

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

business.

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 guilding 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.

§ 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