduct a review of the applicable state law. Often, using this determination as
guidance, they presume that the state rule is representative of the majority rule. Unfortunately, this may not
always be true. From the business perspective, this methodology is not useful in making decisions with
long-term consequences.(63)

Furthermore, when courts explain the policy underlying successor liability under CERCLA, it bears more
resemblance to the modern rules than the traditional rules upon which they purport to base their
decisions.(64)

Another group of cases has dealt with successor liability under CERCLA without finding the need for a
federal rule. However, in these cases, the court looked to state law or federal precedent and have come up
with basically the same analysis or test as those courts which have found that uniformity is critical.

The traditional approach of state courts examining corporations arising from consolidation or statutory
merger concludes that one corporation has gone out of existence and the survivor is the successor. In the
case of consolidation, both cease to exist and a new entity becomes successor to both. Regardless of how
the successor is created, it falls heir to the liabilities of the predecessor. Likewise, the defenses, if any, of the
predecessor(s) belong to the successor. These decisions generally accept the traditional four exceptions
to the rule: (1) an agreement, express or implied, to assume liability, (2) defacto merger, (3) mere
continuation, and (4) fraud used in an attempt to escape liability. The author is unaware of any court
adopting the "product line" exception or its twin, the "continuity of business operation."(65)

The case of *United States v. Bliss* is worthy of consideration.(67) The court was faced with facts all too
familiar in business today. Of the three officers, directors, and sole shareholders, two formerly owned the
unincorporated business that was succeeded, and the third, their son, was a former employee. The business
operation basically was unchanged after incorporation. The successor used the location, equipment, and
employees of the predecessor and retained the same customers. Moreover, it stated in its advertising that it
had been in business for more than forty years. The old logo continued to be used on at least one vehicle.
These facts had combined to lead the Missouri Supreme Court, in a related matter, to hold the successor
liable for the predecessor’s hazardous waste practices. The Missouri Supreme Court found no one factor
controlling but rather found a continuance of the selling corporation and, *ipso facto*, the purchasing
company liable.(68) The federal court, availing itself of collateral estoppel, used the Missouri liability
standard and found that the totality of the circumstances merited imposition of liability to further the
CERCLA objective of holding the responsible party, rather than the public, liable for cleanup costs.

In *Kelley v. Thomas Solvent Co.*, an important decision was rendered by the U.S. District Court for the
Western District of Michigan. The court applied the traditional continuation of business exception using a
test which focused upon three elements of continuity – stockholders, directors, and officers. Thomas Solvent
was in the business of distributing and transporting industrial solvents. Its problems began when the Michigan Department of Natural Resources (DNR) notified the company of suspected ground water contamination at two of their five operations and that the company was the likely source. After the DNR notice, Thomas Solvent reorganized and created four additional corporate entities.

Through some elaborate maneuvers, Richard Thomas and his mother became the sole directors of four new spin-off companies. Thomas and his mother had comprised two-thirds of the board of Thomas Solvent Company. Thomas was president of Thomas Solvent and the other four companies. Thomas Solvent then moved all of its assets to the four new companies with the notable exception of the two sites suspected of contaminating ground water. The stock of the four new companies was then issued to Richard Thomas, trustee, as part of his living trust. Thomas Solvent Company received none of the consideration paid for its assets. Thomas proceeded to manage both Thomas Solvent and the four new companies. The new companies retained the same employees, performed the same services, and handled the same products for the same customers as had Thomas Solvent.

In 1984, Thomas Solvent was faced with a court order requiring it to begin containment and remediation, and to pay costs incurred by the EPA, which had already begun containment and groundwater cleanup. Thomas Solvent filed for bankruptcy and liquidated its assets, which were insufficient to cover these liabilities. The court, limiting its inquiry to the question of continuity of stockholders, officers, and directors, found the new companies liable as successors. The court had no problem with the fact that Thomas Solvent had not dissolved after the reorganization or that the newly formed companies had separate locations and performed legitimate functions.\(^{(70)}\)

In making its decision, the court looked to \textit{Tucker v. Paxson Machine Co.},\(^{(71)}\) a products liability case. While the \textit{Tucker} court found the successor corporation \textit{not} liable under either the "product line" or "continuation" theories, the \textit{Thomas Solvent} court found the test used for the traditional continuation of business exception in \textit{Tucker} helpful. Plaintiff Tucker had urged a "mere continuation" exception because of certain benefits allegedly gained from predecessor's name and goodwill and the fact that the successor produced basically the same product. The \textit{Tucker} court relied on the traditional requirement of "common identity of officers, directors, and stockholders" between the selling and purchasing corporations as the key elements of a 'continuation.'\(^{(72)}\)

A more recent case, \textit{Anspec Co. v. Johnson Controls, Inc.},\(^{(73)}\) presented the issue of whether a successor corporation could be liable for cleanup costs incurred by the present owner under CERCLA with regard to property contaminated by wastes placed there by a corporation with which it had merged. The district court found no liability and declined to develop a federal common law rule on successor liability. The predecessor corporation was dismissed on the theory that upon merger it ceased to exist. On appeal, plaintiffs argued that \textit{Smith Land} controlled, and, therefore, successor corporations should be held liable under CERCLA applying traditionally state common law principles, as well as accepted rules of statutory construction. The defendant relied on the fact that Section 107(a) of CERCLA does not include successor corporations as persons liable for cleanup costs.

In rejecting the defendant's position, the Sixth Circuit found the surviving and merged corporation to be one. This was done based on state law principles, without developing a federal common law. Under state law, the court found that the cessation of the predecessor corporation's existence following merger does not control the issue of its liability. Furthermore, because of CERCLA's broad language and Congressional intent, there was no need to include successor corporations specifically in the definition of "person." The court relied upon "universally accepted principle[s] of private corporate law;" thus "when Congress wrote 'corporation' in CERCLA it intended to include a successor corporation."
§ 4.07. Can Anything be Done to Prevent Liability?

Corporate officers, directors, and stockholders (especially those in close corporations) must become advocates of environmentally responsible behavior. Documenting actions to prevent or abate pollution in the CERCLA and RCRA areas is essential. Audits, training, and meaningful corporate environmental policy statements, if sincere, are helpful. "Window dressing" for the benefit of the public and the regulators is a one-way ticket to jail.

Corporations committed to business plans that include mergers, consolidations, or acquisitions must become more aware of the potential for liability. Audits and due diligence searches prior to these transactions are critical.

To enjoy the benefits of the protections afforded by the corporate form, particular care must be taken to avoid the scope of the exceptions. As to piercing the corporate veil, good corporate practices have not changed. The separate corporate existence of the subsidiary must be respected, and involvement in the subsidiary's day-to-day affairs must be avoided. If some matters must be standardized and reviewed, have them administered by the subsidiary.

Because of the real risk of direct liability under CERCLA, operational involvement in waste disposal should be avoided. Involvement in hazardous waste activity is especially risky. As a parent corporation, judiciously exercise the inherent authority over the subsidiary's pollution control and abatement decisions if you must intervene. Because of the growing number of enforcement and Superfund cases and the aggressive litigation posture of EPA and DOJ, guidelines are difficult to fashion and can change with little notice.

Asset purchases present a different set of concerns. One rule stands out – always deal at arm's length with the seller. Likewise, cash or cash equivalents are less risky than stock payments. Where the purchase constitutes all the assets of the seller, the deal should prohibit the seller from immediate dissolution and require it to retain the proceeds, or at least a reasonable portion thereof, for a period of time, rather than distribute them to the stockholders immediately.

General common sense rules include:

1. Officers, directors, and employees should not be identical.
2. Change something significant even if a large measure of the value of the assets is the seller's identity. Distinguish the new entity.
3. If you retain logos or service marks, change the product, service, or customer base.
4. Do not present the new entity to the customer as the same business with a new name.  

§ 4.08. Conclusion.

Individual officers, directors, and shareholders who direct, participate in, or authorize an activity prohibited under either CERCLA or RCRA may be held personally liable for civil or criminal violations. The number of cases imposing liability in this context has grown steadily since NEPACCO. The willingness of courts to ignore the corporate form and to impose liability upon the corporate chain – even where direct participation has not been shown – is an ominous sign. Regarding individuals, the corporate veil has been shown to be illusory at best.

The civil liability trend is consistent with and, arguably, following the lead of the criminal enforcement initiatives of EPA and DOJ. The Second Circuit has held that, under CERCLA, the person "in charge" is,
for criminal purposes, "in a position to detect, prevent, and abate a release of hazardous substance," and thus, is criminally liable for failure to report a release.\(^{(75)}\)

The issue of parent and successor corporations' liability for predecessor and successor acts, while more likely to have the corporate form and its traditional protections examined in detail, may find that the corporate veil, instead of being pierced, is being side stepped.\(^{(76)}\)

The limits of liability that once made the corporate form a desirable entrepreneurial vehicle have now become an illusory protection. It has fallen prey to overly broad, hastily-drafted statutory definitions and expansive judicial interpretations.

5. 5. *Id.*
11. 11. United States v. Protex Indus., Inc., 874 F.2d 740 (10th Cir. 1989) (prosecution for "knowing endangerment" under RCRA, 42 U.S.C. § 6928(e), with 15 year maximum penalty).
17. 17. 320 U.S. 277 (1943).
18. 18. In the early years of environmental prosecution, the need for "educating the judiciary" was well recognized.


21. 42 U.S.C. § 9601(20) (1988) includes, for liability purposes, (1) any person who owned or operated a facility which disposed of hazardous substances (past or present); (2) generators, i.e., persons who arranged for the treatment, disposal, or transportation of hazardous substances; and (3) transporters, i.e., those who transport wastes to disposal sites where a release or threatened release of hazardous substances may create the necessity of a cleanup.

22. 42 U.S.C. § 9601(33) covers "hazardous substance," i.e., anything that can, after release, cause "death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions or physical deformations".

23. 5. 42 U.S.C. § 6903(3) ("the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent may enter the environment.

24. 6. 42 U.S.C. § 6903(5) (hazardous waste must first be a waste which, due to "its quantity, concentration or physical, chemical, or infectious characteristic," may (a) increase mortality or serious illness, or (b) "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise manage"

25. 7. 42 U.S.C. § 6903(34) ("any method designed to change the character or composition of any hazardous waste so as to render such waste nonhazardous, safer for transport, amendable for recovery, storage, or reduced in volume, [or] render it nonhazardous.


28. 3. United States v. Dotterweich, 320 U.S. 277 (1943) ("responsible corporate officer doctrine").

29. 4. 261 F.2d 406 (10th Cir. 1958).

30. 5. Id. at 408-9.

31. 6. 517 F.2d 1141 (4th Cir. 1975).

32. 7. Id. at 1150 (Boeman, S.J., dissenting). It could be argued on the basis of this case that, despite due diligence (i.e., seeking and relying on the advice of counsel), there is little or no way to escape potential personal liability if you are a decision maker. Perhaps the answer, in part, lies in meticulous documentation of both the decision-making process and the execution of the decision once made, thus establishing the party's reasoning and, one hopes, helping to nullify any inuendo of tortious (or criminal) intent.


Practically all authorities agree that under some circumstances in a particular case the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party; and should be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, public wrong, or to work out the equities among members of the corporation internally and involving no rights of the public or third persons.


37. 4. 42 U.S.C. § 9601(20).

38. 5. 579 F. Supp. at 848.

39. 6. Id. at 849.

40. 7. 42 U.S.C. § 6973(a).


42. 9. 759 F.2d 1032 (2d Cir. 1985).

43. 10. The court relied upon a nuisance claim to help find personal liability. This is a theory which may be used where state law has particularly harsh standards for piercing the corporate veil.


45. 12. Id. at 878 - 79.


47. 14. See Lawrence, Comment, "Liability of Corporate Officers Under CERCLA: An Ounce of Prevention May be the Cure," 20 ELR 10,377 (1990). The author concludes that Kelley should promote corporate responsibility and encourage officers to try to limit their exposure by positive actions.

48.

15. See Kerns & Smith, "Director and Officer Liability for Environmental Cleanup Costs," For the Defense 19 (April 1991). The authors conclude that Kelley indicates a trend focusing upon extent of control and responsibility exerted by officers and directors and how those are used to prevent or abate pollution.

49. 16. Examples include: United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987) (president and vice president held liable under CERCLA § 107(a)(3) as parties


51. 2. Some states have recognized what is called a "product line" exception. Here, the buyer, having acquired all of seller's assets, continued the same manufacturing operation; New Jersey, Pennsylvania, and California. In a minority of states, the traditional exceptions have been expanded in products liability cases under the "continuity of the enterprise theory."


60. 11. 635 F. Supp. 665 (D. Id. 1986).

61. 12. See also Rockwell Int'l Corp. v. IU Int'l Corp., 702 F. Supp. 1384 (N.D. Ill. 1988) (parent corporation liable directly as an "operator" of the subsidiary's facility because of its excessive participation in management, including suggesting changes to procedures concerning hazardous substances and their handling, as well as reviewing requests for environmental protection equipment; piercing of the corporate veil was not addressed, but court specifically noted this abstention in context of whether parent could have been liable as the "owner" of the facility).


70. 21. See also United States v. Stringfellow, No. CV-83-2501, MML, slip op. (C.D. Cal. Feb. 21, 1984)(1984 WL 3206 C.D. Cal.) (court used the California version of the rule requiring either no consideration given for predecessor's assets and available for unsecured creditors or that one or more persons had been an officer, director, or stockholder of both corporations). Interestingly, the district court in Thomas Solvent did not consider the fraud exception, yet found the conveyance fraudulent under state law.

71. 22. 645 F.2d 620 (8th Cir. 1981).

72. 23. Id. at 626.

73. 24. 922 F.2d 1240 (6th Cir. 1991).

75. 1. United States v. Carr, 880 F.2d 1550 (2nd Cir. 1989).