ENVIRONMENTAL REGULATION AND COMPANY LAW IN THE UNITED STATES AND AUSTRALIA: NOT CHALK AND CHEESE*

Cindy A. Schipani**

Corporate liability for violations of environmental law is of great concern today, both in the United States and Australia. Current estimates of the cost of cleanup of contaminated sites have been said to now exceed $500 billion in the United States alone.[1] Unfortunately, however, there is much confusion in the corporate and legal communities regarding the scope of environmental regulation in both countries. In the United States in particular, this confusion appears to be the result of the difficulty the courts have had in interpreting the statutes.

The purpose of this article is to expose some of the difficulties American courts have encountered in interpreting the environmental legislation for consideration as Australia wrestles with these issues. Although environmental regulation in the United States is vast, the most important regulation for the purposes of the issues addressed in this article is the Comprehensive Environment Response, Compensation, and Liability Act ("CERCLA")[2] also commonly known as Superfund. Much of the anxiety about environmental laws in the corporate community revolves around CERCLA and its definition of parties potentially responsible for the cost of environmental cleanup. These parties include past owners and operators of hazardous waste disposal facilities, present owners and operators, persons who have arranged for transport or disposal of hazardous waste and any person who transports the waste.[3] The term person includes individuals as well as corporations and liability is strict,[4] may be joint and several, and retroactive.[5] Corporate officers, directors, and shareholders have begun to fear the potential reach of CERCLA.

In an attempt to offer a few lessons from the experience of the United States with these issues, this article is organized as follows. Part I briefly summarizes the relevant provisions of CERCLA, leading into an outline of the theories the courts have

**Professor, University of Michigan; J.D., 1982, University of Chicago School of Law; B.A., 1979, Michigan State University.

[1] *Coming Clean: Superfund's Problems Can be Solved*, U.S. CONG. OFF. TECH. ASSESSMENT, at 27(1989).

[2]Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988) , *as amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. No. 99-499, 100 Stat. 1613 (1986)) [hereinafter CERCLA],

[3]42 U.S.C. § 9607(a)(l)-(4) (1994).

4.See, e.g., U. S. v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1989), *cert, denied*, 490 U.S. 1106 (1989) (agreeing with "overwhelming precedent" that § 107a establishes a strict liability scheme); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985) (stating a party may be strictly liable under CERCLA).

[5]42 U.S.C. § 9601(10) (1988). *See also* U. S. v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1989) (upholding joint and several liability under CERCLA); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984) (stating that joint and several liability is not precluded under CERCLA); U. S. v. A & F Materials Co., Inc., 578 F. Supp. 1249, 1254-55 (S.D. 111. 1984)(same).

developed in addressing the issues of officer and director liability in Part II. Part III continues with a discussion of individual shareholder liability followed by concluding remarks in Part IV.

I. CERCLA

As noted previously, the federal environmental statute responsible for much of the havoc in the corporate arena is CERCLA.[6] CERCLA was enacted by Congress in 1980 at the end of a lame-duck session,[7] in a hasty attempt to react to the public outcry following major chemical spills, including the chemical waste contamination of Love Canal.[8] The major purpose of CERCLA is to authorize governmental cleanup of hazardous substances and to require responsible parties to pay for the costs of cleanup. Unfortunately, in its haste, Congress left the courts without much guidance regarding how the terms of the statute should be interpreted.[9] Although CERCLA also provides for criminal liability in certain instances,[10] the focus of this article will be CERCLA's civil liability provisions.

CERCLA describes the potentially responsible parties ("PRPs") for the cost of cleanup in Section 107(a).[11] These parties include owners and operators of hazardous waste facilities as well as transporters of hazardous substances and those who contract to transport hazardous waste.[12] The problem is determining who the PRPs are in the corporate context. Although it is relatively clear that corporate officers and directors do not "own" corporate facilities in their own right, whether these officials might be considered "operators" by virtue of their corporate decisionmaking authority is open for interpretation. CERCLA is silent on this issue.

Similarly, CERCLA does not address whether shareholders might be considered owners or operators of contaminated property. Thus, these questions have been left to the courts for disposition. Some of the major judicial interpretations of these issues in the United States follow in Parts II and III.

[6]42 U.S.C. § 9607(a)(1) (1988).

7.See **Frank Grad,** *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980,* 8 COLUM. J.ENVTL. L. 1 (1982).

8.See, e.g., 126 CONG. REC. 30, 391 (1980) (remarks of Sen. Randolph) *reprinted in* 1 SENATE Comm, ON Envt. & Public WORKS, 98th Cong., 2d Sess. (Comm. Print 1983), Legislative History of THE Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), at 684.

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

[10]42 U.S.C. § 9603 (1988).

11.42 U.S.C. § 9607(a)(1) (1988).

12.ld.

II. CORPORATE OFFICER AND DIRECTOR LIABILITY

A. Three Judicial Theories

There are at least three theories pursuant to which the courts have held corporate officials personally liable under CERCLA.[13] The first theory is a personal participation theory,[14] a combination of traditional tort and agency doctrine.[15] The courts articulating this theory find corporate officials liable for the illegal dumping of hazardous wastes if they have personally participated in the illegal activities.[16] Corporate agents who have participated in environmental torts in the name of a corporation have not been permitted to escape personal liability.[17] This theory follows the general principles of agency law requiring an agent to be held personally liable for his or her own torts, even if committed on behalf of a principal.[18]

The second theory is more of a control-based theory.[19] These courts hold corporate officials liable for environmental hazards based upon the degree of control the individuals have exercised in corporate affairs.[20] In practice, however, the term control has not been applied very broadly. Most corporate officers actually found personally liable under the control test have not only occupied positions as corporate officers but were indeed personally involved in the environmental violations.[21] This narrow application of the control standard is consistent with agency law doctrine by holding corporate agents accountable for the torts they commit.[22]

But there are a few cases that prove the exception to this rule in which the federal courts have used fairly broad control language in holding corporate officers

13.See Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. Rev. 259, 273 (1992) (describing the three categories of reasoning the courts apply in determining individual liability for corporate officers under CERCLA and asserting the tests are consistent with traditional corporate law doctrine).

[14] *Id.*

[15]*See, e.g.*, U.S. v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (NEPACCO II) (8th Cir. 1986), *cert, denied,* 484 U.S. 848 (1987) (stating that an individual acting on behalf of a corporation is not relieved from responsibility resulting from participation in a tort). *See also* U.S. v. Carolina Transformer Co., 739 F. Supp. 1030 (E.D.N.C. 1989), *affd,* 978 F.2d 832 (4th Cir. 1992); U.S. v. Bliss), 20 Envtl. L. Rep. (Envtl. L. Instit.) 20879 (E.D. Mo. 1988); U.S. v. Conservation Chem. Co., 628 F. Supp. 391 (W.D. Mo. 1986); U.S. v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

16.See id.

17."Id.

18.See Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 907 (1st Cir. 1980) (applying the general rule that an officer of a corporation "is liable for torts in which he personally participated, whether or not he was acting within the scope of his authority"). *See also* Donsco Inc. v. Casper Corp., 587 F.2d 602, 606 (3d Cir. 1978); U.S. v. USX Corp., 68 F.3d 811 (3d Cir. 1995); Nutrasweet Co. v. X-L Engin. Corp., 933 F. Supp. 1409 (N.D. 111. 1996).

[19]Oswald & Schipani, *supra* note 13, at 282-291 (analyzing the application of the control test by various courts).

[20.,]*See* City of N. Miami v. Berger, 828 F. Supp. 401 (E D. Va. 1993); Idylwoods Assoc, v. Mader Cap., Inc., 915 F. Supp. 1290 (W.D.N Y. 1996); Oswald & Schipani, *supra* note 13, at 282-288.

[21]Oswald & Schipani, *supra* note 13, at 282-288.

[22]*Id.* at 288.

personally liable for environmental hazards.[2'] These courts, however, did not fully describe the officers' roles in the environmental harm in their published opinions. Although it is possible that all of these officers were intimately involved in the hazardous waste disposal activities, it is also possible that these courts may have found status as a corporate officer tantamount with the ability to control environmental affairs. If so, these courts may have imposed strict liability upon the corporate officers.

The third theory, a prevention test,[24] requires courts to consider an officer's authority to prevent the environmental harm before assessing personal liability.[25] Factors to be considered under this test are "authority to control . . . waste handling practices,"[26] "responsibility undertaken for waste disposal practices,"[27] and "responsibility neglected."[28] This test attempts to provide corporate officials with a safe harbor from CERCLA liabilities by encouraging efforts to prevent the harm from occurring.[29]

Although, for the most part, corporate officials held liable under any of the above theories were those who actively participated in the harm, it is easy to sympathize with the fears of corporate officials. Much of the outrage expressed by the corporate community may be due to the failure of the courts or the legislature to clearly articulate a standard of liability. If corporate officials could rely on future courts to employ the personal participation theory or apply the control and prevention theories only to the situations in which corporate officials have directly participated in or purposefully turned a blind eye toward the unlawful activities, perhaps their fears are not justified. Unfortunately, they cannot. Rather, it might be successfully asserted in a future case that all officers and directors, because of the power they are vested with in the corporate hierarchy, could have in some sense *controlled* or *prevented* the corporation's environmental practices. CERCLA liability exposure would not then be necessarily limited to corporate officers who actively participated in the hazardous waste disposal. The control and prevention theories, if carried to their logical extent, could expose all corporate officers as well as directors to liability for corporate environmental violations regardless of whether they were indeed responsible for the violations. The problem with this approach is that there is no evidence that Congress

23.Vermont v. Staco, 684 F. Supp. 822 (D. Vt. 1988), *vacated in part,* No. 86-190, 1989 U.S. Dist. LEXIS 17341 (D. Vt. Apr. 20, 1989); International Clinical Laboratories Inc. v. Stevens, 20 Envtl. Rep. (Envtl. L. Inst.) 10,560 (E.D.N.Y. 1990); U.S. v. Mexico Feed & Seed Co., 764 F. Supp. 565 (E.D. Mo. 1991), *aff'd in part, rev'd in part,* 980 F.2d 478 (8th Cir. 1992).

[24]Donahey v. Bogle, 987 F.2d 1250, 1254 (6th Cir. 1993) (declaring defendant liable under CERCLA because he possessed authority to prevent the contamination of the property by his corporation). *See also* U.S. v. Taylor, 980 F.2d 478 (8th Cir. 1992); Kelley v. ARCO Industries Corp., 723 F. Supp. 1214 (W.D. Mich. 1989).

25.Keeley v. ARCO Industries Corp., 723 F. Supp. 1214, 1220 (W.D. Mich. 1989) (stating that "the focus ... is whether the corporate individual could have prevented the hazardous discharge at issue")

26.Id.. at 1219.

[27.] *Id.*

[2]*8.Id.* at 1220.

29.Oswald & Schipani, *supra* note 13, at 294 (asserting that the ARCO test protects from CERCLA liability individuals who attempt to prevent or alleviate the environmental harm, even if they are unsuccessful in doing so).

intended such a radical departure from corporate law doctrine in enacting the environmental legislation.

B. Director and Officer Liability in Australia

Interestingly, there is a fair amount of similarity to the issues feared by corporate actors in the US to those feared in Australia. Although Australia has no federal counterpart to CERCLA, environmental legislation enacted by the various states creates similar anxiety for corporate directors and officers on a personal level.[30] Moreover, all of the six Australian states have statutes that specifically establish director and officer criminal liability for corporate offenses. This legislation is even more burdensome than CERCLA because liability appears to arise simply from the position the individual holds in the corporate hierarchy. As discussed above, most US courts have based individual
liability on actual participation in the corporate wrong doings rather than on corporate status.

For example, Section 10(1) of the New South Wales Environmental Offenses and Penalties Act (EOPA) provides:

> If a corporation contravenes, whether by act or omission, any provision of this Act, each person who is a director of the corporation or who is concerned in the management of the corporation is to be taken to have contravened the same provision unless the person satisfies the court that:
>
> (a) the corporation contravened the provision without the knowledge actual, imputed or constructive of the person; or
>
> (b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
>
> (c) the person, if in such a position, used all diligence to prevent the contravention by the corporation.'[31]

This provision seems to establish the type of liability that the United States courts held liable for corporate offenses simply because of their positions in the company. It might be argued that in practice, however, it is unlikely that this statute will result in more stringent liability than that in the United States because the defenses allow non-participatory, non-controlling directors to avoid liability. However, the shift in the burden of proof is significant. Courts considering these cases against directors would presume guilt where the corporation was found liable, shifting the burden to the directors to prove one of the defenses.

Section 66B of the Environment Protection Act of Victoria is predominantly similar to the New South Wales legislation. If a corporation has contravened a provision, each director or managing officer is also guilty unless they can establish one of the listed defenses.[32]

30.See generally Kenneth M. Murchison, *Environmental Law in Australia and the United States: A Comparative Overview,* 22 B.C. ENVTL. Aff. L. REV. 503 (1995).

31.'Environmental Offenses and Penalties Act of 1989, N S W. Stat. § 10 (1).

32.Environment Protection (Industrial Waste) Act of 1985, Viet. Acts § 66B.

Western Australia, however, establishes director liability in Section 118 of its Environmental Protection Act when the corporation is guilty of a violation and the director consented to the offense or allowed it to happen through any neglect. The Western Australia statute provides:

> Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director or other officer concerned in the management of the body corporate, or a person who was purporting to act in any such capacity, he as well as the body corporate is guilty of the offence.[31]

The Environmental Protection Act of Queensland imposes similar liability of its executive officers providing that if "the corporation commits an offence against a offence, namely, the offence of failing to ensure the corporation complies with this Act."[34] The executive officers may defend a claim brought under this Act by proving that he or she "took all reasonable steps to insure the corporation complied" or that the "officer was not in a position to influence the conduct of the corporation in relation to the offence."[35] However, it has been said that the lack of influence defense could only be used "by a director who has no control over the operation of the corporation (i.e., a director in name only)."[36] Therefore, the defenses available to Queensland directors appear no different than those in other states.

In South Australia, corporate officers are also held liable for corporate environmental offenses under the Environment Protection Act. In addition, officers who knowingly promote or acquiesce in the actions giving rise to the violation are also held accountable. Moreover, an officer may be prosecuted and convicted "whether or not the body corporate has been prosecuted or convicted of the offence committed by the body corporate."[37] The Environmental Management and Pollution Control Act 1994 of Tasmania is the same as the South Australian legislation.

C. Considerations for the United States and Australia

Although not clearly stated, it appears that most American federal courts deciding issues of individual corporate actor liability seem to be influenced by corporate law principles. The basic rule of agency law that agents are liable for the torts they commit on behalf of their principal runs as a common thread throughout much of the analysis. Yet, this rule is not stated directly and the rules that have been articulated have potentially far-reaching consequences. The American courts do not appear to have considered the direct applicability of traditional agency and corporate law doctrine in the CERCLA context.

33.Environmental Protection Act of 1986, W. Austl. Acts § 118(1).

34.Environmental Protection Act of 1994, Queensl. Acts § 183(2).

35.*Id.* at § 183(4).

36.Sharon Christensen, *Criminal Liability of Directors and the Role of Due Diligence in Their Exculpation*, 11 Co. & SEC. L. J. 340, 352 (1993).

37.Environment Protection Act of 1993, S. Austrl. Acts § 129.

This article proposes that both the United States and Australia turn to a direct traditional corporate law analysis for considering the personal liability of individual corporate actors for corporate environmental violations.[38] First, the basic rule that an agent is liable for his or her own actions should be applied. It is no defense under general agency principles that an action was committed on behalf of a principal. Such actions expose both the agent and principal to liability. Thus, to the extent the corporate official has personally participated in the corporate environmental violation, he or she should be held personally accountable. The CERCLA cases already decided under a personal participation theory provide solid precedent for this approach. The individuals who commit the environmental violation, as well as the corporation itself, should then be held directly liable under the terms of the statute to the government agencies or private parties engaging in the cleanup.

If the corporate officer or director has not personally participated in the CERCLA violation, the analysis need not end there. Rather, liability could ensue if the corporate actors have failed to exercise due care. In both Australia and the United States, corporate officers and directors are considered agents of the corporation and therefore occupy a fiduciary relationship with the corporation. This position of trust requires the officials to exercise due care in all matters of corporate decisionmaking.[39] The fiduciary duty of due care dates back to at least the early 1800s in the United States when articulated in *Percy* v. *Millaudon* in 1829.[40] It is a duty familiar to both the courts and corporate actors. If the corporate actors are found to have breached their duty of care, they could be held personally liable for the costs of cleanup. The advantage of this approach is that it provides consistency with both the purpose of the environmental legislation in holding responsible parties liable for environmental cleanup without requiring the courts to extend the reach of the environmental legislation radically beyond traditional corporate law dictates.

This approach is also similar to the analysis recently applied by the Canadian courts. The Provincial Division of the Ontario Court of Justice attempted to clarify the directors' and officers' responsibilities under the environmental laws in *Regina v. Bata Industries.*[41] In this case, corporate directors were convicted for criminal violations of the Ontario Water Resources Act.[42] The Ontario Water Resources Act is particularly analogous to the Australian statutes because of its criminal liability provisions. The *Bata Industries* court considered whether the likelihood of an unlawful discharge was reasonably foreseeable and whether the directors took reasonable precautions in accordance with the standards of their industry in determining their liability.[43] According to *Bata Industries*, the "minimum profile against which directors' liability could be measured" involved examination of a number of factors.[44] These factors included whether a pollution prevention system was established, whether there were reporting requirements relating to environmental

38.See Cindy A. Schipani, *Integrating Corporate Law Principles with CERCLA Liability for Environmental Hazards*, 18 Del. J. CORP. L. 1 (1993).

39.See, e.g., MODEL BUSINESS CORP. ACT § 8.30(a)(2)(1991); Paul Redmond, *The Reform of Directors' Duties*, 15 U. NEW SOUTH WALES L.J. 86, 97 (1992).

40.Percy v. Millaudon, 8 Mart (ns) 68, 74-75 (La. 1832).

41.R. *v.* Bata Industries Ltd. (No. 2), 70 CCC 3d 394 (1992).

42.ld.

43.Id.

44.Id.

matters, whether the directors were aware of industry standards and whether the directors react immediately when they become aware of a system failure. Application of these factors effectively results in liability if the directors fail to exercise reasonable care.

Thus, instead of simply focusing on the amount of control or power to prevent that the harm the individual possesses in the abstract, the proposed analysis requires courts to also consider whether the individual has exercised the care of a reasonably prudent person acting under similar circumstances. Company law would be invoked to
determine the due care standards to be applied. If the corporate official is found in breach of the duty of care, liability would ensue. It is therefore not necessary for the courts to create new theories for corporate environmental liabilities. Application of traditional corporate law theory should achieve the objectives.

III. LIABILITY OF INDIVIDUAL SHAREHOLDERS

A brief look at the literature in the United States on the liability of individual shareholders for corporate environmental liabilities under CERCLA discloses a number of articles warning individual shareholders of their potential liability exposure under the environmental legislation for corporate activities.[45] These commentators contend that the corporate law principle of limited liability, which operates as a corporate veil to shield shareholders from liability from corporate activities, is being severely eroded in the environmental context. Various cases are cited in which shareholders have indeed been held liable for corporate acts in violation of environmental laws.

When these cases are examined more closely, however, it becomes apparent that the commentators seem to have overlooked the role the individual shareholder played in the commission of the environmental tort. The persons held liable are generally those who have personally participated in some way in the illegal dumping. To reach this result, the courts have articulated two theories of liability, the first involving the doctrine of piercing the corporate veil, the second being direct liability under the statute.

Regardless of which theory the courts invoke, however, the bottom line is the same. American courts are not holding individual shareholders liable for corporate violations of CERCLA based simply on their status in the corporation. Before liability will attach under either theory, the shareholder must have either actively participated in the violation or exerted substantial control over the corporate decisions leading to the violation. These two theories are discussed briefly below.

45. See, e.g., **T. W. Rallison, Comment,** *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA,* UTAH **L.** REV. **585 (1987); T. McMahon & K. Moertl,** *The Erosion of Traditional Corporate Law Doctrines in Environmental Cases,* **3** NAT. RESOURCES & ENV'T. **29 (1988). The liability of parent corporations is beyond the scope of this article but is discussed by the author in Cindy A. Schipani,** *Infiltration of Enterprise Theory Into Environmental Jurispridence,* **22 J. CORP. L. 599 (1997).**

A. Piercing the Corporate Veil

It is quite rare for a court to pierce the corporate veil to hold an individual shareholder liable under CERCLA. One court that did so used fairly standard corporate law doctrine to find the defendant liable for the CERCLA violations. In this case, the defendant had originally operated a waste disposal site as a sole proprietorship then incorporated the business solely to escape potential personal liability after the environmental violations took place.[46] Not only was this defendant held liable as the owner of the predecessor sole proprietorship, but the court also pierced the corporate veil of the successor corporation and found him personally liable as shareholder of the newly formed corporation.[47] The court would not permit a nonincorporated polluter to avoid liability merely by incorporating. The defendant had been actively involved in the events leading to the violation.

Veil piercing is an unusual step. As it turns out, the court did not even need to resort to veil piercing to hold the individual shareholder liable under CERCLA in the case mentioned above. The individual defendant had personally participated in the CERCLA
violation as the sole proprietor and thus could be held liable under the statute directly as the owner of the site.

B. Direct Liability Under CERCLA

The second theory of shareholder liability is direct liability under CERCLA. This theory has disturbed commentators the most. Fears have been expressed that shareholders may now find themselves liable for corporate activities as an "owner" of the corporation committing the environmental violations based simply on their status as shareholder.[48] Yet, when the case law is carefully considered, this is not what has happened. Fortunately, for those holding stock in corporate America, no court has held an individual shareholder liable for environmental harms due simply to stock ownership. Moreover, there is no evidence of a congressional purpose for the courts to do so. Instead, the individual shareholders who have been held personally liable are not the typical passive investors of large-scale corporations. Rather, the shareholders were shareholders of closely held corporations and played an active role in the act giving rise to the environmental violation. In fact, in all cases in which an individual shareholder was held liable, that shareholder was also an officer or employee of the corporation.[49] Liability has not been premised simply upon the

[46] United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988).

[47] *Id.* at 624 (holding that the identity of the ownership and modality of the operation of the defendant's old and new business entities were sufficient for the court to disregard their differences as a matter of law for § 107 liability under CERCLA.).

[48] *See, e.g.*, Gregory P. O'Hara, *Minimizing Exposure to Environmental Liabilities for Corporate Officers, Directors, Shareholders, and Successors*, 6 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 1
(1990) ; Todd W. Rallison, Comment, *The Threat to Investment in the Hazardous Waste Industry': An Analysis of Individual and Corporate Shareholder Liability Under CERCLA*, 1987 UTAH L. REV. 585.

[49] Oswald & Schipani, *supra* note 13, at 297.

individual's status as an officer or shareholder but instead, on the individual's actual involvement in the activities giving rise to the illegal dumping.[50]

C. Recommendation

It is recommended that the courts continue to follow this analysis and decline any extension of shareholder liability based on ownership of shares of stock in the corporation responsible for the pollution. The results in the CERCLA cases to date indicate that regardless of whether the corporate law theory of veil-piercing or direct statutory liability standards are employed, the resulting liability exposure for shareholders is the same. Liability is premised on participation in the CERCLA violation and not on status as a shareholder. The results in the individual shareholder context are consistent with both the goals of the environmental laws in requiring those responsible for the contamination to pay for its cleanup and with the company law principles of limited liability. The courts do not need to create theory in deciding cases involving shareholder liability for environmental harms. Moreover, if Congress intended the contrary result, that is to completely overhaul traditional corporate law doctrines of limited liability, certainly it would have stated so quite clearly.

IV. CONCLUSION

The purpose of the environmental legislation is to hold all parties involved in hazardous waste pollution financially responsible for its cleanup. The difficulty is in determining who all of the responsible parties are, particularly when the violation was a corporate violation.

Although it is clear that CERCLA was meant to impose liability on both corporations and individuals, it is not clear that the intent was to hold corporate officers, directors or shareholders strictly liable for corporate violations. Under general principles of corporate law, corporate officers and directors are held directly liable to third parties for the torts they commit and held accountable to the corporation for their decisions. The directors and officers are obligated to ascertain all relevant and reasonably available information before making a decision. Shareholders are similarly held directly liable for their own actions based on the control they exercise in corporate management. Courts generally resort to piercing of the corporate veil only in cases of gross abuse of the corporate form.

In the context of violation of the environmental statutes, the American courts have been said to have neglected these general principles of corporate law. Although not directly employing corporate law principles, however, the results the courts have reached so far appear largely consistent with traditional corporate law analysis. This coincidence might have occurred because the cases the courts have been presented with thus far have been the easy ones. In most of these cases, the parties held liable for corporate CERCLA violations personally participated in the corporation's egregious hazardous waste disposal method and would have been held liable under

50.Id.

traditional corporate law analysis anyway. Yet, the courts have not always articulated corporate law analysis in their opinions and have often created new theories. These theories, if taken to their logical extent, might be used in future, less compelling cases to drastically erode familiar corporate law notions.

It would, however, be consistent with both corporate law notions and the intent of the environmental statutes in both the United States and Australia to hold corporations liable for corporate acts and to analyze the corporate actor's liability in accordance with traditional corporate law doctrine. Thus, the relevant analysis before imposition of personal liability on corporate officers and directors might be (1) whether the officials are directly liable under the applicable statutes for their personal participation in the environmental harm and (2) whether they have breached of the duty of care. This should not provide an incentive for officials to ignore corporate environmental affairs in order to avoid personal participation and thus avoid liability. Turning a blind eye toward corporate affairs should still result in personal liability to the corporation for breach of the duty of due care.

Under traditional corporate law principles, the inquiry would not involve with the amount of control or authority the individual has over the activities that result in the violation. Rather, the relevant consideration would be whether the corporate actor personally participated in the corporate violation and whether the particular decision made by that corporate officer was informed, made in good faith, absent self- dealing, and in the honest belief that it was in the best interest of the corporation.

Similarly, corporate principles of individual shareholder liability, providing liability either directly due to direct malfeasance or after application of veil-piercing rules could also guide the courts in analyzing issues of environmental liability. Thus, rather than treat the coexistence of environmental regulation and company law like chalk and cheese, an Australian expression for things that do not mix well, they might be integrated to help provide a workable solution to some very difficult issues of corporate environmental responsibility.