



March 2014

Direct Liability as an Arranger under CERCLA #107(a)(3): The Efficacy of Adhering to the Tenets of Traditional Corporate Law

Lance A. Lawson

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Lance A. Lawson, *Direct Liability as an Arranger under CERCLA #107(a)(3): The Efficacy of Adhering to the Tenets of Traditional Corporate Law*, 71 Notre Dame L. Rev. 731 (1996).

Available at: <http://scholarship.law.nd.edu/ndlr/vol71/iss4/16>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

Direct Liability as an Arranger Under CERCLA § 107(a)(3): The Efficacy of Adhering to the Tenets of Traditional Corporate Law

I.	INTRODUCTION	732
II.	CERCLA	734
	A. <i>The Statutory Scheme</i>	734
	B. <i>Strict, Joint, and Several Liability</i>	737
III.	TRADITIONAL CORPORATE LAW: DISTINGUISHING DIRECT LIABILITY FROM INDIRECT LIABILITY	738
	A. <i>Direct Liability</i>	738
	B. <i>Indirect Liability: Piercing the Corporate Veil</i>	740
IV.	DIRECT LIABILITY AS AN ARRANGER AND DIVERGENT VIEWS OF THE CIRCUITS	741
	A. <i>Arranger Liability Under CERCLA § 107(a)(3)</i>	741
	B. <i>Divergent Views of the Circuits</i>	742
	1. Actual Participation	743
	2. Piercing the Corporate Veil	744
	3. Authority to Control	745
	4. Mere Sale of a Useful Product	746
	5. Obligation to Control	747
V.	<i>UNITED STATES V. TIC INVESTMENT CORP.</i>	748
	A. <i>The Factual Background</i>	748
	B. <i>The District Court Opinion</i>	749
	1. Owner-Operator Liability	749
	2. Arranger Liability and Corporate Officers	750
	3. Arranger Liability and Parent Corporations	751
	C. <i>The Eighth Circuit Opinion</i>	753
	1. Arranger Liability and Corporate Officers	753
	2. Arranger Liability and Parent Corporations	755
VI.	ANALYSIS OF <i>TIC</i>	756
	A. <i>Arranger Liability and Corporate Officers</i>	756
	1. Authority to Control	756
	2. CERCLA's Goals and Defining Responsible Parties ...	756
	3. Actual Participation	758
	4. Indirect Liability: Piercing the Corporate Veil	759
	5. Public Policy	760
	6. General Budget Policies	762
	B. <i>Arranger Liability and Parent Corporations</i>	763
	1. Direct Liability	763
	2. Indirect Liability: Piercing the Corporate Veil	764
VII.	PROPOSAL	765
VIII.	CONCLUSION	768

I. INTRODUCTION

In expanding the reach of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹ courts often ignore the fundamental corporate law principle of limited liability provided to corporate officers, directors, and shareholders. Under CERCLA § 107(a)(3), a party may be liable for cleanup costs pertaining to a "release" of hazardous substances where the party "arranged for" the disposal or treatment of the hazardous waste.² However, the statute neither defines "arranged for," nor expressly provides direct liability for nonparticipating corporate officers, directors, or shareholders. Nonetheless, courts have found nonparticipating corporate officers and shareholders directly liable as "arrangers" without piercing the corporate veil. In doing so, courts have disregarded the limited liability provided by the corporate form.

This Note focuses on the challenge of determining whether a corporate officer or parent corporation "arranged for" the disposal of hazardous substances. Specifically, this Note will address the circumstances under which it is appropriate for courts to impose liability upon a corporate officer or parent corporation either directly as an "arranger" under CERCLA § 107(a)(3), or indirectly by piercing the corporate veil, for a corporation's (or subsidiary's) hazardous waste disposal or treatment activities.

One of the primary concerns regarding CERCLA's expanding web of liability is whether, and under what circumstances, this web may reach corporate officers, directors, and shareholders. While struggling to define CERCLA's boundaries, recent federal court decisions have broadly interpreted CERCLA's liability structure.³ As a result, the issue of liability for corporate officers and parent corporations under CERCLA continues to be a primary area of concern.⁴

1 Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in scattered sections of 26 U.S.C. and at 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)) [hereinafter CERCLA], amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993)) [hereinafter SARA].

2 42 U.S.C. § 9607(a)(3).

3 See *infra* Parts IV and V.

4 See, e.g., ALLAN J. TOPOL & REBECCA SNOW, *SUPERFUND LAW AND PROCEDURE* (1992); Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421 (1990) (arguing that imposing direct liability on parent corporations and individual shareholders is consistent with both CERCLA and the principle of limited liability); Richard G. Dennis, *Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law*, 36 VILL. L. REV. 1367 (1991) (arguing that courts should apply state corporate law when evaluating liability for officers, directors, or stockholders); Michael P. Healy, *Direct Liability For Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65 (1992) (arguing that the proper standard for direct liability for parent corporations is based upon actual involvement in hazardous waste disposal activities); Tom McMahon & Katie Moertl, *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases*, 3 NAT. RESOURCES & ENV'T 29 (1988) (arguing that court decisions have eroded the traditional corporate law doctrine of limited liability for officers, directors and shareholders); Gregory P. O'Hara, *Minimizing Exposure to Environmental Liabilities For Corporate Officers, Directors, Shareholders and Successors*, SANTA CLARA COMPUTER HIGH TECH. L.J. 1 (1990) (noting that environmental liability can reach far beyond the protection of the corporate shell); Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299 (1995) (arguing that Congress should amend CERCLA to eliminate the heavy burdens the liability provisions put on defendants) [hereinafter Oswald, *Joint and Several Liability*]; Lynda J. Oswald, *Strict Liability of Individuals Under CER-*

Traditionally, the corporate form protected officers, directors, and parent corporations by limiting their liability—they could only be directly liable for the debts or liabilities of the corporation in which they actively participated. Without active participation, courts could only impose indirect liability on nonparticipating officers, directors, and shareholders by piercing the corporate veil. Several courts, however, have ignored the limited liability of the corporate form and imposed direct liability on nonparticipating officers and shareholders when interpreting CERCLA.⁵ These courts reason that the statute's goals and remedial nature warrant ignoring the corporate form.⁶

For example, in *United States v. TIC Investment Corp.*,⁷ the Court of Appeals for the Eighth Circuit evaluated whether a corporate officer and a parent corporation could be liable as arrangers under CERCLA § 107(a)(3) where neither the corporate officer nor the parent corporation had direct involvement in the corporation's hazardous waste disposal activities. In finding the corporate officer directly liable under the statute, the court of appeals held that the proper standard for imposing direct arranger liability under CERCLA § 107(a)(3) is whether the corporate officer had "the authority to control and did in fact exercise actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of hazardous substances."⁸ The court of appeals

CLA: A Normative Analysis, 20 B.C. ENVTL. AFF. L. REV. 579 (1993) (discussing application of strict liability under CERCLA upon officer and individual shareholders) [hereinafter Oswald, *Strict Liability*]; Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. REV. 259 (1992) (arguing that, while courts' analyses do not emphasize corporate law, the courts' results are largely consistent with corporate law) [hereinafter Oswald & Schipani]; Perry E. Wallace, Jr., *Liability of Corporations and Corporate Officers, Directors, and Shareholders Under Superfund: Should Corporate and Agency Law Apply?*, 14 J. CORP. L. 839 (1989) (arguing that traditional corporate law should apply to CERCLA and courts should look to federal common law when piercing the corporate veil); Harold J. Cronk & Pat Huddleston, II, Comment, *Corporate Officer Liability for Hazardous Waste Disposal: What are the Consequences?*, 38 MERCER L. REV. 677 (1987) (discussing the effects of increased liability on corporate officers) [hereinafter Cronk & Huddleston, *Corporate Officer Liability*]; Richard S. Farmer, Note, *Parent Corporation Responsibility for the Environmental Liabilities of the Subsidiary: A Search for the Appropriate Standard*, 19 J. CORP. L. 769 (1994) (discussing several alternative standards for parent corporation liability and arguing for a standard that requires parent corporations to exercise due care to ensure the financial viability of the subsidiary) [hereinafter Farmer, *Parent Corporation Responsibility*]; Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469 (1989) (arguing that the liberal interpretation of CERCLA's liability scheme leads to inequitable results) [hereinafter Weber, *Spreading the Costs*]; Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 98 HARV. L. REV. 986 (1987) (arguing that limited liability provided to parent corporations undermines federal interests) [hereinafter Note, *Liability of Parent Corporations*].

⁵ See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (holding officer and shareholder directly liable because his status as the person in charge of the facility was sufficient to find him liable as an "operator"); *United States v. Mexico Feed & Seed Co.*, 764 F. Supp. 565 (E.D. Mo. 1991) (holding president and majority shareholder liable because he had the authority to control the hazardous waste disposal activities); *Kelly v. ARCO Industries Corp.*, 723 F. Supp. 1214 (W.D. Mich. 1989) (holding that an officer may be liable where the officer had the authority to control and could have prevented the release of the hazardous substance).

⁶ See *supra* note 5.

⁷ 68 F.3d 1082 (1995).

⁸ *Id.* at 1089.

announced that the standard applied equally to corporate officers and parent corporations.⁹

Even though they may have arrived at the appropriate result, the Eighth Circuit's opinion blurs the line between direct liability for activities a party engages in and the corporate law doctrine that provides limited liability to nonparticipating officers and shareholders. The court's holding that a corporate officer or parent corporation could be directly liable as an arranger for *indirect* activities (i.e., without actual participation in hazardous waste disposal activities) is, in the absence of an express statutory provision, outside the bounds of traditional corporate law.

This Note argues that courts should hold a corporate officer directly liable as an arranger under CERCLA § 107(a)(3) where the corporate officer actually and directly participated in the arrangement for disposal of hazardous substances. Merely as a shareholder, the parent corporation cannot be directly liable as an arranger. When the corporation and the shareholder, however, share such unity of interest and ownership between them that they no longer exist as separate entities, and an inequitable result would follow if the corporate form is not disregarded, then courts should pierce the corporate veil to impose indirect liability on the corporate officer or shareholder for a corporation's (or subsidiary's) arranger liability.

In Part II, this Note describes the liability scheme of CERCLA. Part III discusses and distinguishes the direct and derivative bases of liability. Part IV explores the history of arranger liability under CERCLA, and then discusses the different standards applied by the courts of appeals when addressing the issue. Part V describes the factual and procedural background in *TIC*, and details the Eighth Circuit's reasoning. Part VI examines the appropriateness of the Eighth Circuit's analysis and decision in *TIC*. This Note argues that the Eighth Circuit, in announcing its standard for imposing arranger liability on corporate officers or parent corporations, strayed too far away from traditional corporate law doctrine. In Part VII, this Note proposes that in determining liability of corporate officers, directors, and shareholders under CERCLA § 107(a)(3), courts should adhere to the fundamental corporate law principle of limited liability. Finally, Part VIII presents concluding remarks.

II. CERCLA

A. *The Statutory Scheme*

Congress enacted CERCLA¹⁰ in 1980 in the wake of numerous environmental disasters that occurred in the 1970s.¹¹ Among the more publicized incidents were the "Valley of Drums" in Kentucky where hazardous

⁹ *Id.* at 1092. The court remanded the issue of the parent corporation's direct liability back to the district court for further fact finding. *Id.* at 1092-93.

¹⁰ 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

¹¹ See generally SENATE COMM. ON ENV'T. & PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), Pub. L. 96-510 (Comm. Print 1983) [hereinafter CERCLA's LEGISLATIVE HISTORY].

substances in over 17,000 drums were seeping into the local water,¹² the discharge of the hazardous insecticide kepone into the James River in Virginia,¹³ and the infamous Love Canal tragedy in New York.¹⁴ Under public pressure to take action, Congress responded by enacting CERCLA which gave the federal government the ability to immediately respond to releases of hazardous substances.¹⁵

CERCLA is a remedial, rather than fault based, environmental statute with two stated purposes: "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups."¹⁶ CERCLA § 104 authorizes the Environmental Protection Agency (EPA) to commence remediation operations at a site that is contaminated with hazardous waste,¹⁷ and the EPA may use resources from the "Superfund" to initially fund the remediation operation.¹⁸

CERCLA gives the EPA two options to involve responsible parties in hazardous waste cleanup operations: The EPA can either order the responsible party to commence cleanup operations pursuant to CERCLA § 106,¹⁹ or the EPA may conduct the remedial measures itself pursuant to CERCLA § 104²⁰ and sue the responsible parties for cleanup costs under CERCLA § 107(a).²¹ Further, responsible parties who incur costs related

12 More than 17,000 drums were seeping into the local land water near Louisville, Kentucky, and streams flowing into the Ohio River contained hazardous substances. See H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 18 (1980), *reprinted in* 2 CERCLA'S LEGISLATIVE HISTORY, *supra* note 11, at 49, *cited in* Healy, *supra* note 4, at 68 n.8.

13 A federal grand jury indicted Allied Chemical Co. for illegally discharging kepone, an ant and roach poison, into the James River at Hopewell, Virginia. The company received a \$5,000,000 fine for the violation. See S. Rep. No. 848, 96th Cong., 2d Sess. 7, *reprinted in* 1 CERCLA'S LEGISLATIVE HISTORY, *supra* note 11, at 318, *cited in* Healy, *supra* note 4, at 69 n.9.

14 See, e.g., 126 CONG. REC. 30,931 (1980) (remarks of Sen. Randolph, co-sponsor of CERCLA), *reprinted in* 1 CERCLA'S LEGISLATIVE HISTORY, *supra* note 11, at 684 (Congress passed CERCLA to respond to the "national consciousness largely as a result of the severe health problems discovered at Love Canal"), *quoted in* Oswald & Schipani, *supra* note 4, at n.22. Love Canal soon became synonymous with hazardous waste disasters. In 1978, residents of a neighborhood in New York discovered contamination from chemicals leaking from a hazardous waste dump site, and President Carter promptly declared the neighborhood a disaster area. See S. Rep. No. 848, 96th Cong., 2d Sess. 8-10 (1980), *reprinted in* 1 CERCLA'S LEGISLATIVE HISTORY, *supra* note 11, at 315-17, *cited in* Healy, *supra* note 4, at n.7.; Robert D. McFadden, *Love Canal: A Look Back*, N.Y. TIMES, Oct. 30, 1984, at B6.

15 See generally Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (providing a comprehensive review of the legislative history of CERCLA).

16 H.R. Rep. No. 253(III), 99th Cong., 1st Sess. 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038. See also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) ("CERCLA both provides a mechanism for cleaning up hazardous[-]waste sites, and imposes the costs of the cleanup on those responsible for the contamination.") (citations omitted).

17 CERCLA defines "hazardous substance" broadly as substances defined as hazardous or toxic under the Clean Water Act § 311, 33 U.S.C. § 1321(b)(2)(A) (1988), and § 317, 33 U.S.C. § 1317(a) (1988); 42 U.S.C. § 9602 (1988); RCRA § 3001, 42 U.S.C. § 6921 (1988); Clean Air Act § 112, 42 U.S.C. § 7412 (1988); and Toxic Substances Control Act § 7, 15 U.S.C. § 2606 (1988).

18 The term "Superfund" is used in two ways. Technically, "Superfund" refers to the fund Congress created to enable the EPA to finance immediate cleanup costs of abandoned waste chemical dump sites. CERCLA § 111 (42 U.S.C. § 9611) specifies the procedures for using the fund. A tax paid mostly by petrochemical companies funds the Superfund. 26 U.S.C. § 9507 (1988). Additionally, "Superfund" is commonly used to refer to the entire act.

19 42 U.S.C. § 9606.

20 42 U.S.C. § 9604.

21 42 U.S.C. § 9607(a).

to the cleanup activities are entitled to seek contribution from other parties.²²

To establish a *prima facie* case for liability under CERCLA, a plaintiff must prove the following five elements: (1) the defendant is a responsible party;²³ (2) there has been a release, or threat of release, of a hazardous substance at the a site;²⁴ (3) the site is a "facility";²⁵ (4) the plaintiff incurred response costs relating to the release;²⁶ and (5) the response taken and the corresponding costs conform with CERCLA's National Contingency Plan.²⁷ This Note will focus on the first element: determining whether corporate officers or shareholders, as arrangers, are responsible parties. CERCLA § 107 contains the statute's liability provisions. Arrangers are one of four categories of responsible parties specified in CERCLA § 107(a): (1) current owners or operators of a hazardous waste vessel or facility; (2) any person who formerly owned or operated a facility at the time hazardous waste was disposed of at the site (owner/operator); (3) any person who arranged for the disposal or treatment of a hazardous substance at any facility owned or operated by another person (arranger or generator); and (4) any person who transported a hazardous substance to a facility.²⁸ The statute broadly defines "person" to include individuals, corporations, and other business entities.²⁹ Moreover, most courts determin-

22 42 U.S.C. § 9606(c).

23 Defined in 42 U.S.C. § 9607(a)(1)-(4).

24 42 U.S.C. § 9604(a)(1).

25 Defined in 42 U.S.C. § 9601(9).

26 42 U.S.C. § 9607(a).

27 *Id.*

28 *Id.* at (1)-(4) provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

- (1) the owner or operator of a vessel or facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for the disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
 - (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
 - (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
 - (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
 - (D) the costs of any health assessment or health effects study carried out under section 9604(I) of this title.

Id.

29 "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). See Oswald, *Strict Liability*, *supra* note 4, at 587 n.29 for a detailed discussion of the contrast between CERCLA not naming which individuals or under what capacity or circumstances, and other environmental statutes specifically naming officers, agents, and shareholders. One should note that

ing liability under CERCLA interpret the statute's scope of liability very broadly.³⁰

B. *Strict, Joint, and Several Liability*

Courts interpreting CERCLA have imposed strict liability on responsible parties.³¹ Additionally, courts have interpreted the statute to permit, but not require, joint and several liability.³²

The statute provides responsible parties with five defenses to liability: (1) "innocent purchaser" defense;³³ (2) act of God, (3) act of war, (4) unrelated third party; or (5) federally permitted release.³⁴ These defenses are

the statute specifies "corporation" and not corporate officers, directors, shareholders or parent corporations. See *infra* Part IIIA.

³⁰ See, *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990) (since CERCLA is remedial in nature, courts should "construe its provisions liberally to avoid frustration of the beneficial legislative purpose.") (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)), *cert. denied*, 498 U.S. 1084 (1991); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) ("Congress used broad language in providing for liability for persons who 'by contract, agreement, or otherwise arranged for' the disposal of hazardous substances. . . . [C]ourts have concluded that a liberal judicial interpretation is consistent with CERCLA's 'overwhelmingly remedial' statutory scheme."); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986); *Oswald & Schipani*, *supra* note 4, at 269; *Wallace*, *supra* note 4, at 863.

³¹ 42 U.S.C. § 9601(32) provides that CERCLA's standard of liability shall be the same as the standard of liability under § 311 of the Clean Water Act, 33 U.S.C. § 1321 (1988), which courts have unanimously interpreted as strict liability. See, e.g., *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1086 ("CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), imposes strict liability upon 'any person' who arranged for the disposal or transportation for disposal of hazardous substances.") (quoting *Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 810 F.2d 726, 743 (8th Cir. 1986)); *United States v. Monsanto Co.*, 858 F.2d 160, 167 & n.11 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted § 107(a) as establishing a strict liability scheme."), *cert. denied*, 490 U.S. 1106 (1989). For a detailed discussion of CERCLA's strict liability standard, see *Oswald, Strict Liability*, *supra* note 4.

³² See, e.g., *Monsanto* at 171 ("While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm.")

³³ This is an affirmative defense for one who purchases contaminated property if the purchaser can establish that he or she did not know, and had no reason to know, of any hazardous substance contamination at the site at the time of the purchase. 42 U.S.C. § 9601(35)(B).

³⁴ 42 U.S.C. § 9607(b) provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by —

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

The "innocent third party defense" is a defense to CERCLA's strict liability where the damage to the environment results solely from an act or omission of a third party (other than an employee or an agent of a defendant, or a party with a direct or indirect contractual relationship with a defendant), and the defendant establishes with a preponderance of the evidence that he

limited, however, since the strict liability nature of CERCLA means that proof, or lack thereof, of the defendant's culpable conduct is immaterial to the issue of liability.³⁵

III. TRADITIONAL CORPORATE LAW: DISTINGUISHING DIRECT LIABILITY FROM INDIRECT LIABILITY

A. *Direct Liability*

A party is directly liable for the tortious acts in which the party actively participates.³⁶ The basis of the tort may be either common or statutory law. Because the corporation is a separate legal entity, the corporation is responsible for the torts it commits.³⁷

An important distinction between corporations and their officers is that corporate officers are generally not individually liable for the debts or liabilities of the corporation. A fundamental characteristic of the corporate form is limited liability for officers and shareholders.³⁸ The protective shield of the corporation provides the corporate officer with incentive to work for the corporation without risking personal liability for torts in which she does not participate. Likewise, the protective shield provides the shareholder incentive to invest in corporate ventures.³⁹ However, as with tort liability, corporate officers may be personally liable for the torts they commit.⁴⁰ Direct liability is not based upon the corporation's acts or the officer's position in the corporation; rather, it is based upon the officer's actual participation in, or consent to, wrongful conduct.⁴¹ If a corporate

or she exercised due care with respect to the hazardous substances and took reasonable precautions against the foreseeable acts or omissions of third parties. CERCLA § 107(b).

³⁵ See generally, Oswald, *Strict Liability*, *supra* note 4.

³⁶ See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 1, at 6 (5th ed. 1984) [hereinafter PROSSER] ("The law of torts . . . is concerned with the allocation of losses arising out of human activities. . . . The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.") (quoting Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238 (1944)), quoted in Wallace, *supra* note 4, at 850 n.66.

³⁷ 1 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA ON THE LAW OF PRIVATE CORPORATIONS § 33 (James Solheim & Kenneth Elkins eds., rev. ed. 1994) [hereinafter W. FLETCHER].

³⁸ 1 W. FLETCHER, *supra* note 37, § 14. For the purposes of this Note, "owners" and "shareholders" are used interchangeably.

³⁹ Aronovsky & Fuller, *supra* note 4, at 431.

⁴⁰ 3A W. FLETCHER, *supra* note 37, § 1135, at 290 ("Corporate officers are liable for their torts, although committed when acting officially."); Traditional tort law holds individuals liable for the torts they commit, and the individual is not relieved of that liability if the individual is an agent working for a principle. RESTATEMENT (SECOND) OF AGENCY § 343 (1958) ("An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal . . ."). Similarly, corporate officer liability attaches regardless of whether the corporate officer was acting in the officer's official capacity when committing the tort. 3A W. FLETCHER, *supra* note 37, § 1135.

⁴¹ See, e.g., *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978):

A corporate officer is individually liable for the torts he personally commits and cannot shield himself behind a corporation when he is an actual participant in the tort. . . . The fact that an officer is acting for a corporation also may make the corporation vicariously or secondarily liable under the doctrine of respondeat superior; it does not however relieve the individual of his responsibility.

(citations omitted); *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141, 1144 (4th Cir. 1975) ("If a director does not personally participate in the corporation's tort, general corpora-

officer does not actively participate in the tortious conduct, then a court may only impose indirect liability on the officer by piercing the corporate veil.⁴²

A fundamental tenet of corporate law is the limited liability provided to corporate officers, directors, and shareholders. The common law recognizes the corporation and its shareholders as separate legal entities.⁴³ Limited liability for individual shareholders means that a shareholder's liability with respect to debts or wrongful acts of the corporation is limited to the shareholder's investment in the subsidiary.⁴⁴ Most states adopted the limited liability rule for corporations by the late 1830s.⁴⁵

The mere status of a party as a shareholder, by itself, does not warrant imposing direct liability on the shareholder for the corporation's debts. Corporate law provides that shareholders merely hold an ownership interest in the corporation. They do not manage the corporation; they elect officers to manage the corporation.⁴⁶ Consequently, nonparticipatory shareholders cannot be directly liable for a corporation's debts or wrongful acts.

Frequently, the majority or primary shareholder of a corporation is another corporation—a "parent" corporation. Since the parent corporation is viewed as a shareholder, the previous discussion on limited liability for shareholders applies to parent corporations as well.⁴⁷ Thus, parent cor-

tion law does not subject him to liability simply by virtue of his office.") (citations omitted); *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 852 (N.D. Cal. 1979) ("Courts have, however, consistently stated that a corporate executive will not be held vicariously liable, merely by virtue of his office, for the torts of corporation."), *aff'd*, 658 F.2d 1256 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982); 3A W. FLETCHER, *supra* note 37, § 1137, at 300-02 provides:

An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable for resulting injuries; but an officer who takes a part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation. Officers and directors may be held individually liable for personal participation in tortious acts even though they derived no personal benefit, but acted on behalf, and in the name of, the corporation, and the corporation alone was enriched by the acts.

....

Some knowledge and participation, actual or implied, must be brought home to the agent.

Id.

42 3A W. FLETCHER, *supra* note 37, § 1137, at 300-01 (stating that "it is necessary to pierce the corporate veil in order to impose personal liability upon a nonparticipating corporate officer").

43 1 W. FLETCHER, *supra* note 37, § 25 at 514.

44 Many commentators consider the limited liability for owners of a corporation to be essential to a free market economy: limited liability encourages owners to invest capital in the corporation.

[L]imited liability is considered a fundamental characteristic of the corporate form. Commerce and free enterprise, it was thought, could only flourish if shareholders and their personal wealth were insulated from the risks associated with owning a business enterprise. Thus, corporate shareholders, whether individuals or parent corporations, are typically regarded as entities distinct from the corporation itself. . . .

Oswald & Schipani, *supra* note 4, at 262 (citations omitted); see also Farmer, *Parent Corporation Responsibility*, *supra* note 4, at n.16.

45 Aronovsky & Fuller, *supra* note 4, at 430.

46 1 W. FLETCHER, *supra* note 37, § 25.

47 See *supra* notes 43-46 and accompanying text.

porations cannot be directly liable for the debts or wrongful acts of its subsidiary corporation.

In summary, traditional corporate law provides that a corporate officer is only directly liable where the officer actually participated in, or consented to, the wrongful acts of the corporation. Additionally, the limited liability of the corporate form provides that nonparticipatory shareholders cannot be directly liable for a corporations debts or wrongful acts.

B. Indirect Liability: Piercing the Corporate Veil

Courts will only disregard the independent existence of the corporation and its shareholders and impose indirect liability on the officers or shareholders in the rare cases when it is in the interest of justice.⁴⁸ Indirect liability is an exception to the limited liability for officers, directors and shareholders (and, hence, parent corporations) of a corporation and is commonly referred to as piercing the corporate veil. It is an equitable doctrine that courts typically apply in one of two situations: (1) where the shareholders form the corporation for "some illegal, fraudulent, or unjust purpose;" or (2) where the officers or shareholders ignore the corporate form and use it as a mere instrument to conduct their affairs ("alter ego" theory).⁴⁹ In these circumstances, both the corporation and its officers and shareholders (or subsidiary and the parent corporation) can be liable for the corporation's (or subsidiary's) wrongful conduct.⁵⁰

Because this Note is not concerned with corporations formed for an illegal or fraudulent purpose, "alter ego" is the relevant theory for piercing the corporate veil under CERCLA.⁵¹ The rationale of alter ego theory of liability is that if shareholders disregard the legal separation, unique properties or proper formalities between the different corporate entities, then the law will disregard them as well to protect both individual and corporate creditors.⁵² Under this theory, courts generally apply a two-prong test, requiring that: (1) there is such unity of interest and ownership that the separate personalities of the corporation and individual no longer exist; and (2) adhering to the doctrine of the separate corporate entity would lead to an unjust result.⁵³

Under the first prong, the critical inquiry is whether the parent corporation controlled or dominated the subsidiary which committed the wrongful acts.⁵⁴ In determining whether this control or domination rose to a

48 1 W. FLETCHER, *supra* note 37, § 41.

49 *Id.* at § 41.10, at 615 ("The doctrine of alter ego fastens liability on the individual who uses a corporation merely as an instrumentality to conduct his or her own personal business, and such liability arises from fraud or injustice perpetrated no on the corporation but on third persons dealing with the corporation."), *quoted in* Oswald & Schipani, *supra* note 4, at 296 n.206.

50 In this discussion, a parent corporation is a shareholder of the corporation; hence, one may use the terms "shareholder" and "parent corporation" interchangeably.

51 1 W. FLETCHER, *supra* note 37, § 41.10. The alter ego is also commonly referred to a the "business conduit" or "mere instrumentality" theory of piercing the corporate veil. *Id.*

52 *Id.*

53 *Id.*; see also Oswald & Schipani, *supra* note 4, at 296; Dennis, *supra* note 4, at 1436-39; Wallace, *supra* note 4, at 877.

54 1 W. FLETCHER, *supra* note 37, § 41.10, at 616 (stating that the first prong requires "control, not merely majority or complete stock control, but complete domination, not only of the fi-

level warranting piercing the corporate veil, courts evaluate several factors including, but not limited to, whether: (1) the shareholder owns most or all of the stock; (2) the shareholder subscribed to all or most of the corporation's capital stock or otherwise caused its incorporation; (3) the corporation is under-capitalized; (4) the shareholder uses the corporation's property as his own; (5) the corporation's officers or directors act independently in the interest of the corporation or simply take their orders from the shareholder; and (6) the corporation observes the legal formalities of the corporate form.⁵⁵ Because none of the factors by themselves is determinative, courts typically examine the totality of the circumstances.⁵⁶

One should note two important features of piercing the corporate veil: First, when courts pierce the corporate veil to impose indirect liability on a corporate officer, the corporate officer is almost always a shareholder in the corporation.⁵⁷ This is due to the unity of interest and control requirement in the first prong of the alter ego test. Ownership, particularly majority ownership, goes a long way to satisfying this requirement. Second, courts are much more likely to pierce the corporate veil of a closely held corporation than of a publicly held corporation.⁵⁸ In closely held corporations, shareholders are often the corporation's officers and directors. As the separateness between the corporation's management and shareholders becomes more blurred, courts find it easier to disregard the corporate entity.

IV. DIRECT LIABILITY AS AN ARRANGER AND DIVERGENT VIEWS OF THE CIRCUITS

A. *Arranger Liability Under CERCLA § 107(a)(3)*

CERCLA § 107(a)(3) provides arranger liability for "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances."⁵⁹ While the statute also defines the terms "hazardous

nances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own"), cited in Oswald & Schipani, *supra* note 4, at 297 n.208.

55 1 W. FLETCHER, *supra* note 37, § 41.10, at 616; see also United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691-92 (5th Cir. 1985) (listing 12 factors to evaluate when determining whether to pierce the corporate veil of a parent corporation; Aronovsky & Fuller, *supra* note 4, at 432-33 (listing factors state courts in California evaluate for piercing the corporate veil); O'Hara, *supra* note 4, at 3-4 (listing factors to evaluate for piercing the corporate veil).

56 1 W. FLETCHER, *supra* note 37, § 41.10, at 616 (stating that "no one talismanic fact will justify piercing the corporate veil with impunity"), quoted in Oswald & Schipani, *supra* note 4, at 304 n.234.

57 See *Labadie Coal Co. v. Black*, 672 F.2d 92, 97 (D.C. Cir. 1982) (in holding that formal ownership of stock in a corporation is not necessary to pierce the corporate veil, the court stated that "[t]he question is one of control, not merely paper ownership"); 1 W. FLETCHER, *supra* note 37, § 41.10, at 615 ("The question of control is determined by actual, substantial relationship of the parties; the mere existence or nonexistence of formal stock ownership is not necessarily conclusive.") (citing *Labadie Coal Co.*, 672 F.2d at 97); Wallace, *supra* note 4, at 857 (stating that "[g]enerally control is basic to most piercing cases").

58 1 W. FLETCHER, *supra* note 37, § 25, at 514.

59 42 U.S.C. § 9607(a)(3).

substance"⁶⁰ and "facility,"⁶¹ it does not define the phrase "otherwise arranged for." This lack of a statutory definition has led to a great amount of litigation: determining which parties "otherwise arranged for" the treatment or disposal of the hazardous substances determines who can be potentially liable as an arranger.⁶²

Notably, the statute includes both individuals and corporations in its definition of "person."⁶³ Some courts and commentators argue that, although the statute includes corporations in its definition of a "person" subject to liability, a court may only impose liability on shareholders and parent corporations through the common law theory of piercing the corporate veil.⁶⁴ Other courts, relying on the fact that CERCLA includes corporations in its definition of "persons" who may be liable, hold that shareholders and parent corporations may be directly liable as arrangers because of their subsidiary's actions if they sufficiently control the subsidiary. These courts focus their inquiry on the amount of control exerted by the parent corporation over the subsidiary's operations that led to the CERCLA violation.⁶⁵

Professors Oswald and Schipani concluded that whether holding officers directly or indirectly liable, courts ultimately found that the shareholder or parent corporation had to exert "substantial control" over the particular activities that led to the CERCLA violation.⁶⁶

B. *Divergent Views of the Circuits*

The courts of appeals have not uniformly agreed upon the proper legal standard for imposing direct liability on parties as arrangers under CERCLA § 107(a)(3).⁶⁷ Some courts use the "actual participation" test that requires the parent corporation to actually participate in the subsidiary's activities that led to the disposal of hazardous substances.⁶⁸ One court applied traditional corporate law doctrine and held that a parent corporation could not be directly liable for its subsidiary's hazardous waste disposal activities—to reach the parent, the plaintiff must assert facts that warrant piercing the corporate veil.⁶⁹ In contrast, other courts use the "authority to control" test that only requires the parent corporation to exert some type

60 42 U.S.C. § 9601(14).

61 42 U.S.C. § 9601(9).

62 See *infra* Part IV.B.

63 42 U.S.C. § 9601(21).

64 See, e.g., *Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80 (5th Cir. 1990) (holding that a parent corporation cannot be directly liable under CERCLA § 107(a) for the disposal activities of its subsidiaries, but may only be liable through traditional common law doctrine of piercing the corporate veil) (for a more detailed discussion of *Joslyn*, see *infra* notes 80-84); see also Wallace, *supra* note 4.

65 See *supra* note 5.

66 Oswald & Schipani, *supra* note 4, at 308.

67 When imposing direct liability on corporate officers and parent corporations, some courts find a significant difference between the standards for "operator" liability under CERCLA § 107(a)(2) and arranger liability under § 107(a)(3). See, e.g., *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1091 (8th Cir. 1995) (noting that "the statutory requirements for each of these two classifications under CERCLA are significantly different").

68 See *infra* notes 72-79 and accompanying text.

69 See *infra* notes 80-84 and accompanying text.

of control over the subsidiary's general activities,⁷⁰ while another merely required the party to have an "obligation to control" the hazardous waste disposal activities.⁷¹ These inconsistent standards for corporate officer and shareholder liability as arrangers unduly complicate matters for parties involved in generating or treating hazardous substances, and create the potential for unpredictable and questionable holdings in the future.

1. Actual Participation

In *Amcast Industrial Corp. v. Detrex Corp.*,⁷² the Seventh Circuit held that a shipper of a useful product containing a hazardous substance is not "arranging for" disposal or treatment of hazardous wastes and is therefore not an arranger under CERCLA § 107(a)(3).⁷³ In *Amcast*, the plaintiff, a manufacturer of copper fittings, used TCE, a hazardous substance, in its manufacturing process. Plaintiff purchased some of the TCE from the defendant. The defendant either delivered the TCE to the plaintiff itself or defendant contracted with a local transporter to deliver the chemicals. Over 800 gallons of TCE were found in the groundwater beneath the plaintiff's pharmaceutical plant. Evidence showed that both the defendant's and the transporter's drivers sometimes accidentally spilled the TCE on the plaintiff's premises while filling the plaintiff's storage tanks. Having spent more than one million dollars on remediation of the site, the plaintiff sued the defendant chemical manufacturer for contribution, alleging that the defendant was responsible for both the chemical spilled from its own trucks, and for the chemical spilled from the transporter's trucks because the defendant "arranged for" the transportation and delivery of the chemicals.

First, the Seventh Circuit found the defendant liable for the chemicals spilled from its own trucks because statute defines disposal to include spilling.⁷⁴ Next, the court addressed whether the defendant "arranged for" the disposal of the chemicals by contracting with a transporter to deliver the chemicals to the pharmaceutical plant. The court of appeals interpreted the statutory language to determine the meaning of "arranged for," and held that "the critical words for present purposes are 'arranged for.' The words imply intentional action."⁷⁵ Hence, the Seventh Circuit requires a party to "intentionally" arrange for the disposal or treatment of hazardous waste to be an arranger under CERCLA. From *Amcast*, one can infer that the Seventh Circuit would require a potentially responsible party to actively participate in a corporation's hazardous waste disposal activities before imposing direct liability on the party.⁷⁶

70 See *infra* notes 85-89 and accompanying text.

71 See *infra* notes 102-07 and accompanying text.

72 2 F.3d 746 (7th Cir. 1993).

73 *Amcast*, 2 F.3d at 751.

74 *Id.* at 750.

75 *Id.* at 751.

76 Cf. *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1086-87 (8th Cir. 1995) (defendant unsuccessfully argued that the appropriate standard was actual participation).

In *Edward Hines Lumber Co. v. Vulcan Materials Co.*,⁷⁷ the Seventh Circuit affirmed the district court's holding that suppliers of chemicals to a wood treatment facility were not liable as arrangers.⁷⁸ The district court found that a mere sale of substances by suppliers for use in the wood treatment process did not constitute "arranging for" disposal of hazardous substance, even when process runoff containing hazardous substances was located at the same site.⁷⁹

2. Piercing the Corporate Veil

In *Joslyn Manufacturing Co. v. T. L. James & Co.*,⁸⁰ the Fifth Circuit held that a parent corporation cannot be directly liable as an owner or operator under CERCLA § 107(a)(2) for the disposal activities of its subsidiaries but may only be indirectly liable through the traditional common law doctrine of piercing the corporate veil.⁸¹ In holding that the statutory language of CERCLA did not warrant altering "so substantially a basic tenet of corporation law," the court stated that "[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so."⁸² The court agreed with the Seventh Circuit's statutory interpretation of the limits of CERCLA's liability reach: "To the point that courts could achieve 'more' of the legislative objectives by adding to the lists of those responsible, it is enough to respond that statutes have not only ends but also limits."⁸³

Next, the Fifth Circuit applied traditional rules of corporate law to determine whether to impose liability on the parent corporation by piercing the corporate veil. Using the alter ego test, the Fifth Circuit evaluated a laundry list of factors and determined that piercing the corporate veil was not appropriate.⁸⁴

77 861 F.2d 155 (7th Cir. 1988).

78 *Id.* at 156 (while implicitly finding arranger liability under CERCLA § 107(a)(3) inapplicable, the court stated that the defendant's "potential liability arises, if at all, under § 107(a)(2)").

79 *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654-56 (N.D. Ill. 1988); *see also* *United States v. Gurley*, 43 F.3d 1188 (8th Cir. 1995). In *Gurley*, the court held that an individual employee of the corporation could only be liable as an operator under CERCLA § 107(a)(2) if the employee (1) had the authority to make hazardous waste disposal decisions, and (2) actually exercised that authority by personally participating in the hazardous waste disposal activities by either personally performing the tasks, or directing others to do so. Although in the context of owner or operator liability under CERCLA § 107(a)(2), this case clearly requires the party to actively participate in the corporation's CERCLA violation before imposing liability on that party.

80 893 F.2d 80 (5th Cir. 1990).

81 *See* *Riverside Market Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327 (5th Cir. 1991). In *Riverside Market*, the court announced that the more liberal "participation" standard applied to "operator" liability for corporate officers under CERCLA § 107(a)(2). The "participation" standard implicitly accepts that the corporate officer may be directly liable where the corporate officer personally participates in the corporation's wrongful conduct. The court stated that, "[W]e must look to the extent of the defendant's personal participation in the alleged wrongful conduct. . . . Corporate officers are liable for their torts, although committed when acting officially." *Id.* at 330 (citing 3A W. FLETCHER, *supra* note 37, § 1135, at 290).

82 *Joslyn*, 893 F.2d at 83.

83 *Id.* (quoting *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988)).

84 *Id.* at 83-84.

Admittedly, this case specifically addressed parent corporation direct liability as an owner or operator under CERCLA § 107(a)(2). However, the strong language used by the court clearly indicates that the Fifth Circuit would find that direct liability as an arranger under CERCLA § 107(a)(3) would not reach shareholders and parent corporations, and imposing indirect liability on shareholders and parent corporations for a corporation's (or subsidiary's) CERCLA violations is only appropriate when piercing the corporate veil.

3. Authority to Control

In *United States v. Vertac Chemical Corp.*,⁸⁵ the Eighth Circuit held that the mere authority to control hazardous waste activities does not, by itself, warrant imposing direct arranger liability.⁸⁶ In *Vertac*, the United States and the state of Arkansas brought a recovery action against several parties including a government contractor who produced defoliant for wartime use. The appellant argued that the United States should be liable both as an operator under § 107(a)(2) and as arranger under § 107(a)(3) due to the government's regulatory authority over production of the defoliant.

First, the circuit court distinguished the issue in *Vertac* from its earlier holding in *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*.⁸⁷ In *NEPACCO*, the Eighth Circuit, in the context of "owner or operator" liability under CERCLA § 107(a)(2), determined that the appropriate test for determining whether a person "owned" the hazardous waste in question is whether the person had "the authority to control the handling and disposal of hazardous substances."⁸⁸ Although the Eighth Circuit was ultimately determining whether to impose liability upon the corporate officer as an arranger under CERCLA § 107(a)(3), the "authority to control" test was applied to determine whether the corporate officer "owned" the hazardous waste within the definition of the statute. Unfortunately, several courts took the "authority to control" language in *NEPACCO* out of context.⁸⁹

In *Vertac*, the Eighth Circuit did not make this error. Accordingly, the court stated that "[o]ur holding in *NEPACCO*, when read in the context of the facts of the case, certainly does not suggest such a broad interpretation."⁹⁰ The court then held that mere authority to control hazardous waste activities does not, by itself, warrant imposing arranger liability; hence, the United States was not liable as an arranger.⁹¹

85 46 F.3d 803 (8th Cir.), cert. denied, 115 S. Ct. 2609 (1995).

86 *Id.* at 810.

87 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

88 *Id.* at 743.

89 See *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (holding that a stockholder who manages the corporation is liable under CERCLA as an "owner or operator") (citing *NEPACCO*, 579 F. Supp. 823, 847-48 (W.D. Mo. 1984)); *United States v. Carolawn Co.*, 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,699, 20,700 (D.S.C. June 15, 1984) (citing *NEPACCO*, 579 F. Supp. 823). For a criticism of the authority to control standard in these cases, see Wallace, *supra* note 4, at 851-55.

90 *Vertac*, 46 F.3d at 810.

91 *Id.* at 810.

4. Mere Sale of a Useful Product

In *Florida Power & Light Co. v. Allis Chalmers Corp.*,⁹² the Eleventh Circuit held that manufacturers of transformers containing hazardous substances were not liable as arrangers under CERCLA § 107(a)(3). In *Florida Power & Light*, the plaintiff power company (FP & L) purchased transformers from the defendant manufacturers. After using the transformers in their business for approximately forty years, FP & L sold them as scrap to a company that salvaged the transformers for metals and oil. The plaintiffs alleged that the manufacturer, with knowledge that transformers contained hazardous waste, arranged for the disposal of hazardous waste by selling transformers and were thus liable as arrangers.⁹³ First, the court cited *NEPACCO* for the general proposition that a court should give a liberal interpretation of the term "arranged" to achieve "CERCLA's overwhelmingly remedial statutory scheme."⁹⁴ Next, in finding that the defendant manufacturer was not directly liable as an arranger, the court declared that arranger liability does not attach where the "party merely sells a product."⁹⁵ The court reasoned that a manufacturer could be liable as an arranger even though he does not make the "critical decisions" as to disposal. However, the court did not explain when and under what circumstances a manufacturer would be liable for "arranging for" disposal of a hazardous substance.⁹⁶ The court found that the transaction was a "mere sale," and thus the manufacturers were not liable as arrangers under CERCLA § 107(a)(3).⁹⁷

In a similar situation, the Eighth Circuit found that where a manufacturer contracts with another party to process a product, and this process inherently produces hazardous substances that must be disposed of, the manufacturer has arranged for the disposal of hazardous substances. In *United States v. Aceto Agriculture Chemicals Corp.*,⁹⁸ the defendant pesticide manufacturer contracted to have another party formulate technical grade pesticides. The pesticide formulation process generated hazardous wastes. The court distinguished this from the sale of a useful product in several manners. First, because the process generated hazardous substances that would require disposal, it was a disposal of hazardous substance, not incorporation of a hazardous substance for sale as a useful product.⁹⁹ Moreover, unlike the sale of transformers in *FP & L*, the contracting party in *Aceto* performed a process on a product that was wholly owned by the manufacturer, for the manufacturer's benefit, and the disposal of hazardous substances was contemporaneous with the process.¹⁰⁰ The court reasoned that

92 893 F.2d 1313 (11th Cir. 1990).

93 *Id.* at 1316.

94 *Id.* at 1317 (citing *NEPACCO*, 810 F.2d at 733).

95 *Id.*

96 *Id.* at 1318.

97 *Id.* at 1319.

98 872 F.2d 1373 (8th Cir. 1989).

99 *Id.* at 1381.

100 *Id.*

not finding liability in this situation would allow defendants to “close their eyes” to the method of disposal of their hazardous substances.¹⁰¹

5. Obligation to Control

The Second Circuit, in *General Electric v. AAMCO Transmissions, Inc.*,¹⁰² held that oil companies were not “arrangers” for their service station tenants’ waste disposal, even if the companies had the ability or opportunity to control the disposal and exercised control over certain aspects of their tenants’ business.¹⁰³ In *General Electric*, defendant oil companies leased service stations to dealers. The dealers subsequently collected, stored and ultimately disposed of the waste motor oil at a hazardous waste dumpsite. The plaintiff, seeking contribution for its remediation costs, alleged that the defendant oil companies “arranged for” the disposal or treatment of hazardous substances because the parties had the “opportunity or authority to control” the location or method of disposal.¹⁰⁴

The court found that while arranger liability could extend “to parties that do not have active involvement regarding the timing, manner or location of disposal,”¹⁰⁵ there must be a nexus between the defendant and the disposal of hazardous substances. The court defined this nexus as “the obligation to exercise control over the hazardous substances, and not the mere ability or opportunity to control the disposal.”¹⁰⁶ In highlighting that the standard for arranger liability is different from “operator” liability, the court noted that courts refused to find arranger liability where a party merely “knew about the nature of the facility’s operations and had ‘the power to get involved in actual management’ of the facility.”¹⁰⁷

Thus, the several circuit courts that have addressed the issue of direct liability as an arranger under CERCLA § 107(a)(3) have struggled to articulate a standard that is consistent with both CERCLA’s broad scope of liability and the limited liability provided to nonparticipating corporate officers and shareholders. It seems clear that the mere sale of a product that contains hazardous substances is not arranging for treatment or disposal of a hazardous waste. However, when applying this standard, the Eleventh Circuit stated that a manufacturer could be directly liable as an arranger without making the hazardous substance treatment or disposal decisions, but the court did not articulate under what circumstances.¹⁰⁸ Beyond that, the rules of liability are blurred. The Seventh Circuit announced a standard that appears to require the party to actually participate in the hazardous waste disposal activities of the corporation.¹⁰⁹ Similarly,

101 *Id.* at 1382.

102 962 F.2d 281 (2d Cir. 1992).

103 *Id.* at 287-88.

104 *Id.* at 283.

105 *Id.* at 286 (quoting *CPC Int’l, Inc. v. Aerojet-General Corp.*, 759 F. Supp. 1269, 1279 (W.D. Mich. 1991)).

106 *Id.*

107 *Id.* at 287 (quoting *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454, 1457 (N.D. Cal. 1991)).

108 See *supra* notes 92-97.

109 See *supra* notes 72-76.

the Fifth Circuit strictly applied traditional corporate law doctrine and held that a parent corporation could not be directly liable for its subsidiary's hazardous waste disposal activities—to reach the parent, the plaintiff must assert facts that warrant piercing the corporate veil.¹¹⁰ The Second Circuit found that imposing direct arranger liability merely required the party to have an obligation to control the corporation's hazardous substance activities. In contrast, the Eighth Circuit found that the mere authority to control the hazardous disposal activities, by itself, did not make a party liable as an arranger. However, the Eighth Circuit did not enumerate what activity would justify imposing direct liability on a party as an arranger.

V. *UNITED STATES V. TIC INVESTMENT CORP.*

A. *The Factual Background*¹¹¹

White Farm Equipment Company (WFE) was a wholly owned subsidiary of TIC Investment Corporation, Inc. (TIC).¹¹² WFE owned and operated a farm implement manufacturing plant located in Charles City, Iowa from 1971 through 1985. During the manufacturing, WFE produced foundry sand and ash that required disposal.¹¹³ WFE contracted with a local corporation¹¹⁴ to transport and dispose WFE's hazardous waste at a local dumpsite.¹¹⁵

In 1979, WFE agreed to lease the dumpsite from the local corporation for two years for a nominal fee. Neither WFE's corporate officer (Mr. Georgoulis) nor its parent corporation (TIC) were involved with WFE before or at the time the parties signed the lease. After the lease expired, WFE did not renew the lease, yet it continued to transport and dispose its hazardous waste at the dumpsite.

In December 1980, White Farm U.S.A., Inc., an investment holding company, bought all of WFE's stock, and was thus the sole shareholder.¹¹⁶ From December 1980 through October 1985, White Farm U.S.A. wholly owned WFE, and White Farm Industries, Inc. in turn wholly owned White Farm U.S.A. From 1980 through 1985, TIC wholly owned White Farm Industries. Thus, in essence, TIC was WFE's parent corporation. The defendant corporate officer in the case, Mr. Georgoulis, was the sole shareholder of TIC when TIC was the parent corporation of WFE.¹¹⁷ From

110 See *supra* notes 80-84.

111 *United States v. TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995). The facts are taken from the district court's summary of facts. *United States v. TIC Inv. Corp.*, 866 F. Supp. 1173, 1175-77 (N.D. Iowa 1994).

112 There were several holding companies that began with the name TIC. Hereinafter, all of these corporations are referred to as TIC.

113 The waste foundry sand and ash contained lead, cadmium, and chromium, all of which are hazardous substances under 42 U.S.C. § 9601(14). *TIC*, 866 F. Supp. at 1175.

114 The local corporation was H.E. Construction Co. (HEC). *Id.*

115 The dumpsite was basically farmland owned by Homer Blickenderfer. *Id.*

116 White Farm U.S.A. purchased the stock from White Motor Corporation pursuant to an order from a United States Bankruptcy Court. *Id.*

117 Georgoulis was president of the following: WFE from December 19, 1980 to November 23, 1981; TIC Services, Co. and TICI from May 1980 to March 1985, and TICU from the time it was formed through March 1985. From May 1, 1980 through March 27, 1985, Georgoulis was the Chairman of the following corporations' corporate boards: WFE, White Farm U.S.A., White

December 1980 until Borg-Warner Acceptance Corporation (BWAC) refinanced WFE in 1983, WFE's corporate board only consisted of two people, and Georgoulis, the chairman, was one of them. Under the refinancing agreement, BWAC required WFE to expand its board to five members. Georgoulis remained on the board through March 1985.¹¹⁸

There was no evidence that Georgoulis or any other employee of TIC had any personal knowledge of WFE's waste disposal practices or that they participated in any way with the waste disposal decisions of any of the subsidiary corporations.

In May 1985, WFE defaulted on its loan agreement with BWAC. Because BWAC was the priority lienholder of WFE's assets, BWAC became the owner of all WFE assets at the time. Shortly thereafter, in October 1985, BWAC sold all of WFE's assets to one of the plaintiffs, Allied.

In 1988, the United States Environmental Protection Agency (EPA) placed the dumpsite on the National Priorities List and began remediation activities at the dumpsite.¹¹⁹ Both the EPA and Allied incurred response costs while conducting remediation activities.

Allied and the United States brought separate actions under CERCLA § 107 against Georgoulis and TIC to recover their response costs. The plaintiffs alleged that Georgoulis (as a corporate officer and director) and TIC (as a parent corporation) were directly liable under CERCLA § 107(a)(3) as arrangers, and derivatively liable by piercing the corporate veil.¹²⁰ Allied moved for summary judgment. Likewise, defendants made a cross motion for summary judgment.

B. *The District Court Opinion*

1. Owner-Operator Liability

The district court dismissed the plaintiffs' request for summary judgment on the claim that the defendants' "owned or operated" the dumpsite through WFE's lease of the dumpsite. First, the court noted that, when addressing lessee liability as an "owner-operator," a court should look at "how much control over and responsibility for the use of the site the lessor maintains."¹²¹ The district court found that although the lease maintained

Farm Industries, Inc., TIC Services Co., TICI and TICU. Hence, with respect to TICU, Georgoulis was the President and Chairman of the Board of TICU from the time it was formed through March 1985. *TIC*, 68 F.3d at 1084-85.

¹¹⁸ *Id.*

¹¹⁹ See 42 U.S.C. § 9605(a)(8)(B); 40 C.F.R. Part 300, App. B (1993).

¹²⁰ The EPA only asked for summary judgment in relation to the claim of derivative liability. In addition to arranger liability under § 107(a)(3), Allied also asserted both direct and derivative liability under § 107(a)(2) as "owner-operators." Allied asked for summary judgment under both "arranger" and "owner-operators" theories of liability.

¹²¹ *TIC*, 866 F. Supp. at 1178 (citing *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992); *Pierson Sand & Gravel, Inc. v. Pierson Township*, 851 F. Supp. 850 (W.D. Mich. 1994); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1003 (D.S.C. 1984), *rev'd in part on other grounds*, *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988)). The court also noted that courts finding lessees liable as owner-operators focused on the fact that the lessees' activities directly caused the release of a hazardous substance. *TIC*, 866 F. Supp. at 1178 (citing *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478, 484 (8th Cir. 1992) (owner and operator of leaking oil tanks located on leased land was an "owner-operator"

that lessor retained complete control over the dumpsite, there was sufficient evidence suggesting that WFE did, in fact, exert some control. Because there was a genuine issue of material fact, the court found summary judgment on this issue inappropriate.¹²²

2. Arranger Liability and Corporate Officers

CERCLA § 107(a)(3) imposes strict liability upon "any person" who "by contract, agreement, or otherwise arranged for disposal . . . of hazardous substances. . . ."¹²³ The statute includes both individuals and corporations within its definition of "person."¹²⁴ The district court noted, however, that "arranged for" is not defined in the statute. Hence, the issues for the district court were first to define "arranged for" within the meaning and intent of the statute, and second, to determine whether the defendants' actions satisfied that meaning.¹²⁵

The plaintiffs asserted that the proper standard for arranger liability was the authority to control test described in the Eighth Circuit's opinion in *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*.¹²⁶ In contrast, the defendants asserted that the authority to control test was too liberal an interpretation of "otherwise arranged for" under CERCLA. The defendants further argued that the "actual participation" test was the appropriate standard; therefore, since they did not participate in the corporation's hazardous waste disposal activities, it followed that they could not be directly liable under the statute.¹²⁷

Relying on *NEPACCO* and cases from other circuits, the district court held that the proper standard for determining corporate officer liability as an arranger under § 107(a)(3) was the authority to control test used in determining owner-operator liability under § 107(a)(2).¹²⁸ In addition, the court required a "showing that the defendant actually exercised his or her authority" to control the corporation's operations.¹²⁹ Alluding to both

under CERCLA); *Weyerhaeuser Corp. v. Koppers Co.*, 771 F. Supp. 1406 (D. Md. 1991) (lessee of wood treatment plant liable as owner-operator). For a detailed discussion of owner-operator liability under CERCLA, see citations *supra* note 4.

¹²² *TIC*, 866 F. Supp. at 1178.

¹²³ 42 U.S.C. § 9607(a)(3), *quoted in TIC*, 866 F. Supp. at 1178.

¹²⁴ 42 U.S.C. § 9601(21): "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.*

¹²⁵ *TIC*, 866 F. Supp. at 1177.

¹²⁶ 810 F.2d 726, 743 (8th Cir. 1986).

¹²⁷ *TIC*, 866 F. Supp. at 1178.

¹²⁸ *Id.* at 1179. The court gave two reasons when explaining its rationale for applying the "authority to control" test for "arranger" liability:

[T]o hold that liability should be determined differently depending on whether the corporation disposed of waste on its own facility or at a facility off the corporation's property would open a large gap in CERCLA legislation allowing corporate officers to escape liability merely by shipping its hazardous waste offsite. Moreover, the authority to control test is appropriate for arranger liability as to hold otherwise would encourage persons in authority to turn a blind eye to the method of disposal of their corporation's hazardous substances. This would contravene the underlying policy of CERCLA.

Id. (citing *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1382 (8th Cir. 1989)).

¹²⁹ *Id.* at 1180, *quoted in United States v. TIC Inv. Corp.*, 68 F.2d 1082, 1086 (8th Cir. 1995). The court rebuffed the defendant's argument that the plaintiff must prove that the corporate officer exercised "actual control" over the daily operations of the corporation. The court noted

public policy and legislative intent, the court explained the rationale behind its “actual exercise of control” test for arranger liability:

The necessity for showing that the defendant actually exercised his or her authority is to establish that the defendant was not a mere figurehead, and that he or she played more than a passive role in the corporation. Whether an individual chooses to exercise all the authority he or she has over a corporation is not relevant under the statutory scheme as one purpose of CERCLA is to encourage those individuals with the power to do so, to take action to abate the damage caused by hazardous waste disposal. To allow those in authority to escape liability because they chose to oversee certain aspects of their corporation, yet ignore hazardous waste disposal practices, would defeat the purpose behind the legislation.¹³⁰

After reviewing all of the evidence of Georgoulis’s involvement in WFE’s operations, the court determined that he was neither “a mere figurehead of WFE [n]or a passive stockholder.”¹³¹ Although there was no evidence that Georgoulis had any personal knowledge of WFE’s waste disposal activities, the district court concluded that “[due] to Georgoulis’ authority to control WFE and his actual exercise of control over WFE, he is directly liable as an arranger under CERCLA.”¹³²

Because the court found Georgoulis directly liable as an arranger, it did not evaluate whether he could be derivatively liable as an arranger on the common law theory of “piercing the corporate veil.”¹³³

3. Arranger Liability and Parent Corporations

In analyzing arranger liability for parent corporations, the district court rejected the authority to control test because such authority is “inherent” in the parent-subsidiary relationship.¹³⁴ The court then held that, like corporate officers, parent corporations may be directly liable as arrangers under § 107(a)(3) if the parent corporations have “gone beyond an investment relationship with the subsidiary and [have] exerted actual control over the subsidiary’s activities.”¹³⁵ Therefore, the district court was consistent and made the test for direct liability as an arranger under 107(a)(3) the same for both corporate officers and parent corporations: “actual control.”¹³⁶

that several courts, in finding “operator” liability, found that the corporate officer did not have to exercise “actual control” over the daily operations of the corporation. *TIC*, 866 F. Supp. at 1180 (citing *Donahey v. Bogle*, 987 F.2d 1250, 1254 (6th Cir. 1993) (sole shareholder of a company that disposed of its hazardous waste at one of the company’s leased facilities was liable as an “operator” notwithstanding the fact that the shareholder did not actively participate in the corporation’s day-to-day activities)); *Pierson Sand & Gravel, Inc. v. Pierson Township*, 851 F. Supp. 850, 855 (W.D. Mich. 1994) (“authority to control” a landfill is sufficient for “operator” liability, and there is no need to prove day-to-day management).

130 *TIC*, 866 F. Supp. at 1180-81 (citations omitted).

131 *Id.* at 1181.

132 *Id.*, quoted in *TIC*, 68 F.3d at 1086.

133 *TIC*, 866 F. Supp. at 1181.

134 *Id.* at 1182.

135 *Id.*, quoted in *TIC*, 68 F.3d at 1091.

136 For a discussion of direct liability as an arranger under § 107(a)(3) for corporate officers, see *supra* notes 123-36 and accompanying text.

The rationale for applying the actual control test to find direct liability for parent corporations as arrangers under § 107(a)(3) was two-fold: (1) to discourage "active" parent corporations from ignoring the hazardous waste disposal practices of its subsidiaries;¹³⁷ and (2) to recognize that a parent corporation's involvement in "seemingly unrelated" areas may directly affect waste disposal practices of the subsidiary.¹³⁸

The court then explained that determining whether a parent corporation exerted enough actual control to warrant arranger liability would be a fact specific, "case-by-case" inquiry.¹³⁹ After reviewing the facts and corresponding determinations of parent corporation liability by other courts,¹⁴⁰ the district court listed the instances of TIC's involvement in WFE's affairs.¹⁴¹ Despite the absence of evidence showing that TIC participated in the subsidiary's waste disposal activities or decisions, the court found TIC's level of active involvement in WFE's affairs sufficient to find them directly liable as arrangers under § 107(a)(3).¹⁴² Because the court found direct liability, it did not consider indirect liability under § 107(a)(3).¹⁴³

137 *TIC*, 866 F. Supp. at 1182.

138 *Id.* The court explained that where a parent corporation makes budgetary or cost cutting demands directed at the subsidiary, the subsidiary may feel either compelled to make savings in the hazardous waste disposal area where the costs are relatively high, or constrained from making improvements in the existing waste disposal system. *Id.* at 1182 n.5.

139 *Id.* at 1182.

140 *Id.* at 1182-83 (citing *Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1223-24 (3d Cir. 1993) (appellate court did not affirm, and remanded for further findings, district court's determination that the parent was not liable as an "operator"; appellate court found it significant that the companies shared common officers, common officers reported to the shared president, and the shared president had final decision making authority over operation and management of the two companies); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) (no liability as an "operator" where the parent corporation's involvement limited to dictating the terms of employment for subsidiary, owning 100% of subsidiary's stock, hiring and creating profit sharing plan for the subsidiary's executive officers, receiving dividend distributions totaling more than the subsidiary's net earnings, and receiving the subsidiary's status reports); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 407 (1st Cir. 1993) (parent holding company directly liable as "operator" of its subsidiary utility companies where parent president was also president of subsidiary, appointed by the parent, and reported to the parent); *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24 (1st Cir. 1990) (parent corporation liable where parent had total monetary control over the subsidiary, placed restrictions on subsidiary's budget, required subsidiary to funnel all government and real estate transactions through the parent, and filled nearly all of the subsidiary's executive positions); *CPC Int'l, Inc. v. Aerojet-General, Inc.*, 777 F. Supp. 549, 575 (W.D. Mich. 1991) ("operator" liability found where parent had full ownership of subsidiary, sometimes controlled the subsidiary's board, was involved in daily operations through parent officials who served in positions within the subsidiary, was active in policy making and control over the subsidiary's environmental matters and labor problems, and exerted financial control over the subsidiary's budget and major capital expenditures)).

141 The court listed numerous facts including Georgoulis's involvement as president and chairman of the board of directors for both TICI and TICU; TICI and TICU's involvement in lowering personnel and labor costs; Georgoulis's maintaining final authority over WFE's manpower and staffing; and TIC owned, through various holding companies, 100% of WFE's stock. *TIC*, 866 F. Supp. at 1183-84.

142 *Id.* at 1184. The court also stated that it would, alternatively, find arranger liability for both Georgoulis and TIC under the "sufficient nexus" theory. Under this theory, a person is liable "if there is a sufficient nexus between the defendant and the complained of hazardous substance." *Id.* at 1184 n.8. This would include liability both where the defendant is active in hazardous waste disposal decisions, and where the defendant had an obligation to control the hazardous substances. *Id.* (citing *General Electric Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992); and *United States v. Fleet Factors Corp.*, 821 F. Supp. 707, 724 (S.D. Ga. 1993)).

143 *TIC*, 866 F. Supp. at 1184.

C. *The Eighth Circuit Opinion*

1. Arranger Liability and Corporate Officers

In *United States v. TIC Investment Corp.*,¹⁴⁴ a three judge panel from the Eighth Circuit reviewed the district court's opinion and announced that the proper standard for determining arranger liability for corporate officers "imposes direct arranger liability on a corporate officer or director if he or she had the authority to control and did in fact exercise actual or substantial control, *directly or indirectly*, over the arrangement for disposal, or the off-site disposal, of hazardous substances."¹⁴⁵ Applying this standard to the facts of the case, the court concluded that Georgoulis was directly liable as an arranger under § 107(a)(3) because "he exercised substantial *indirect* control over the disposal arrangement."¹⁴⁶

The standard for direct arranger liability for corporate officers announced by the Eighth Circuit departs from the district court's decision in a significant manner. Both courts require the corporate officer to exercise actual control over the corporation; however, the court of appeals standard also includes a causation requirement between the exercise of control and the arrangement for disposal of the hazardous substances.¹⁴⁷ The district court standard merely required that the corporate officer have authority to control, and actually exercise that authority, over the corporation's operations; it did not require a nexus with the corporation's hazardous waste disposal activities. In contrast, the court of appeals expressly required that the exercise of control have a nexus with the corporation's hazardous waste disposal activities. The court reasoned that "[t]he language of CERCLA's arranger subsection specifically requires that one arrange for disposal or treatment, or arrange for transportation for disposal or treatment."¹⁴⁸

The Eighth Circuit rejected the defendants' argument that direct liability as an arranger requires that the party "take . . . some intentional action to arrange for disposal of a hazardous substance."¹⁴⁹ In doing so, the court explained its interpretation of Congress's broad liability scheme under CERCLA.¹⁵⁰ The court then explained that its earlier holding in *Aceto*, where it found arranger liability for defendants who contracted to

¹⁴⁴ 68 F.3d 1082 (8th Cir. 1995).

¹⁴⁵ *Id.* at 1088.

¹⁴⁶ *Id.* at 1090 (emphasis added). The court summarized Georgoulis's activities:

[T]he undisputed facts show that Georgoulis had the authority to control virtually every aspect of WFE's operations and indirectly control others. We find it beyond dispute that Georgoulis, in his capacity as board chairman and chief executive officer of WFE, so usurped the power of those who were only nominally running WFE that he undertook responsibility for all of WFE's decisionmaking; he so tightly controlled WFE, particularly its budgetary aspects, that he left WFE employees no other choice but to continue with the relatively inexpensive arrangement that had historically existed between WFE and HEC. In other words, Georgoulis's actions inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite.

Id. at 1090.

¹⁴⁷ *Id.* at 1090 n.7.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1087 (citing *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), cited in Brief for Appellants at 9).

¹⁵⁰ *Id.* at 1088 (stating that Congress's goals were "(1) to ensure that those responsible for the problems caused by hazardous wastes are required to pay for the clean-up costs . . . and (2) to

have another party “formulate” rather than “dispose of” defendants’ pesticides containing hazardous wastes¹⁵¹ “implicitly rejected a specific intent requirement.”¹⁵²

Next, the court of appeals distinguished its recent holding in *United States v. Gurley*¹⁵³ from the facts in this case. *Gurley* dealt with operator liability of a “mere employee,” whereas *TIC* involved the actions of a corporate officer. In *Gurley*, the court found an employee liable as an operator because the employee “(1) had the authority to determine whether hazardous waste would be disposed of and the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks.”¹⁵⁴ In *TIC*, the court limited the holding in *Gurley* by distinguishing between employees and corporate officers, directors or shareholders because “officers, directors, or shareholders are more likely to cause a company to dispose of hazardous waste.”¹⁵⁵

The Eighth Circuit explained that the public policy rationale for finding a more liberal liability scheme for corporate officers was to close a loophole for officers who in fact controlled practically every aspect of a corporation’s activities, even though there was no proof of personal involvement in the arrangement for disposal. The court determined the loophole existed where

[a] corporate officer, who has virtually unlimited control over a company and in fact exercises that control but knows well enough to close his or her eyes to the specific details of the company’s hazardous waste disposal practices, could avoid CERCLA liability; meanwhile, the employee charged with the job of actually carrying out the disposal activities or making the disposal arrangements—even if he or she has no meaningful decisionmaking authority—could not avoid personal liability.¹⁵⁶

Because Georgoulis’s “mandates left no room for others to exercise any decision making authority or judgment in any area of the business,”¹⁵⁷ the court found that he “exercised some control . . . indirectly[] over the arrangement for disposal.”¹⁵⁸

In reaching its conclusion, the court found Georgoulis’s involvement in WFE’s activities, and power exerted over WFE’s employees, dispositive. The court stated:

[T]he undisputed facts show that Georgoulis had the authority to control virtually every aspect of WFE’s operations and indirectly control others. We find it beyond dispute that Georgoulis, in his capacity as board chairman and chief executive officer of WFE, so usurped the power of those

ensure that responsible persons are not allowed to avoid liability by remaining idle.”) (citing *TIC*, 866 F. Supp. at 1177 (citations omitted)).

151 *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989).

152 *TIC*, 68 F.3d at 1088.

153 43 F.3d 1188 (8th Cir. 1994), *cert. denied*, 116 S.Ct. 73 (1995).

154 *TIC*, 68 F.3d at 1088 (citing *Gurley*, 43 F.3d at 1194).

155 *Id.* at 1088-89 (quoting *Gurley*, 43 F.3d at 1194).

156 *Id.* at 1089.

157 *Id.* at 1090.

158 *Id.*

who were only nominally running WFE that he undertook responsibility for all of WFE's decision making; he so tightly controlled WFE, particularly its budgetary aspects, that he left WFE employees no other choice but to continue with the relatively inexpensive arrangement that had historically existed between WFE and HEC. In other words, Georgoulis's actions inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite.¹⁵⁹

Finally, the court stated that the lack of personal knowledge of WFE's hazardous waste disposal activities did not excuse Georgoulis from liability.¹⁶⁰

2. Arranger Liability and Parent Corporations

The Eighth Circuit held that the standard for finding direct arranger liability under CERCLA § 107(a)(3) for parent corporations is the same standard for corporate officers: whether the "parent had authority to control and exercised actual or substantial control, directly or indirectly, over the arrangement for disposal, or the off-site disposal, of the subsidiary's hazardous substances."¹⁶¹

In doing so, the court of appeals rejected the district court's actual control test. The court explained that, in contrast to the district court's reasoning, the standard for determining liability for a parent corporation as an arranger is "significantly" different, and more stringent, than liability as an operator. The court reasoned that the statute makes a critical distinction between operator and arranger liability because CERCLA § 107(a)(2) only requires a "person" to operate the disposal facility at the time of disposal—imposing direct operator liability when the parent corporation had authority to control, and exercised substantial or actual control, over the subsidiary. Conversely, CERCLA § 107(a)(3) requires the person to arrange for the disposal, treatment, or transportation for disposal or treatment—imposing direct arranger liability where there is "some causal connection or nexus" between the parent corporation's activities and the subsidiary's arrangement for disposal.¹⁶² The court recognized that this will be a fact intensive inquiry that is based upon the totality of the circumstances.¹⁶³

In reversing the district court's summary judgment in favor of the parent corporation, the court of appeals found that it was not clear from the record that Georgoulis's activities in WFE's affairs were in his capacity as an officer or director of the parent corporation. The mere fact that Georgoulis and other officers served concurrently for both WFE and the parent corporation did not, "in and of itself," establish liability for the parent corporation.¹⁶⁴ As a result, the court only evaluated the facts relevant to the parent corporation's working relationship with the subsidiary, WFE, and

159 *Id.*

160 *Id.*

161 *Id.* at 1092.

162 *Id.* at 1091-92.

163 *Id.* at 1092.

164 *Id.*

found there was a genuine issue whether the parent corporation "exercised actual or substantial control, directly or indirectly, over WFE's waste disposal arrangement" which precluded summary judgment.¹⁶⁵

VI. ANALYSIS OF *TIC*

A. Arranger Liability and Corporate Officers

1. Authority to Control

While several courts have adopted the authority to control test articulated in *United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)*¹⁶⁶ for determining operator liability under CERCLA § 107(a)(2), the Eighth Circuit rejected the district court's conclusion that *NEPACCO*'s authority to control test applied equally to arranger liability.¹⁶⁷ The court noted that its recent decisions in *United States v. Gurley*¹⁶⁸ and *United States v. Vertac Chemicals Corp.*¹⁶⁹ made it clear that arranger liability required more than the authority to control test. This is important to note because several courts have adopted the authority to control test.

2. CERCLA's Goals and Defining Responsible Parties

In *TIC*, the Eighth Circuit stated that the twin goals of CERCLA are "(1) to ensure that those responsible for the problems caused by hazardous wastes are required to pay for the cleanup costs . . . and (2) to ensure that responsible persons are not allowed to avoid liability by remaining idle."¹⁷⁰ Yet, it is well settled that the two goals of CERCLA are to (1) allow for the immediate cleanup of a release, or a threat of release, of hazardous substances, and (2) make those responsible for the disposal of the hazardous substances pay for the cleanup.¹⁷¹

¹⁶⁵ *Id.*

¹⁶⁶ 810 F.2d 726 (1986).

¹⁶⁷ Defendants argued that *NEPACCO*, on its facts, was clearly distinguishable from *TIC* because the employee in *NEPACCO*, who was found to be liable as an arranger, "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the *NEPACCO* plant's hazardous substances." *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1087 (quoting *NEPACCO*, 810 F.2d at 743). In *TIC*, neither the corporate officer nor the parent corporation had any involvement with the corporations hazardous waste activities.

¹⁶⁸ 43 F.3d 1188 (8th Cir. 1994).

¹⁶⁹ 46 F.3d 803 (8th Cir.), *cert. denied*, 115 S. Ct. 2609 (1995). In *Vertac*, the court explained that CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), in addition to requiring the party to arrange for the disposal or treatment of hazardous substances, also requires that the hazardous substances be "owned or possessed by" the same party who arranged for the disposal or treatment of the hazardous substances. Thus, the court explained, *NEPACCO* involved the issue of whether a corporate employee could be found to have "owned or possessed" the hazardous substances within the meaning of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3). The *NEPACCO* court applied the authority to control test to determine whether the corporate employee "owned or possessed" the hazardous substances. It was not used as the standard to determine whether the party "arranged for" the disposal of the hazardous substances. *Vertac*, 46 F.3d at 810.

¹⁷⁰ *TIC*, 68 F.3d at 1088 (quoting *TIC*, 866 F. Supp. at 1177 (citations omitted)).

¹⁷¹ The First Circuit stated the goals succinctly in the following often quoted passage:

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

Nothing in the legislative history supports the court's assertion that one of Congress's primary goals in enacting CERCLA was to prevent responsible persons from avoiding liability by remaining idle. By focusing on liability for inaction, this seemingly insignificant interpretation of CERCLA's statutory goals opens the door for finding parties directly liable under the statute where the party did not actively participate in the wrongdoing.

Because holding responsible parties liable for releases of hazardous waste is a primary goal of CERCLA, how the statute defines responsibility is of utmost importance. However, as one commentator noted, simply identifying imposition of liability on responsible persons as a goal does not help determine which rules of liability should apply. The rules of liability chosen will directly determine which parties will be responsible.¹⁷² This presents a problem of circularity: one cannot determine whether liability under CERCLA attaches to a party until one determines which rules of liability apply.¹⁷³

As the varied opinions by the courts of appeals on CERCLA liability indicate,¹⁷⁴ neither the statute nor its legislative history positively indicates which rules of liability apply.¹⁷⁵ Combining the lack of evidence of Congressional intent to significantly alter the traditional corporate law doctrine of limited liability with the accepted rules of statutory construction, it follows that the federal courts should adhere to the limited liability rules provided by the corporate form.¹⁷⁶

ble for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986). Some commentators argue that replenishing the Superfund is a third goal of CERCLA and this goal warrants going beyond the traditional liability rules to find parties responsible for cleanups. Defenders of this position posit that this goal is at least implied in the statute because the President needs the proceeds from the Superfund to operate under the statute. See generally Note, *Liability of Parent Corporations*, *supra* note 4 (arguing that a parent corporation's ability to escape liability under traditional corporate law doctrine is counter to the goals of CERCLA because it either delays or reduces recovery of funds necessary for further remedial activities).

¹⁷² See Dennis, *supra* note 4, at 1475-76.

¹⁷³ To illustrate the circularity problem, one commentator used the following example: Corporation X is responsible for a release of a hazardous substance, and the president of Corporation X actively participated in the management of the corporation. However, the president did not participate in, nor have any knowledge of, the activities that led to the release of the hazardous substances. Hence, whether the president is liable for Corporation X's release of the hazardous substance will depend on whether the court applies traditional corporate law doctrine requiring the corporate officer actually to participate in the activity that caused the release, or uses a lesser standard similar to the Second Circuit's obligation to control. Thus, by hypothesis, the president is not "responsible" unless the court rejects the traditional corporate law doctrine and chooses the capacity to control standard. *Id.*

¹⁷⁴ For a discussion of the split in the federal circuits over the proper standard for imposing direct arranger liability, see *supra* Part IV.B.

¹⁷⁵ See *Joslyn Mfg. Corp. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) (noting that there is "little in the history of CERCLA to indicate that Congress intended to make such a significant change in corporation law principles"); *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 226 (W.D. La. 1988) ("neither the clear language of CERCLA nor its legislative history provides authority for imposing individual liability on corporate officers or direct liability on parent corporations") (citing Cronk & Huddleston, *Corporate Officer Liability*, *supra* note 4); Dennis, *supra* note 4, at 1393-94.

¹⁷⁶ See *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a

3. Actual Participation

The Eighth Circuit posited that the reasoning in its opinion in *Gurley*¹⁷⁷ supports a finding that the standard for imposing arranger liability on officers is different from employees because "persons who are officers, directors, or shareholders are more likely to cause a company to dispose of hazardous wastes."¹⁷⁸ As a result, the court argues, a mere employee must participate directly by either performing the task or directing the task, whereas an officer may be directly liable without participating in the hazardous waste disposal activities. The court acknowledges that arranger liability requires "some level of participation, or exercise of control over, activities that are causally connected to, or have a nexus with," the hazardous disposal activities. The court contends that this "nexus" for direct liability can be met by showing that the officer "exercised actual or substantial control, *directly or indirectly*, over the arrangement for disposal" of the hazardous waste.

The Eighth Circuit's reasoning appears to be deficient for several reasons. To impose direct liability on a corporate officer, the officer must actually participate in the wrongdoing.¹⁷⁹ Since the corporate officer is an agent of the corporation, the language in *Gurley* with respect to employee liability applies equally to corporate officers. Consequently, direct liability will attach to a corporate officer if the corporate officer (1) had the authority to control the hazardous waste activities, and (2) actually exercised that authority, either by personally performing the tasks, or directing others to perform the tasks, necessary to dispose of the hazardous wastes.¹⁸⁰

The court found that direct liability under CERCLA § 107(a)(3) requires "some causal connection or nexus" between the defendant's activities and the corporation's arrangement for disposal.¹⁸¹ The causation or nexus requirement for direct liability is perfectly in accordance with traditional corporate law doctrine: officers are liable for the torts they personally commit, even if they commit them while acting in their official capacity.¹⁸² The issue then is what nexus warrants imposing direct arranger liability on a potentially responsible party.

judicially created concept, it makes that intent specific."), *quoted in* *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 82-83 (5th Cir. 1990); *DeBreceni v. Graf Bros. Leasing, Inc.*, 828 F.2d 877, 880 (1st Cir. 1987) ("[T]he principle of limited liability for corporate debts is longstanding enough and important enough to be considered a background norm, against which Congress may act of course, but which is controlling in the absence of such action."), *cert. denied*, 484 U.S. 1064 (1988), *cited in* *Dennis*, *supra* note 4, at n.109.

¹⁷⁷ 43 F.3d 1188 (8th Cir. 1994). See *supra* note 79 for a discussion of the Eighth Circuit's opinion in *Gurley*.

¹⁷⁸ *TIC*, 68 F.3d at 1089 (quoting *Gurley*, 43 F.3d at 1194).

¹⁷⁹ See *supra* Part III.

¹⁸⁰ See *Gurley*, 43 F.3d at 1193, *cited in* *TIC*, 68 F.3d at 1087.

¹⁸¹ *TIC*, 68 F.3d at 1091-92 (although the court was speaking in the context of direct liability for parent corporations, the author infers that the court intended for the causation requirement to apply to direct liability for corporate officers as well).

¹⁸² 3A W. FLETCHER, *supra* note 37, § 1137:

An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable for resulting injuries; but an officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation. Officers and directors may be held individually liable for personal participation in tortious acts even though they derived

The Eighth Circuit's analysis that one can meet the nexus requirement for direct liability by showing that the officer "did in fact exercise actual or substantial control . . . *directly* . . . over the arrangement for disposal"¹⁸³ is consistent with the actual participation requirement found in corporate law.¹⁸⁴ This is the accepted standard in both federal and state courts.¹⁸⁵ The Eighth Circuit's analysis falters, however, where it states that one can meet the nexus requirement by showing the officer "exercised actual or substantial control . . . *indirectly*, over the arrangement for disposal."¹⁸⁶ The addition of *indirectly* to the direct liability standard is an unwarranted departure from the well established actual participation standard because direct arranger liability under CERCLA § 107(a)(3) "implies intentional action."¹⁸⁷ It follows that direct liability as an arranger requires the individual to take intentional action with respect to the corporation's hazardous waste disposal activities. In other words, the standard for direct arranger liability under CERCLA § 107(a)(3) should be essentially the participation standard applied by other courts: the individual must actually participate directly in the corporation's hazardous waste disposal activities.

Finally, clearly defining key words used in the statute is helpful. Indirect is the antonym of direct. Consequently, a party cannot be directly liable for indirect activity. In *TIC*, the facts were undisputed: the defendant did not participate directly in any of the corporation's hazardous waste disposal practices or decisions. Accordingly, the Eighth Circuit should not have imposed direct arranger liability on the corporate officer who did not directly participate in the corporation's hazardous waste activities.

4. Indirect Liability: Piercing the Corporate Veil

The preceding discussion is not meant to imply that a party cannot be liable for indirect activity. Piercing the corporate veil imposes liability on parties for indirect activities.¹⁸⁸ The court's opinion blurred the line between direct liability and indirect liability: all of the facts the court used to explain how the corporate officer indirectly controlled the corporation are typically evaluated when piercing the corporate veil.¹⁸⁹

Since Georgoulis was the sole shareholder of WFE, and he completely dominated the corporation, it is very likely that the Eighth Circuit would have imposed indirect liability on Georgoulis by piercing the corporate veil

no personal benefit, but acted on behalf, and in the name of, the corporation, and the corporation alone was enriched by the acts.

183 *TIC*, 68 F.3d at 1089.

184 See 3A W. FLETCHER, *supra* note 37, § 1137.

185 *Id.*; see also Dennis, *supra* note 4, at 1411 (noting the doctrine that officers and directors are personally liable for torts where they actively participated is firmly embedded in both federal and state common law).

186 *TIC*, 68 F.3d at 1089 (emphasis added).

187 *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), *quoted in TIC*, 68 F.3d at 1087. For a discussion of the Seventh Circuit's holding in *Amcast*, see *supra* Part IV.

188 See *supra* Part III.B. (discussing indirect liability).

189 The court's analysis of the corporate officer's actions focused almost entirely on the amount of control the corporate officer exerted over the corporation. *TIC*, 68 F.3d at 1090. Control is the first prong of the alter ego test. See *supra* Part III.B.

had they conducted the analysis.¹⁹⁰ Interestingly, many of the facts the Eighth Circuit listed detailing Georgoulis's involvement in WFE's affairs are pertinent to the analysis under the alter ego theory of piercing the corporate veil. The first prong (unity of interest and ownership) of the two-prong alter ego test would be satisfied based upon the facts that Georgoulis was the sole shareholder of WFE, and Georgoulis's domination and control of WFE was nearly complete because he "so usurped the power of those who were only nominally running WFE that he undertook responsibility for all of WFE's decisionmaking."¹⁹¹ It is also likely that the Eighth Circuit would find the second prong (inequitable result if the corporate veil is not pierced) satisfied.¹⁹² Thus, the Eighth Circuit could have pierced the corporate veil to impose indirect liability on Georgoulis in his capacity as shareholder and corporate officer; there was no need to fashion new, confusing rules of liability for corporate officers, directors and shareholders.

5. Public Policy

The Eighth Circuit announced that the public policy rationale supporting their decision in *TIC* was to close a loophole created for "powerful individuals" who have virtually unlimited power and who in fact exercise control of the company's hazardous waste activities but who know "well enough to close his or her eyes to the specific details of the company's hazardous waste disposal activities."¹⁹³

CERCLA attempts to "hold responsible parties liable for the costs of [the] cleanups."¹⁹⁴ The statute does not attempt to impose direct liability on parties responsible for other activities of the corporation, even if the party is directly responsible for every activity in the company except for the hazardous waste disposal activities. Nothing in the statute or its legislative history warrants changing this fundamental principle of corporate law.¹⁹⁵ As the Fifth Circuit noted, "The 'normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.' Any bold rewriting of corporation law in this area is best left to Congress."¹⁹⁶ The statutory language in CERCLA does not go that far. The act of imposing direct liability upon a corporate officer for indirect activity would be a serious departure from the fundamental principle of limited liability. As two commentators noted prior to the Eighth Circuit's decision in *TIC*, courts

190 1 W. FLETCHER, *supra* note 37, § 41.10 at 615 ("Whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate identity may properly be disregarded.").

191 *TIC*, 68 F.3d at 1090.

192 See *supra* Part V.C. for a discussion of the Eighth Circuit's reasons for finding Georgoulis liable.

193 *TIC*, 68 F.3d at 1089.

194 H.R. Rep. No. 253(III), 99th Cong., 1st Sess. 15 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3038.

195 *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990); Wallace, *supra* note 4, at 853.

196 *Joslyn*, 893 F.2d at 82-83 (quoting *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986)).

have only imposed liability on a corporate officer under CERCLA where the officer participated in the wrongful act.¹⁹⁷

This is not to say that a corporate officer who shirks a duty (i.e., looks the other way to purposefully avoid personal participation in the waste disposal activities) cannot be directly liable. In a case where an officer shirks a legal duty by "looking the other way," the officer could be directly liable for a breach of duty since breach of duty through nonfeasance gives rise to direct liability just as does breach of duty through misfeasance or malfeasance.¹⁹⁸ Hence, if an officer is responsible for managing or supervising the company's hazardous waste disposal activities, that officer cannot avoid liability by not acting. It follows that the concern expressed by the Eighth Circuit regarding a "loophole" in the liability scheme for a corporate officer who "knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices" is unfounded.

One could argue that the corporate officer could then avoid liability by avoiding responsibility for the company's hazardous waste disposal activities. This may be true, but this is consistent with a basic tenet of tort law: if there is no legal duty, there can be no breach of a legal duty.¹⁹⁹ Hence, if a plaintiff cannot meet the minimum requirement of showing there was a legal duty to act, the officer, by his inactivity (here, nonfeasance), cannot be directly liable for breaching a nonexistent legal duty.

The court also expressed a concern that the responsible corporate officer could escape liability by "closing his or her eyes" to the disposal activities while the employee "charged with the job of actually carrying out the disposal activities" could not avoid liability.²⁰⁰ The word "charged" implies that the employee was directed by someone to carry out the disposal activities. Under the proposed standard that adopts traditional corporate law doctrine, the individual who directed the employee to carry out the disposal activities would be directly liable as an arranger. It would be an extremely rare case where the fact finder could not determine who directed the employee to carry out the disposal activities if in fact the employee received such direction.

197 Oswald & Schipani, *supra* note 4, at 329-30.

198 See 3A W. FLETCHER, *supra* note 37, § 1135, at 290 ("Personal liability attaches, regardless of whether the breach was accomplished through malfeasance, misfeasance or nonfeasance."), quoted in Oswald & Schipani, *supra* note 4, at n.180.

199 PROSSER, *supra* note 36, § 1.

200 *TIC*, 68 F.3d at 1089 (emphasis added). This Note does not attempt to debate the merits of the strict liability provisions of CERCLA imposing liability on an employee who merely carries out the direction of others with respect to "arranging for" the disposal or treatment of hazardous substances. Several commentators have criticized the strict liability scheme of CERCLA. For a discussion of the merits of CERCLA's strict liability scheme, see Oswald, *Strict Liability*, *supra* note 4. If one agrees that imposing direct liability on an employee for merely carrying out the employee's duties is an inequitable result, then it does not necessarily follow that imposing liability on a manager who does not participate at all in the hazardous waste activities of the corporation will make the first result equitable. In other words, it seems that this argument implies that two wrongs make a right.

6. General Budget Policies

In analyzing the amount of activity required by a corporate officer to warrant imposing direct liability, the Eighth Circuit adopted the EPA's argument that the participation standard would

insulate from liability those who own and intrusively run organizations, those who effectively dictate their hazardous waste decisions through day-to-day strict control of budgets, production, and capital investment, those who strip the company of its cash and its independent decision-making, but who do not trouble themselves with the cost-cutting disposal practices of their company.²⁰¹

There are several responses to this concern. First, as mentioned previously, corporate officers are employees of the corporation and do not "own" the corporation by virtue of their position in the corporation.²⁰² Hence, this statement is inapplicable to corporate officers where it refers to those who "own" the organization.

Second, responsibility for strict control of budgets could be said about almost every corporate officer. In many cases, the corporate officer would breach her fiduciary duty to the corporation if she did not manage the financial status of the corporation.²⁰³ The Eighth Circuit found Georgoulis's involvement in WFE's budget decisions, in his capacity as board chairman and chief executive officer of WFE, to be the most significant factor in finding him directly liable as an arranger.²⁰⁴ The court conceded that Georgoulis had nothing to do with the original arrangement, nor did he ever participate in any hazardous waste disposal activities. Yet, it held that Georgoulis's involvement in WFE's budget decisions led to the continuation of WFE's hazardous waste disposal activities. The court in essence found that a corporate officer arranged for the disposal of hazardous wastes by participating in budget decisions whose only "trickle down" effect on the corporation's hazardous waste disposal practice was to continue the disposal practice utilized before the corporate officer was involved with the corporation.²⁰⁵ In other words, although the corporation's disposal practices did not change after the corporate officer arrived, and there was no evidence that the corporate officer participated in hazardous waste disposal

201 *TIC*, 68 F.3d at 1089.

202 *See supra* Part III and accompanying text, explaining the particulars of the position of corporate officer. While corporate officers often may own shares in the corporation, in some cases 100% of the shares, the officers would own the shares in their capacity as a shareholder. The point is that this is separate and distinct from their capacity as a corporate officer.

203 3A W. FLETCHER, *supra* note 37, § 1029.

204 *TIC*, 68 F.3d at 1090.

We find it beyond dispute that Georgoulis, in his capacity as board chairman and chief executive officer, so usurped the power of those who were only nominally running WFE that he undertook responsibility for all of WFE's decisionmaking; he so tightly controlled WFE, particularly its budgetary aspects, that he left WFE employees no other choice but to continue with the relatively inexpensive arrangement that had historically existed between WFE and HEC. In other words, Georgoulis's actions inexorably led to the continuation of the disposal of WFE's wastes at the dumpsite.

Id. (emphasis added) (footnote omitted).

205 *Id.* at 1084.

activities, the court still found that the corporate officer arranged for the disposal of the hazardous waste.²⁰⁶ This seems to be an inequitable result.

The same can be said for managing the areas of production and capital investment. If strictly managing a corporation's budget on a macro level warrants imposing liability as an arranger, it would be a radical departure from the traditional rules of liability for corporate officers. Further, it would sweep in individual officers who simply had nothing to do with a corporation's hazardous waste disposal activities.

Third, and most importantly, indirect liability by piercing the corporate veil already addresses concerns over officers and owners who "intrusively run organizations," and "effectively dictate their decisions by day-to-day strict control of budgets, production, and capital investment and strip the company of its cash and its independent decision-making."²⁰⁷ These factors are typically the focus of a court's inquiry when determining whether to pierce the corporate veil. Hence, the capability to impose liability on intrusive corporate officers and shareholders by piercing the corporate veil appears to address many of the Eighth Circuit's concerns.

B. Arranger Liability and Parent Corporations

1. Direct Liability

After discussing arranger liability for corporate officers, the Eighth Circuit addressed arranger liability for parent corporations. The court announced essentially the same standard as that for corporate officers: the parent corporation is liable as an arranger where the parent "had the authority to control and exercised actual or substantial control, directly or indirectly, over the arrangement for disposal . . . of the subsidiary's hazardous substances."²⁰⁸ Because the statute includes both individuals and corporations in its definition of "persons" who may be liable,²⁰⁹ the court reasoned that the direct liability standard for corporate officers and parent corporations should be the same.²¹⁰ Admittedly, one may impose indirect liability on parent corporations by piercing the corporate veil. It is significant to note that the Eighth Circuit is not the first court to find that CERCLA § 107(a) warrants imposing direct liability on a parent corporation for a subsidiary's actions.²¹¹ And these courts present appealing arguments. However, the conclusion that CERCLA authorizes imposing direct ar-

206 *Id.* at 1090.

207 *See supra* Part III.B, describing the numerous factors courts consider when determining whether to pierce the corporate veil.

208 *TTC*, 68 F.3d at 1092.

209 42 U.S.C. § 9601(21).

210 *TTC*, 68 F.3d at 1091.

211 *See, e.g.,* *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990) (holding parent corporation directly liable as an operator), *cert. denied*, 498 U.S. 1084 (1991); *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 82 (5th Cir. 1990) (listing *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Mottoilo*, 695 F. Supp. 615 (D.N.H. 1988); *Colorado v. Idarodo Mining Co.*, 18 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20578 (D. Colo. 1987); *Vermont v. Staco, Inc.*, 684 F. Supp. 822 (D. Vt. 1988); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho (1986)); *see also* *Oswald & Schipani*, *supra* note 4, at 301 nn.228-30 (listing numerous articles discussing parent corporation liability and noting that there are two views of parent corporation liability for the environmental torts of their subsidiaries: parent may only be liable by piercing

ranger liability on parent corporations disregards a fundamental tenet of corporate law: because parent corporations are shareholders, the corporate veil shields parent corporations from being directly liable for their subsidiary's torts.²¹²

The Fifth Circuit's reasoning in *Joslyn Mfg. Co. v. T.L. James & Co.*²¹³ for not disregarding the limited liability for parent corporations is persuasive. It is well settled that when Congress desires to alter the interpretation or meaning of a judicially created concept (here, limited liability for parent corporations), "it must make that intent specific."²¹⁴ The different opinions articulated by the federal courts support the position that Congress did not specifically express a desire to alter the limited liability of parent corporations.²¹⁵

Further buttressing this position, it is clear that Congress has the power to create statutes that specifically provide direct liability for shareholders and parent corporations for the actions of a corporation.²¹⁶ Moreover, Congress reauthorized CERCLA in 1986;²¹⁷ even with a second opportunity to specifically impose direct liability on shareholders and parent corporations, Congress chose not to do so.²¹⁸ As the Supreme Court noted, "[S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely."²¹⁹ Accordingly, although the Eighth Circuit presented several appealing arguments, imposing direct liability on parent corporations as arrangers disregards the common law principle of limited liability for parent corporations.

2. Indirect Liability: Piercing the Corporate Veil

As discussed previously, courts may impose indirect liability on a parent corporation for a subsidiary's environmental torts by piercing the corporate veil.²²⁰ In *TIC*, the Eighth Circuit should have applied the two-prong test of the alter ego theory of piercing the corporate veil.²²¹ Because the court did not evaluate the possibility of imposing indirect liability on

the corporate veil; and parent may be directly liable where the parent exercises sufficient control over the subsidiary).

212 See *supra* Part III.B. For a view espousing direct liability for parent corporations under CERCLA, see Healy, *supra* note 4, at 124-27; Note, *Liability of Parent Corporations For Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986).

213 893 F.2d 80 (5th Cir. 1990).

214 *Id.* at 83 (quoting *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 501 (1986)).

215 See *supra* Part IV.B.

216 See, e.g., *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 226 (W.D. La. 1988) (listing Depository Institution Management Interlocks Act, 12 U.S.C. §§ 3201-3207; I.R.C. § 1239(b)(2), (3) (1976); Fair Labor Standards Act § 3(r), 29 U.S.C. § 203(r); and Employee Retirement Insurance Security Act § 4001(b), 29 U.S.C. § 1301(b)(1)).

217 Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. §§ 9601-9675 (1988)).

218 See *Joslyn*, 893 F.2d at 83 ("If Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so.")

219 *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 267 (1979), quoted in *Joslyn*, 893 F.2d at 83.

220 See *supra* Part III.B.

221 See *supra* notes 48-56 and accompanying text.

TIC, one can only speculate whether TIC's involvement in WFE's activities warranted piercing the corporate veil.²²²

Thus, a careful analysis of the court's opinion finds its rationale for disregarding fundamental tenets of corporate law deficient in numerous respects: neither CERCLA nor its legislative history warrant disregarding the limited liability of the corporate form; a party cannot be directly liable for indirect activity; imposing direct liability on nonparticipating corporate officers does not further public policy; liability based on general budget policies is unwarranted; and straightforward application of the traditional rules of liability likely would have found the defendant corporate officer liable by piercing the corporate veil. As a result, while attempting to fashion new rules of liability under CERCLA, the Eighth Circuit further muddied CERCLA's already turbid waters.

VII. PROPOSAL

This Note does not take issue with the Eighth Circuit's final destination reached in *TIC*, but rather the route chosen to get there. The proper test for finding direct liability for a corporate officer as an arranger under CERCLA § 107(a)(3) should be whether the corporate officer actually and directly participated in the arrangement for disposal of hazardous substances. The parent corporation, in its capacity as a shareholder, cannot be directly liable as an arranger. Courts may impose indirect liability on either the corporate officer or the parent corporation for a corporation's (or subsidiary's) arranger liability through the equitable remedy of piercing the corporate veil. The appropriate standard for piercing the corporate veil is the well established two-prong alter ego test: (1) that there is such unity of interest and ownership that separate personalities no longer exist; and (2) to adhere to the doctrine of a separate corporate entity would promote injustice.²²³

222 Given that the Eighth Circuit found TIC's involvement in the subsidiary's activities did not warrant summary judgment on the issue of TIC's direct liability, it is reasonable to speculate that the court would not find summary judgment in favor of the plaintiff for indirect liability.

223 This test requires the court to evaluate numerous factors. See *supra* notes 48-56. Several commentators argue that courts, when determining whether to pierce the corporate veil, must choose between applying either a federal or a state common law alter ego standard. See Dennis, *supra* note 4, at 1440-1511 (applying the three-prong test enumerated in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and determining that courts ought to apply state alter ego tests when determining whether to pierce the corporate veil under CERCLA § 107); Wallace, *supra* note 4, at 870-75 (arguing to adopt a federal common law for piercing the corporate veil that would exclude some more restrictive state elements); Note, *Liability of Parent Corporations*, *supra* note 4, at 999-1003 (arguing that adoption of state alter ego test would undermine the goals of CERCLA).

It is well settled that federal law governs actions that arise under federal programs. In determining whether federal or state law should govern actions arising under CERCLA, courts should apply the test enumerated in *Kimbell Foods*. Although not the point of this Note, the author agrees with the Fifth Circuit in that the federal and state alter ego tests appear to be essentially the same. See *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n.6 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986) ("we find no need to determine whether a uniform federal alter ego rule is required, since the federal and state alter ego cases have rarely stated whether they were applying a federal or state standard, and have cited federal and state cases interchangeably"), quoted in *Joslyn Corp. v. T.L. James & Co.*, 696 F. Supp. 222, 226 (W.D. La. 1988). *Contra* Aronovsky & Fuller, *supra* note 4 (arguing that there is a significant difference between federal and state law when piercing the corporate veil); Wallace, *supra* note 4.

The purpose of this proposal is to establish a clear standard of liability for persons, particularly corporate officers and shareholders, whose corporation is involved in hazardous waste disposal activities. Moreover, the proposal is predictable in application. It could replace the various standards applied by several courts, including the Eighth Circuit's opinion in *TIC*, that misapply traditional corporate law doctrine. Most importantly, relative to previous court decisions, the proposal will go further to achieve CERCLA's two primary goals: cleaning up sites contaminated with hazardous waste and making those responsible for the contamination liable for the cleanup.

First, the proposal adheres strictly to the quintessential tenet of corporate law: a corporate officer may only be directly liable for a tort in which the corporate officer actually participates.²²⁴ Any individual or corporation participating directly in the hazardous waste disposal activities of a corporation may be liable as an arranger. On the other hand, mere involvement in managerial activities, including budgetary decisions, not directly related to the hazardous waste disposal activities of a corporation is not enough to impose direct liability.

Further, to impose indirect liability on corporate officers, directors or shareholders (parent corporations), the proposal requires a court to apply the alter ego test when determining whether to pierce the corporate veil. Thus, where equity requires, a court may impose liability on any officer, director or shareholder who disregards or abuses the legal separateness of the corporation. For instance, while the facts in *TIC* did not warrant imposing direct liability on the corporate officer, the facts likely warranted imposing liability on the same officer by piercing the corporate veil.

Given that in the end, both the Eighth Circuit's standard for arranger liability announced in *TIC* and the standard proposed in this Note find the corporate officer liable, the issue becomes why the proposed standard is better than the Eighth Circuit's standard.

The potential benefits of this proposal are numerous. First, the clear standard offered in the proposal, unlike the Eighth Circuit's opinion in *TIC*, provides certainty in the law. The proposal will replace the numerous ad hoc rules announced by several courts of appeals and the subsequent delays caused by diverse laws with clear, well accepted standards of liability which will aid in reducing the counterproductive litigation in this area.²²⁵ The reduction in litigation will in turn free up limited resources that are better applied toward CERCLA's goal of cleaning up hazardous waste sites.

In addition to reducing litigation, the proposal's clear standards of liability will go a long way toward reducing the chilling effect that CERCLA

224 See *supra* Part III.A.

225 See, e.g., *TOPO & SNOW*, § 1.1 (noting that sources estimate that well over half of all monies allocated to hazardous waste cleanups actually pay for legal and administrative expenses to fix the blame rather than cleanup the wastes); E. Donald Elliot, Jr., *Superfund: EPA Success, National Debauch?*, 6 NAT. RESOURCES & ENV'T 11 (1992) (former EPA general counsel noting that it takes an average of 10 years to clean up a site and only three years of that time is spent on the cleanup; argues that the CERCLA cleanup process is too slow and that far too many resources are spent on administrative and legal expenses rather than on cleanup operations).

has had on economic activity and development.²²⁶ The limited liability provided by the corporate form provides numerous economic benefits for it is the assumption upon which “large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted.”²²⁷ Inconsistent court opinions like that in *TTC* significantly undermine these fundamental assumptions. Corporate officers, directors and shareholders are unwilling to act in an area where there is an unknown risk of a court imposing personal liability that is strict, joint, and several.²²⁸ Because these parties are sophisticated in legal matters, they do and will continue to change their actions accordingly.²²⁹ Although not the purpose of this Note to prove, it is reasonable to conclude that the federal courts’ overbroad interpretation of CERCLA’s liability net contributes significantly to the “donut hole” effect now seen throughout the nation in what were formerly prosperous industrial areas.²³⁰

Further, disregarding corporate law could create a “perverse incentive” for “corporate dis-integration” in order for parent corporations to minimize liability accruing from the subsidiary.²³¹ This would then put both potential tort victims and the ability to recover response costs under CERCLA in a worse position than under traditional rules of limited liability: smaller, dis-integrated corporations are less likely to carry insurance than are the large, multi-layered corporations.²³²

Finally, uniform adoption of the proposal would discourage businesses from locating primarily in jurisdictions with more lenient standards.²³³ Where each court of appeals has its own standard of liability,²³⁴ businesses would be free to forum shop and locate in the jurisdiction with the more lenient standard.

In summary, the proper test for finding direct liability for a corporate officer as an arranger under CERCLA § 107(a)(3) should be whether the corporate officer actually and directly participated in the arrangement for disposal of hazardous substances. The parent corporation, in its capacity as a shareholder, cannot be directly liable as an arranger. Courts may impose indirect liability on either the corporate officer or the parent corporation for a corporation’s (or subsidiary’s) arranger liability through the equitable

²²⁶ See, e.g., Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment*, 43 *BUFF. L. REV.* 285 (1995).

²²⁷ *Anderson v. Abbott*, 321 U.S. 349, 362 (1944), quoted in *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 (5th Cir. 1985); see also Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 *U. CHI. L. REV.* 89 (1985) (describing the rationale for the limited liability of the corporate form and its multiple economic benefits). *Contra Note, Liability of Parent Corporations*, *supra* note 4 (arguing that the investment incentives, risk spreading, and costs of dispute resolution all favor imposing liability for releases of hazardous waste upon parent corporations of insolvent responsible parties).

²²⁸ See Cronk & Huddleston, *Corporate Officer Liability*, *supra* note 4. For a discussion of the efficacy of strict liability under CERCLA, see Oswald, *Strict Liability*, *supra* note 4.

²²⁹ “Sophisticated” in the sense that they will likely have legal counsel, and they will make decisions based upon the latest developments in the law.

²³⁰ See, e.g., Solo, *supra* note 226.

²³¹ Easterbrook & Fischel, *supra* note 227, at 110.

²³² *Id.* at 111.

²³³ *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1255 (S.D. Ill. 1984) (quoting *United States v. Chem-Dyne*, 572 F. Supp. 802, 809 (W.D. La. 1983)).

²³⁴ See *supra* Part IV.B.

remedy of piercing the corporate veil. Among the numerous benefits of this proposal are establishing certainty in the law that will reduce litigation and increase the quantity of resources devoted to hazardous waste cleanup operations; reducing the chilling effect CERCLA has had on economic activity in industrial areas; preventing creation of a perverse incentive for corporate dis-integration in order for parent corporations to minimize liability accruing from the subsidiary; and discouraging businesses from locating primarily in jurisdictions with more lenient standards.

VIII. CONCLUSION

Since Congress passed CERCLA in 1980, federal courts have struggled to determine the scope of the statute's liability scheme while attempting to further the government's laudatory goal of responding effectively to releases of hazardous wastes. However, the Eighth Circuit strayed too far from traditional corporate law doctrine in announcing its standard for imposing direct liability as an arranger under CERCLA § 107(a)(3). Specifically, the court's holding that a corporate officer or parent corporation could be directly liable as an arranger for indirect activities (i.e., without actual participation in hazardous waste activities) is outside the bounds of traditional corporate law. Similar decisions by other federal courts that depart from the fundamental tenets of corporate law have led to inconsistent, conflicting, and unpredictable opinions regarding arranger liability.²³⁵

The facts in *TIC* presented the Eighth Circuit with an opportunity to articulate a standard of liability that adheres to well established principles of corporate law. Limited liability is a fundamental tenet of traditional corporate law. Yet, in *TIC*, the Eighth Circuit chose to fashion a new doctrine that imposes direct liability as an arranger upon parties who did not actually participate in any manner in the arrangement for disposal of the hazardous waste.

The Eighth Circuit presented several appealing reasons for articulating a new standard for arranger liability under CERCLA § 107(a)(3). However, a careful analysis of the court's opinion reveals that the court's rationale for disregarding the limited liability of the corporate form may be unwarranted for several reasons: First, neither CERCLA nor its legislative history expressly provide for disregarding the limited liability of the corporate form. Second, a party cannot be directly liable for indirect activity. Third, imposing direct liability on nonparticipating corporate officers does not further public policy. Fourth, liability based on general budget policies is unwarranted. Finally, straightforward application of the traditional rules of liability likely would have found the defendant corporate officer liable by piercing the corporate veil. As a result, instead of helping to clarify the law in this area by applying fundamentals of corporate law, it appears that the Eighth Circuit may have further muddied CERCLA's already turbid waters.

The proper test for finding direct liability for a corporate officer as an arranger under CERCLA § 107(a)(3) should be whether the corporate of-

ficer actually and directly participated in the arrangement for disposal of hazardous substances. The parent corporation, in its capacity as a shareholder, cannot be directly liable as an arranger. Courts may impose indirect liability on either the corporate officer or the parent corporation for a corporation's (or subsidiary's) arranger liability through the equitable remedy of piercing the corporate veil.

The proposal establishes a clear standard of liability for persons, particularly corporate officers and shareholders, whose corporation may be involved in hazardous waste disposal activities. Moreover, the proposal is predictable in application. Relative to previous varying and conflicting court decisions, the proposal will go further to achieve CERCLA's two primary goals: cleaning up sites contaminated with hazardous waste and making those responsible for the contamination liable for the cleanup. Finally, in the absence of express Congressional intent to the contrary, only imposing direct liability on persons for wrongs in which they actually participate is consistent with traditional notions of justice.

*Lance A. Lawson**

* Special thanks and appreciation are due to many persons. First, to my wife, Karen, for her strength, affection, and support throughout our law school experience. To my parents, Lionel and Bonnie Lawson, for, among many things, instilling in me their hard work ethic that they continue to exemplify today. To Mary Elizabeth Huber and Brendan Rielly, for their assistance in preparing this Note. And to Professor Frank Booker, for his daily example of what lawyers ought to be.

