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SHAREHOLDER LIABILITY UNDER SUPERFUND: CORPORATE VEIL OR VALE OF TEARS?

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Indisputably, harmful solid waste must be removed from our environment where it has been dumped. This pressing societal need was addressed when Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[1] The Act's broad remedial purpose has been asserted to support personal liability for shareholders of corporate defendants prosecuted under CERCLA. Such an approach, however, may be indefensible under the statute.

This article analyzes the confused state of the law regarding shareholder liability under Superfund. Section I briefly explains the history of Superfund and other pertinent environmental protection statutes. Section II addresses the Superfund liability scheme. Section III analyzes cases that have decided the issue of shareholder liability under Superfund. Finally, the article concludes with recommendations on how shareholder liability should be addressed in the future.

I. BACKGROUND: FEDERAL PROTECTION OF THE ENVIRONMENT

The United States Code includes a variety of provisions to prevent and penalize industrial pollution of the environment. For example, the Clean Air Act[2] seeks to reduce air pollution by establishing maximum levels for certain air pollutants, such as lead and carbon monoxide.[3] Similarly, under the Federal Water Pollution Control Act,[4] the Environmental Protection Agency ("EPA") issues permits to any point source of water pollution.[5] The EPA then imposes increasingly stricter effluent limitations on these permittees.[6] The Resource Conservation and Recover Act ("RCRA") regulates disposal of solid waste onto land, by requiring, among other things, detailed record keeping regarding waste pickup and disposal.[7] All of these statutes provide for daily civil penalties and

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1. 42 U.S.C. §§ 9601-57 (1986) [hereinafter Superfund, CERCLA, or the Act].
2. 42 U.S.C. §§ 7401-7642 (1986).
3. 42 U.S.C. § 7409 (1986). *See also* 40 C.F.R. § 50.4-50.12 (1988).
4. 33 U.S.C. §§ 1251-1376 (1986) (also known as the "Clean Water Act").
5. 33 U.S.C. § 1342(a) (1986).
6. *See generally* 33 U.S.C. § 1311 (1986). The original water pollution permit law was the River and Harbors Act of 1899, which required a permit from the Army Corps of Engineers before discharging refuse into navigable waters. 33 U.S.C. §§ 407-26m (1986). The River and Harbors Act, however, did not allow for discharge limits to be linked to the permits, which necessitated the Clean Water Act limit scheme. Exec. Order No. 11,574 (1970). *See also* 40 C.F.R. § 122.41 (1988).
7. 42 U.S.C. §§ 6901-87 (1986).

criminal sanctions for violations.[8] None of these statutes, however, provides automatic personal liability for shareholders of corporations found liable under the law.[9]

The RCRA manifest system was intended to provide a "cradle to grave" scheme for regulating hazardous waste, by regulating waste generators, transporters, treaters, storers, and disposers. RCRA also regulates the operations of waste disposal sites through an EPA permit system for dump site operators.[10] Unfortunately, RCRA had no mechanism for responding to environmental harm from past careless solid waste disposal.[11] In response to this statutory deficiency, Congress passed CERCLA.[12]

CERCLA authorizes the President to respond to actual or threatened releases of hazardous substances into the environment.[13] The Act also requires the EPA to create a national contingency plan, which establishes "procedures and standards for responding to releases of hazardous substances . . . . "[14] Cleanup costs and procedures may be funded through Superfund, the provisions of which mandate a separate account accumulated from surcharges on toxic chemicals, as they are produced, and on some petroleum products.[15] Although Superfund is available for cleanup payment, the Act clearly establishes that ultimate financial liability for cleanup be borne by several responsible parties. These CERCLA liability provisions are discussed next.

II. OVERVIEW: SUPERFUND CLEANUP LIABILITY.

CERCLA identifies several parties who may be liable to clean up facilities from which there is or may be a hazardous release into the environment.[16] These responsible parties include current owners and operators of the hazardous facility, as well as owners and operators at the time when the hazardous wastes were discarded at the facility.[17] Also responsible are persons who contractually arranged

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8. *See generally* S. BRIGGUM, G. GOLDMAN, D. SQUIRE, D. WEINBERG, HAZARDOUS WASTE REGULATION HANDBOOK: A PRACTICAL GUIDE TO RCRA AND SUPERFUND 235-39 (1985) [hereinafter HANDBOOK].

9. *See* Joslyn Corp. v. T.L. James & Co., Inc., 696 F. Supp. 222, 226 (W.D. La. 1988).

10. R. FORTUNA AND D. LENNETT, HAZARDOUS WASTE REGULATION, A NEW ERA 9 (1987).

11. *See* HANDBOOK at 4.

12. *Id. See also* 126 Cong. Rec. 30,930-31 (1980) (S. Randolph); 126 Cong. Rec. 31,972-73 (1980) (R. Vento).

13. 42 U.S.C. § 9604 (1986). In conjunction, the EPA is authorized to seek injunctions in federal court to force a responsible party to clean up any site or spill that presents an imminent and substantial danger to public health or welfare or the environment. 42 U.S.C. § 9606(a) (1986).

14. 42 U.S.C. § 9605 (1986). This portion of the national contingency plan is known as the national hazardous substance response plan.

15. 42 U.S.C. § 9631 (1976), repealed by the Superfund Amendments and Reauthorization Act ("SARA"), which extended the EPA's authority under the original statute and expanded the tax to more general business activities and to gasoline. Pub. L. No. 99-499, 100 Stat. 1613 (1986). The term "Superfund" has come to refer not just to the accumulated cleanup fund, but to the statute itself. "Superfund" is used in that more generic sense herein.

16. A "facility" is defined as: "(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 where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." 42 U.S.C. § 9601(9) (1986).

17. 42 U.S.C. §§ 9607(a)(1)-(2) (1986). The act expressly excludes from the definition of responsible owners or operators those persons, who without participating in the management of the facility hold indicia of ownership primarily to a protect security interest in the facility. 42 U.S.C. § 9601(20)(A) (1986). *See infra* notes 38-42 and accompanying text.

for disposal or treatment of their hazardous waste or who arranged with a transporter for transport of their waste for disposal or treatment.[18] Finally, the transporter who accepts hazardous wastes, for transport to a facility of the transporter's choosing, is liable when there is a release or threatened release from the facility.[19]

A responsible party may be liable for all costs associated with waste removal or remedial action at the site, incurred by the United States, a state or others, as long as the response or remedy is not inconsistent with the EPA's national contingency plan.[20] The responsible party also may be liable for injury to, destruction of, or loss of natural resources, as well as the cost of assessing such injury.[21] A party who is ordered to remove or respond to a site or spill that is creating an imminent or substantial danger[22] will be liable for punitive damages for failure to respond as ordered. Punitive damages will be three times the cost incurred by the government as a result of the responsible party's failure to respond.[23]

The statutory responsible parties will be strictly liable for the applicable response costs.[24] Further, all responsible parties are jointly and severally liable for the entire cost of cleanup.[25] Thus, the United States or a state can pursue its action for response costs against any or all responsible parties. If the government recovers from fewer than all the responsible parties, those prosecuted can seek contribution from the others.[26]

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18. 42 U.S.C. § 9607(a)(3) (1986). This category of responsible parties often is referred to as waste generators.

19. 42 U.S.C. § 9607(a)(4) (1986).

20. 42 U.S.C. § 9607(a)(4)(A)-(B) (1986). *See also supra* note 14 and accompanying text regarding the national contingency plan. The propriety of the government's remedial response often is the subject of protracted litigation. *See, e.g.*, United States v. Conservation Chemical Co., 628 F. Supp. 391, 396-398 (W.D. Mo. 1985) [hereinafter CCC]. The responsible parties have the burden of proving the government's response costs are not consistent with the national contingency plan. *See* United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726, 747-48 (8th Cir. 1986) [hereinafter *NEPACCO II*].

21. 42 U.S.C. § 9607(a)(4)(C) (1986). The *NEPACCO II* Court, 810 F.2d at 749, affirmed a lower court conclusion that the government's recoverable response costs include salaries and expenses associated with monitoring and assessing the environmental threat, as well as litigation expenses of the EPA and Department of Justice, attorneys' fees and prejudgment interest. *See* United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 579 F. Supp. 823, 850-52 (W.D. Mo. 1984) [hereinafter *NEPACCO I*] (In 1989, the EPA declared the Denney farm, the dumpsite at issue in the NEPACCO cases, as well as seven other sites all in southwestern Missouri, to be free of all of the highly toxic chemical dioxin. *See* Kansas City Times, May 5, 1989, at B1).

22. *See* 42 U.S.C. § 9606(a) (1986).

23. 42 U.S.C. § 9607(c)(3) (1986).

24. CERCLA states that liability under the Act will be "construed to be the same standard of liability which obtains under section 311 of the Federal Water Pollution control Act." 42 U.S.C. § 9601(32) (1986). Section 311 of the Clean Water Act, 33 U.S.C. § 1321 (1986), has been interpreted to require strict liability. *See* Giblin and Kelly, *Judicial Development of Standards of Liability in Government Enforcement Actions under the Comprehensive Environmental Response, Compensation and Liability Act*, 33 CLEV. ST. L. REV. 1, 11-13 (1985).

25. Rallison, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability under CERCLA*, 1987 UTAH L. REV. 585, 591-92, 595-96 [hereinafter Rallison].

26. *See* Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283, 291 (N.D. Cal. 1984); City of Philadelphia v. Stephan Chemical Co., 544 F. Supp. 1135, 1143 (E.D. Pa. 1982). *But see* Mardan Corp. v. C.G.C. Music Ltd., 600 F. Supp. 1049, 1058 (D. Az. 1984) (denied contribution based on the doctrine of unclean hands).

The Superfund scheme thus emphasizes cleanup first. Subsequently, financial responsibility for cleanup is determined, with the government enjoying broad powers to recover from third parties. Recently, the government has extended its recovery claims to shareholders of site owners[27] and to officers of generators.[28] What is contentious, therefore, is the assessment of CERCLA liability for shareholders of CERCLA site owners or operators.

III. SHAREHOLDER LIABILITY UNDER CERCLA WITHOUT PIERCING THE CORPORATE VEIL?

Generally, before a shareholder of a defendant corporation is liable for any damage-causing activities of the company, the courts must pierce the corporate veil.[29] Courts have held, however, that the shareholders of companies that owned

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Contribution from other responsible parties is supported by the language in the "responsible parties" section of CERCLA which allows for recovery of response costs incurred by the United State, or by a state, or *by any other person*. 42 U.S.C. § 9607(a)(4)(B) (1986) (emphasis added). Thus, responsible parties who incur expense for cleanup have a concurrent right to contribution for the costs they incur. This right to contribution is qualified, as is the government's recovery right; only necessary costs consistent with the national contingency plan may be recovered. *See CCC*, 628 F. Supp. at 405.

In allocating liability among multiple responsible parties, the courts may consider degree of fault, extent of knowledge, and control. *See* Tisdale, *Current Issues in Superfund Litigation*, in HAZARDOUS WASTE LITIGATION (1985).

27. *See infra* notes 30-50 and accompanying text.

28. *See, e.g.*, United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985). Unfortunately, the courts often cite generator cases to support personal liability for shareholders of site owners and operators. *See, e.g., infra* notes 39-41 and accompanying text.

The case authority for generator liability, however, is inapplicable to owner/operator liability. In *Ward*, the Ward Transformer Company ("WTC"), purchased, rebuilt and sold electrical transformers and generated polychlorinated biphenyl ("PCB") oil in the process. Robert Ward, Jr. was the president of WTC and was responsible for all day-to-day decisions of the company. Ward, on behalf of the company, contracted with Robert Burns to dispose of the PCB oil. With Ward's knowledge, Burns dumped the oil at Fort Bragg Military Reservation and along North Carolina roadsides. Eventually, Ward and Burns were convicted for unlawful disposal. 618 F. Supp. at 890-910.

Although WTC contracted for disposal with Burns, Ward was held personally liable for cleanup costs as a "person who arranged for disposal of hazardous substances." 42 U.S.C. § 9607(a)(3) (1986). The Court noted that Ward personally participated in securing the disposal contract. (Ward also personally benefitted from the contract because some of the contract proceeds to Burns, in turn, were paid to Ward on a $55,000 debt Burns owed Ward). The court held that any corporate officer who was personally involved in arranging for hazardous waste disposal is liable for cleanup costs, as a "person who arranged . . . ." 618 F. Supp. at 894. Personal liability for Ward was consistent with traditional corporate and tort law because corporate officers are personally liable for the torts they commit on behalf of their company. 19 C.J.S. *Corporations* § 845 (1940).

See also NEPACCO II, 810 F.2d at 744; United States v. Mottolo, 605 F. Supp. 898, 913-14 (D.N.H. 1985) (motion for summary judgment of generator's president, treasurer, sole shareholder, denied because fact issues remained regarding the officer as a person who arranged for disposal of hazardous waste).

Notably, the *Ward* Court rejected the United States' theory that both Ward and WTC were liable as hazardous facility owners or operators under 42 U.S.C. § 9607(a)(2) (1986). The government's attempt to call Ward and WTC "operators" of the North Carolina roadsides was termed by the court "a tortured maze of legal reasoning," "inventive," and "mental gymnastics." 618 F. Supp. at 884. Similarly, in *NEPACCO II*, the Eighth Circuit rejected the theory that NEPACCO officers were owners or operators of the Denney farm hazardous site where NEPACCO dumped dioxin. 810 F.2d. at 743. These courts recognize that generator liability under Superfund is not interchangeable with owner/operator liability. *See infra* notes 39-41 and accompanying text.

29. 18 C.J.S. *Corporations* § 580 (1939). A "piercing" analysis requires a court to decide if the shareholder(s) of a company has disregarded the legal separateness of the corporate entity, such that

hazardous sites are directly liable under the owner/operator provision of CERCLA, without piercing the corporate veil of the site-owning company.[30] This judicial approach appears unjustified.

For example, in *State of New York v. Shore Realty Corp.*, the hazardous waste disposal site at issue was owned by Shore Realty Corporation. In turn, Shore Realty was owned by one Donald LeoGrande.[31] The court found both Shore Realty Corp. and LeoGrande liable for New York's response costs, and for common law nuisance abatement expenses, in cleaning up the site.[32] Shore Realty Corp. was held liable as a current site owner under 42 U.S.C. § 9607(a)(1).[33] The court also found LeoGrande personally liable as an "owner or operator."

To support this conclusion, the Second Circuit noted that the definition of "persons," who may be owners or operators under the statute, specifically includes individuals.[34] Further, the court recognized the statutory exception for a non-managerial owner who "holds indicia of ownership primarily to protect his security interest."[35] In the *Shore Realty* majority's opinion, the exception for owners via security interests implied liability for a managing shareholder.[36] Finally, the court concluded that personal liability for LeoGrande as an "operator" was appropriate because he was "in charge of the operation of the facility . . . ."[37]

The Second Circuit's analysis of LeoGrande's personal liability is flawed. The court first relied on the "owner" language in CERCLA to impose liability on LeoGrande. In so doing, however, the court ignored the fact that it was calling both Shore Realty Corp. and LeoGrande the "owner" of the site. Actually, as a shareholder of Shore Realty Corp., LeoGrande is the *owner of the owner* of the site. Under traditional corporate law, LeoGrande would not be liable unless the plaintiff could prove that Shore Realty's corporate separateness had been sufficiently ignored to justify piercing the corporate veil. The *Shore Realty*

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the company is merely the instrumentality or alter ego of the owner. This decision is based on several factors, including: (i) whether the owner disregarded statutory corporate formalities, such as holding meetings and keeping minutes; (ii) whether the owner co-mingled company resources with personal resources; and (iii) whether the company is drastically undercapitalized to meet its business ends. If the foregoing are found, a court may conclude that the business is not a separate legal person from its owner, so the owner should be liable for company obligations. *See generally* MOYE, THE LAW OF CORPORATIONS 89-90 (1982).

30. *See, e.g.*, State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) [hereinafter *Shore Realty*].

31. *Shore Realty*, 759 F.2d at 1037. The land was purchased for condominium development. The site included five large tanks in a field, six smaller above and below-ground tanks, one tank truck trailer, and two warehouses containing over 400 leaking drums of chemicals and contaminated solids. Shore Realty Corp. employees called in State environmental assistance when the drums began bursting and leaking. *Id.* at 1038, n.3.

32. *Id.* at 1044-45, 1050-52.

33. *Id.* at 1044. Shore Realty Corp. is liable as an owner regardless of the fact that some of the waste disposed on the property was dumped by unauthorized tenants. The court explained that responsible parties will be liable, without proof of causation or contribution. *Id.* at 1044-45. *See also supra* note 24 and accompanying text.

34. 759 F.2d at 1052, citing 42 U.S.C. § 9601(21) (1986).

35. 42 U.S.C. § 9601(20)(A) (1986). *See supra* note 17 and accompanying text.

36. *Id.*

37. 759 F.2d at 1054. Under the state law nuisance theory, the court found LeoGrande was liable as an officer who controlled corporate tortious conduct. The court admitted that LeoGrande's *common law* liability as a shareholder "is debatable" because facts sufficient to pierce the corporate veil "are probably insufficiently particularized." *Id.* at 1052.

Court, however, never acknowledged the issue of piercing the corporate veil to impose Superfund liability on LeoGrande. Thus, the court mistakenly relied on the "owner" language in the statute to impose direct personal liability on someone who was not an owner of a site.

To support its finding of LeoGrande's liability as an owner, the *Shore Realty* Court relied on the statutory exception for those who hold title to property to protect a security interest.[38] Apparently, the majority believed that since totally passive owners of site property, such as mortgagees, are exempted from liability, then, by inference, managerial shareholders must be liable under the statute. The court's reliance on the security interest exception is unjustified. First, the *Shore Realty* Court ignores the fact that the security interest exception applies to those who hold a security interest for the hazardous waste site property itself. In contrast, LeoGrande held an interest, as a shareholder, in a *company* that owned a waste site. LeoGrande did not hold an interest in the site property.

Further, as authority for its interpretation of the security interest exception, the Second Circuit cited *NEPACCO I*.[39] In *NEPACCO I*, however, the individuals held personally liable were shareholders and officers of *generators*, not shareholders of a site owner or operator.[40] Considering that the Eighth Circuit in *NEPACCO II* subsequently rejected personal liability for the individual defendants based on CERCLA's owner/operator provision, the *Shore Realty* majority's reliance on *NEPACCO* for precedent regarding the owner/operator provision seems misplaced.[41]

Finally, by relying on the security interest exception, the *Shore Realty* Court glossed over the fact that the exception expressly applies to a unique ownership role—documentary financial "ownership" by a creditor. Any inferences drawn from the exception, therefore, should be limited to that special class of owners it covers. The language "without participating in the management . . . holds an indicia of ownership to protect his security interest . . ." might infer that *secured parties* could lose their protected status if they interfered in the disposal activities on the site property governed by their security interest.[42] The exception does not, however, justify courts' overlooking the actual legal ownership of site property by a corporation, to bind its shareholders, when no security interest is involved. Nothing in the security interest exception appears to justify the sort of implicit, automatic corporate piercing the *Shore Realty* Court manufactures.

To buttress its conclusion as to LeoGrande's liability sans piercing, the Second Circuit relied on the CERCLA "operator" language. It held "[i]n any event, LeoGrande is in charge of the operation of the facility in question, and as such is an 'operator' within the meaning of CERCLA."[43] The court cites no authority to support its conclusion regarding CERCLA's meaning of "opera-

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38. 759 F.2d at 1052.
39. 579 F. Supp. at 847-48.
40. *See supra* note 28 and accompanying text.
41. *See NEPACCO II*, 810 F.2d at 743-44. Like *NEPACCO I*, other cases finding personal liability for a *generator* company's officers are mistakenly cited as authority for liability of a site company shareholder under the owner/operator provision. *See CCC*, 628 F. Supp. at 420, citing *Ward* and *Motollo supra* note 28.
42. *See generally* Rallison, *supra* note 24, at 608-11.
43. 759 F.2d at 1052.

tor."[44] Based on the common meaning of the word, however, LeoGrande would appear to qualify as an "operator," since "[a]ll corporate decisions and actions were made, directed, and controlled by him."[45] This "operator" liability under CERCLA is consistent with the court's finding of personal liability for LeoGrande under New York nuisance law because LeoGrande was "a corporate officer who controls corporate conduct" and, therefore, "is liable for the torts of the corporation."[46] Thus, the "operator" language in CERCLA, not the "owner" provision, may be the appropriate statutory basis for courts to impose individual liability on managerial shareholders.[47]

An alternative approach to individual shareholder liability was reflected in *Joslyn Corporation v. T.L. James & Co., Inc.*[48] Joslyn Corporation was the current owner of a contaminated site that the Louisiana Department of Environmental Quality ordered cleaned up under CERCLA. Joslyn sued T.L. James & Co., which previously owned the Lincoln Creosoting Company. Allegedly, Lincoln contaminated the site in question during its wood treatment/creosoting operations. Joslyn also sued several T.L. James corporate officers, all as former owners or operators of the hazardous creosoting/wood treating facility.[49]

The *Joslyn* Court explicitly rejected the reasoning in cases like *Shore Realty*, that found Superfund liability for shareholders and officers without piercing.[50] Rather, the court held that limited shareholder liability is firmly entrenched in corporate law and should not be disregarded without specific legislative directive. The *Joslyn* Court found CERCLA lacks any clear language or legislative history to impose direct, personal liability on shareholders of CERCLA defendants. For this reason, the court rejected direct liability for T.L. James & Co.[51]

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44. The Clean Water Act, *see supra* notes 4-6 and accompanying text, imposes liability on "persons in charge." *See* 33 U.S.C. § 1321(b)(5)-(6) (1986). At least one court has held that a *corporate* owner-operator (as well as an individual) can qualify as a "person in charge" because it has the *capacity to control* or direct the pollution-causing activities. *See* Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976).

The court in *NEPACCO I* relied on *Apex* to conclude that "capacity to control" is relevant to the CERCLA analysis of personal liability for shareholders of site owners or operators. 579 F. Supp. at 848-49. In so doing, the *NEPACCO I* Court ignored that *Apex* only represents the narrow conclusion that a "person in charge" under the WPCA includes a corporate person. *Apex* concluded nothing regarding liability of shareholders for the activities of their corporation, as the *NEPACCO I* Court's reliance would indicate.

NEPACCO I has spawned subsequent analyses of a shareholder's "capacity to control" for the purposes of CERCLA "owner/operator" liability. *See, e.g., CCC*, 628 F. Supp. at 420; State of Idaho v. Bunker Hill Co., 635 F. Supp. 665, 671-72 (D. Idaho 1986). CERCLA gives no guidance whether this "capacity to control" approach is relevant or appropriate under the owner/operator provision. Considering *NEPACCO II* held that liability for the NEPACCO defendants was not justified under the owner/operator language, however, any further reliance on *NEPACCO I* as support for shareholder liability under the owner/operator provision is inappropriate.

45. 759 F.2d at 1038.

46. *Id.* at 1052.

47. *See infra* notes 66-71 and accompanying text.

48. 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990).

49. 696 F. Supp. 222-24. The court's opinion is limited to motions to dismiss by T.L. James & Co., on the grounds that the Lincoln Creosoting Co., not its shareholder, was the owner of the site at the time of contamination. The opinion does not address the personal liability of the officers of T.L. James & Co.

50. *Id.* at 224-25 n.4.

51. *Id.* at 225-26. The court went on to absolve T.L. James & Co. of any liability based on a traditional piercing analysis that examined corporate formalities, capitalization, and independent financial record keeping. *Id.* at 230-31.

Shore Realty and *Joslyn* thus represent competing views on the issue of personal liability for shareholders of CERCLA site owners and operators. As stated, the reasoning in the *Shore Realty* opinion is flawed on the "owner" issue — although the court's personal liability finding for the shareholder may be justified if the CERCLA "operator" provision is equated with traditional tort liability for corporate officers. *Joslyn* reflects the traditional corporate law approach to shareholder liability, which requires sufficient facts to pierce the corporate veil before a corporation's owners will be liable for the corporation's acts.

An additional line of cases is relevant to arriving at a consistent treatment for shareholders of Superfund sites. These cases analyze whether a federal court can assert personal jurisdiction over the CERCLA defendant's shareholder, when the shareholder is not a resident of the forum state.[52] In general, before a federal court can impose judgment on any defendant, it must establish personal jurisdiction over that defendant, through valid service of process.[53] If the defendant is not a resident of the forum state, the federal court will serve process on the non-resident pursuant to the forum state's long-arm statute.[54] Further, due process requires the defendant must have had some minimum contacts with the forum state, so that appearing before the court in that forum does not offend traditional notions of fair play and substantial justice.[55]

Several courts have analyzed the issue of whether they can exercise jurisdiction over non-resident shareholders of companies that operate hazardous sites.[56] Like LeoGrande in *Shore Realty* or T.L. James & Co. in *Joslyn*, these potential CERCLA defendants were prosecuted for response costs because they allegedly owned and operated a hazardous site. In each case, the only contact these shareholders — also corporations themselves — had with the forum was ownership of the resident defendant that operated the site.[57] The plaintiffs' exclusive basis

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52. *See* State of Idaho v. Bunker Hill C., 635 F. Supp. 665 (D. Idaho); United States v. Bliss, 108 F.R.D. 127 (E.D. Mo. 1985); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27 (E.D. Mo. 1985). In *Bliss*, the non-resident defendants were affiliates in the Syntex corporate family. Syntex Corporation was the holding company for all the members of the conglomerate. Syntex U.S.A. was its wholly-owned subsidiary and the parent corporation of Syntex Agribusiness. Syntex U.S.A. was the successor in interest of Hoffman-Taft, Inc., the former owner of the hazardous site at issue. At the time of the litigation, Syntex Agribusiness was the present site owner. Syntex U.S.A. and Syntex Corporation were pursued as CERCLA "owners" based on their affiliation with Agribusiness. *See* 108 F.R.D. at 130-31.

Wehner and *Bliss* deal with the same hazardous site and the same defendants. *Bliss* is the government's recovery action for response costs. *Wehner* is an action by a private plaintiff for contribution from the Syntex group for its alleged share of the response costs borne by the plaintiff.

53. *See generally* 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 4.41-1 (1989).

54. Some federal statutes authorize nationwide service of process for the federal courts. CERCLA does not so provide, at least for cost recovery actions. *See, e.g., Wehner*, 616 F. Supp. at 29. At least one court has held that CERCLA does provide nationwide service of process for *abatement* actions, but not for cost recovery actions. *Bliss*, 108 F.R.D. at 137. If nationwide service of process applied to the cost-recovery action, the minimum contacts of the defendant necessary to satisfy due process would be with the entire United States, not just the forum state. *Id.* (citing F.T.C. v. Jim Walter Corp., 651 F.2d 251, 256 (7th Cir. 1979)).

55. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

56. *See supra* note 51 and accompanying text.

57. *Bunker Hill*, 635 F. Supp. 665, 670; *Wehner*, 616 F. Supp. 27, 29. In *Bliss*, the only basis for jurisdiction over Syntex Corporation was the activities of its subsidiary Agribusiness, the present owner of the site property. The basis for jurisdiction over Syntex U.S.A. was its succession in interest to the assets of the original site owner, Hoffman-Taft, Inc. 108 F.R.D. 127, 132-33.

for jurisdiction was the activities of the site-operating subsidiary within the jurisdiction.[58]

In each case, the courts correctly analyzed the relationship between the parent and the subsidiary to determine if the parent was sufficiently involved in the subsidiary's activities in the forum state to establish the requisite minimum contacts. Essentially, the courts conducted a piercing-type analysis, deciding if the traditional legal separateness between the parent and the subsidiary had been sufficiently breached by the parent. If so, the court exercised jurisdiction over the parent based on the parent's involvement in the subsidiary's activities in the forum state.

In *State of Idaho v. Bunker Hill Co.*, the court found sufficient domination of the non-resident parent corporation, Gulf Resources and Chemical Corp. ("Gulf"), over the resident site-operating subsidiary to exercise jurisdiction over Gulf. Among other things, Gulf approved all pollution-related expenditures by Bunker Hill Co. in excess of $500, Bunker Hill Co.'s authorized capital was only $1100, while its dividends to Gulf in a six-year period totaled $27 million. Moreover, Gulf approved all of Bunker Hill Co.'s capital expenditures and could overrule all transactions or management decisions made by Bunker Hill Co.[59] For the foregoing reasons, the court found that "Gulf's activities with respect to Bunker Hill, its control of management and operations and its overall contacts with this State render it personally subject to the jurisdiction of this court."[60]

On the other hand, in *Wehner v. Syntex Agribusiness, Inc.*, the piercing analysis regarding Syntex Corporation and its site-owning subsidiary, Syntex Agribusiness, resulted in the court dismissing the actions against the shareholder.[61] The *Wehner* Court emphasized that traditional corporate law treats corporations separate from their owners, even when the owner is the sole shareholder. This same rule applies to determine jurisdiction over the non-resident shareholder of a resident CERCLA defendant subsidiary.[62] In the relationship between Syntex Corporation and Syntex Agribusiness, corporate separateness remained intact. Agribusiness established its own budget, prices and production. It raised its own capital and kept separate financial records.[63] The few intermingled operations of the parent and subsidiary were deemed normal incidents of a corporate parent's ownership of a subsidiary and did not warrant piercing to establish jurisdiction.[64]

These jurisdiction cases illustrate the inconsistency of the court's approach in *Shore Realty*, whereby it found liability without piercing. If a court has jurisdiction over a defendant because it is a resident of the forum state, the court can automatically impose liability, under the *Shore Realty* analysis. Conversely, for the purpose of deciding whether or not it will be subject to the court's

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58. *Id.*
59. 635 F. Supp. at 670.
60. *Id.* Alternatively, the court held that Gulf was estopped to deny jurisdiction because the same court previously had exercised jurisdiction over Gulf in another matter regarding Bunker Hill's pollution-causing activities. *Id.* at 671.
61. *Wehner*, 616 F. Supp. at 30. The action of the United States against Syntex Corporation was also dismissed for lack of jurisdiction. *Bliss*, 108 F.R.D. at 132.
62. 616 F. Supp. at 29.
63. *Id.* at 30.
64. *Id.*

jurisdiction, the non-resident defendant gets the benefit of a full-blown piercing analysis. If the court cannot pierce the corporate veil, the case against the non-resident defendant is dismissed.

Thus, under the *Shore Realty* approach, the standard for liability (no piercing) is lower than the standard for jurisdiction, where piercing is required. In practice, shareholder liability under CERCLA may hinge on the citizenship of the shareholder. Clearly, this dichotomy does not serve any public policy under corporate law or CERCLA.[65]

IV. CONCLUSIONS AND RECOMMENDATIONS.

The real justification for LeoGrande's liability in *Shore Realty* was his participation in operating the hazardous site.[66] Unfortunately, the court's opinion appears to equate management with ownership, when it found LeoGrande liable as a site owner. Potentially, this approach creates an overly-broad precedent, whereby any shareholder may be liable, without regard to his participation in management, solely because of his ownership role.

If stock ownership is all that is required to trigger liability under CERCLA's owner/operator provision, myriad non-managerial shareholders could become liable for site cleanups. Such potential responsible parties could include stock purchasers on the open market, employees under employee stock ownership plans, pension plan trustees, and mutual funds. Clearly, this open-ended liability is unjustified, even under a broad, remedial statute like CERCLA.

The *Shore Realty* type of analysis and outcome must be shifted away from the "owner" justification, to instead emphasize the "operator" as the responsible party. "Owner" liability should be limited to the actual owner of the site. It should not be extended to shareholders of corporations that own sites, unless the court finds reason to pierce the corporate veil. Then, and only then, can "operator" liability be extended to include any person, corporate or individual (including shareholders, directors, officers, managerial employees or independent contractors) who participated in site operations.[67]

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65. The CERCLA personal jurisdiction cases have all dealt with corporate parents of wholly-owned subsidiaries. Presumably, an individual shareholder, who is also an officer always will have the requisite minimum contacts with the forum state where the site operates because of his role in managing the site-operating corporation. At least one commentator argues that corporate shareholders of site-owning companies (as opposed to individuals) more often should be liable as CERCLA owner/operators because limited liability for parent corporations "would promote overly risky hazardous waste disposal activities by encouraging corporations to place hazardous waste operations in the hands of poorly capitalized subsidiaries . . . ." Note, *Liability of Parent Corporations for Hazardous Waste Clean-Up and Damages*, 99 HARV. L. REV. 986, 1002 (1986). A traditional piercing analysis, however, such as that done by the court in *Bunker Hill*, *supra* notes 59 and 60 and accompanying text, that takes into account factors such as undercapitalization, could yield liability for any shareholder, without making generalized distinctions between individual and corporate shareholders. An analysis that focuses on shareholder participation in site operations also could yield more uniform and justifiable results. *See infra* note 67 and accompanying text.

66. *See supra* notes 43-47 and accompanying text.

67. Admittedly, the *Shore Realty* Court relied on this operator argument as an alternative justification for its conclusion. *See supra* notes 43-47 and accompanying text. Actually, it is the only sound justification. Recently, courts have relied on *Shore Realty* to find CERCLA liability for corporate parents whose subsidiaries owned and operated cleanup sites. *See, e.g.*, United States v. Kayser-Roth Corp., Inc., 910 F.2d 24 (9th Cir. 1990); United States v. Allied Chemical Corp. No. 83-5896-FMS (N.D. Calif. June 27, 1990). In each case the courts relied on *Shore Realty*'s "operator"

The focus on the operator role of potential CERCLA defendants eliminates the resident/non-resident dichotomy for shareholders. If a resident shareholder of a site-owning corporation is not participating in site operations, he would not be liable without piercing. Thus, the resident shareholder would get the same benefit of the piercing analysis that the non-resident gets for jurisdictional purposes. Further, any resident or non-resident who participated in site management, presumably would have sufficient contacts with the site's forum state to be subject to jurisdiction and liability as a site operator.

Furthermore, the focus on the operational role of a defendant, rather than ownership, would revive cases such as *NEPACCO*[68] and *Ward*[69] as important precedents. The "generator" cases that found shareholders, officers and directors alike liable, focused on these individuals' proactive roles as persons who arranged for disposal. The facts in these cases could provide helpful analogies for courts that must decide what level of activity dictates that a person is a site "operator." Whereas liability of a person who arranged for disposal is irrelevant to liability of a site owner, it clearly could be relevant to finding liability of individuals operating a site. Further, cases analyzing torts committed by agents could be helpful and relevant in the "operator" analysis.[70]

From a public policy perspective, the *Shore Realty* decision may be completely justifiable. The Second Circuit's principal justification for LeoGrande's liability, however, — LeoGrande's "ownership" of a hazardous site — is legally unsupportable. On the contrary, the *Joslyn* Court correctly analyzed CERCLA's ownership provision.[71] Fortunately, the statute's remedial purpose can be served with defensible legal opinions regarding liability for shareholders and site owners. If the site owner is a corporation, its shareholders may be liable, as shareholders, through a traditional corporate piercing analysis. All other individuals, or corporate persons, can be liable for site cleanups if their participation in site operations qualify them as site operators. In sum, this is the analysis courts should apply hereafter.

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analysis to support liability of the corporate parent, based on its level of involvement in the site-owning subsidiary or in the hazardous facility itself. In fact, the *Kayser-Roth* Court distinguishes *Joslyn* from its analysis because *Joslyn* "is concerned primarily with owner rather than operator liability." 910 F.2d at 27. Arguably, *Shore Realty* should be limited to the issue of "operator" liability for shareholders and *Joslyn* should govern "owner" liability.

68. *See supra* notes 20-21, 28 & 39-41 and accompanying text.

69. *See supra* note 28 and accompanying text.

70. The analysis proposed here, however, would be based on the defendant's participation in site management, which may or may not be tortious. Simple participation probably should suffice for operator liability since responsible parties are strictly liable. *See supra* notes 24-26 and accompanying text. Nevertheless, some site operations may be neglectful and, thus, the agent tort cases could be instructive.

71. *See supra* notes 48-51 and accompanying text.