

OFFICER AND SHAREHOLDER LIABILITY
UNDER CERCLA:
*UNITED STATES v. NORTHEASTERN
PHARMACEUTICAL AND CHEMICAL
CO., INC.,*
810 F.2d 726 (8th Cir. 1986)

The problem of abandoned toxic waste dumps is a tragedy of devastating proportions.¹ Federal efforts to remedy this potentially catastrophic situation culminated in the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).² The liability provision of the Act imposes cleanup costs incurred by state and federal authorities on responsible "persons."³ Although the term "person" encompasses both individuals and corpo-

1. H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17, 18 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120, contains congressional findings and discussion regarding the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) [hereinafter CERCLA Report].

2. 42 U.S.C. §§ 9601-9674 (1982 & Supp. 1986). The history of the Act notes Congress' intention to close a loophole created by the Solid Waste Disposal Act of 1976, 42 U.S.C. §§ 6901-6991 (1982 & Supp. 1986) (also known as the Resource Conservation and Recovery Act, or RCRA). RCRA seeks to provide a "cradle-to-grave regulatory regime governing the movement of hazardous waste in our society. Since enactment of that law, a major new source of environmental concern has surfaced: the tragic consequences of improperly, negligently, and recklessly hazardous waste disposal practices known as the 'inactive hazardous waste site problem.'" CERCLA Report, *supra* note 1, at 6120. Thus, while RCRA applies prospectively to currently produced and stored toxic wastes, CERCLA operates retrospectively to govern those wastes disposed of and abandoned. *Id.*

3. CERCLA authorizes the President to enter into agreements with state and local authorities to effect cleanup. 42 U.S.C. § 9604(d) (1982). The liability provisions of § 9607(a) provide:

Notwithstanding any other provision or rule of law, . . . (1) the owner and operator of . . . a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous wastes were disposed of, (3) any person who . . . arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances . . . , and (4) any person who accepts or accepted any hazardous substances for transport to disposal facilities . . . from which there is a release, or a threatened release . . . shall

rations, courts continue to struggle with the individual liability of corporate officers and owners who incur CERCLA liability while acting within the scope of their employment.⁴ In *United States v. Northeastern Pharmaceutical & Chemical Co.*⁵ the United States Court of Appeals for the Eighth Circuit imposed personal CERCLA liability on a corporate officer involved in toxic dumping.⁶

John W. Lee supervised the operation of Northeastern Pharmaceutical's (NEPACCO) disinfectant manufacturing plant in Verona, Missouri.⁷ Lee was a shareholder and vice-president of NEPACCO.⁸ The plant's operations produced several toxic by-products, including dioxin.⁹ In 1971, Lee approved the burial of eighty-five 55-gallon drums

be liable for (A) all costs of removal or remedial action incurred by the United States Government or State

The Act further defines "person" at 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." See *infra* note 42 for the CERCLA definitions of "owner or operator" and "facility."

4. See *supra* note 3; see also *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 186, 187 (W.D. Mo. 1985).

5. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987).

6. 810 F.2d at 744.

7. Lee defended this action with NEPACCO and two other employees. One defendant was Mills, a former shift supervisor at the plant, and the individual who actually "dumped" the waste. Michaels, the founder and former president of NEPACCO and the corporation's largest shareholder, was the other individual defendant. *Id.* at 745.

8. *Id.* at 729.

9. The Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(2)(A), designates dioxin, or 2,3,7,8-tetrachlorodibenzo-p-dioxin, a hazardous substance under 42 U.S.C. § 9601(14)(A) (Supp. IV 1986). List of Hazardous Substances and Reportable Quantities, 40 C.F.R. § 302.4 (table) (1986).

The *Northeastern Pharmaceutical* trial court discussed the toxic nature of dioxin in its findings:

[T]o date, dioxin has produced teratogenic, mutagenic, fetotoxic, and carcinogenic results in low dose levels in various laboratory animals. . . . [D]ioxin is particularly devastating to specific organs of laboratory animals and human beings; e.g., liver, kidneys, intestines, nervous system, reproductive, and skin. Dioxin is persistent in the environment and is bio-accumulative in the tissues . . . of plants and animals [T]here is presently no known safe level of dioxin in the environment

United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823, 832 (W.D. Mo. 1984).

NEPACCO manufactured hexachlorophene, a disinfectant. Manufacture of hexachlorophene entailed the initial production of TCP, which was then refined into the end product. The early stages of distilling the TCP produced a residue called still bottoms, characterized as a "dark oily sludge." *Id.* at 828, 829. The hazardous waste took a

containing dioxin at a local farm.¹⁰ Nine years later, the Environmental Protection Agency (EPA) investigated the dumping site,¹¹ stabilized the affected area, and filed suit against both NEPACCO and Lee for recovery of the cleanup costs.¹² The district court agreed with the EPA that CERCLA imposes liability on any individual who makes decisions regarding toxic waste disposal.¹³ The Eighth Circuit affirmed, holding that Lee's personal activity with NEPACCO, not his status as a corporate officer and shareholder, rendered him liable.¹⁴

The common law provides two means of holding corporate owners and officers liable for the torts of their corporation. First, a court may "pierce the corporate veil"¹⁵ upon a showing that the corporation is

variety of forms, including the sludge of the still bottoms, clay from the refining and filtering process, and waste water. Besides containing other chemicals of varying levels of toxicity, the court noted that each residue probably contained dangerous quantities of dioxin as well. *Id.*

10. *Northeastern Pharmaceutical*, 810 F.2d 726, 730 (8th Cir. 1986). The court describes the participation of the other defendants:

In July 1971 Mills approached NEPACCO plant manager Bill Ray with a proposal to dispose of the waste-filled 55-gallon drums on a farm owned by James Denney located about seven miles south of Verona. Ray visited the Denney farm and discussed the proposal with Lee; Lee approved the use of Mills' services and the Denney farm as a disposal site. In mid-July 1971 Mills and Gerald Lechner dumped approximately 85 of the 55-gallon drums into a large trench on the Denney farm . . . that had been excavated by Leon Vaughn. Vaughn then filled in the trench. Only NEPACCO drums were disposed of at the Denney farm site.

Id.

11. The EPA reacted to an anonymous tip that NEPACCO buried waste on James Denney's farm. An EPA investigation revealed that the site was not suitable for waste disposal. The EPA took samples from the barrels, the local well water, and the soil beneath the drums. Under contract with the EPA, a private firm began a feasibility study of site cleanup. *Northeastern Pharmaceutical*, 579 F. Supp. at 831.

12. *Northeastern Pharmaceutical*, 810 F.2d at 730. CERCLA provides that "'respond' or 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25) (Supp. IV 1986). Thus, response costs are those incurred in responding to or remedying a hazardous situation.

13. *Northeastern Pharmaceutical*, 579 F. Supp. at 847, 848.

14. *Northeastern Pharmaceutical*, 810 F.2d at 744.

15. Courts disregard the artificial nature of the entity and "pierce the corporate veil" to impose liability on corporate owners. The conflicting concepts are the idea of corporate individuality, or "personality," and the circumstances giving rise to liability. See generally HENN & ALEXANDER, LAWS OF CORPORATIONS § 146 (3d ed. 1983), (citing, *United States v. Milwaukee Refrigerator Transit Co.*, 142 F. 247 (C.C.E.D. Wis. 1905)). *Milwaukee* illustrates a court's capacity to ignore a corporation's personality:

If any general rule be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until suffi-

"less than a bona fide entity."¹⁶ This rule renders shareholders liable for actions of the corporation, contingent upon a showing that the corporate entity exists primarily to divert liability from the shareholders.¹⁷ The second form of liability, "corporate actor" liability,¹⁸ stems from the direct involvement of the officer or stockholder in the acts resulting in corporate liability.¹⁹ Thus, when a corporate officer or owner participates in behavior rendering the corporation liable,²⁰ a court may find both the corporation and the individual officer liable.²¹ Corporate actor liability differs from piercing the corporate veil because the latter

cient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

Milwaukee Refrigerator, 142 F. at 255. Thus, a court may disregard the corporate form when there is reason to believe the corporation is "less than a bona fide entity." See *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978).

The court in *Ramsay v. Adams*, 4 Kan. App. 2d 184, 603 P.2d 1025 (1979), suggested eight factors which may serve as grounds for "piercing the corporate veil":

(1) undercapitalization of a one-man corporation, (2) failure to observe corporate formalities, (3) non-payment of dividends, (4) siphoning of corporate funds by a dominant stockholder, (5) non-functioning of other officers or directors, (6) absence of corporate records, (7) use of the corporation as a facade for operation of a dominant stockholder or stockholders, and (8) use of the corporation in promoting injustice or fraud.

Id. at 186-87, 603 P.2d at 1028.

16. *Donsco*, 587 F.2d at 606.

17. See *supra* note 15 for a list of specific grounds for piercing the corporate veil.

18. The United States Court of Appeals for the Third Circuit used the "corporate actor" liability rule in *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978). The court applied this rule against a corporate officer defendant. The case involved the defendant's pirating of plaintiff's advertising scheme, or "trade dress." The court affirmed the district court's decision holding both the defendant corporation and the defendant officer liable. The Third Circuit found the acts of the defendants unfair because they tended to confuse customers and copywriters. *Id.* at 603. The court noted that the officer "authorized and approved the acts of unfair competition which [were] the basis of Casper Corporation's liability." *Id.* at 606. Finding the personal participation in the wrongful act to be the sole determinative factor, the court held the officer's assertion of corporate status immaterial to his defense. *Id.*

19. *Id.* at 606; see also 3A FLANAGAN & KEATING, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 1135 and 1137 (Perm. ed. 1986) (statement of the corporate actor liability rule and extensive discussion of its permutations).

20. *Donsco*, 587 F.2d at 606.

21. *Id.* *Fletcher* notes: "The fact that the circumstances are such as to render the corporation liable is altogether immaterial. The injured person may hold either [the corporation or its officer] liable, and generally the injured person may hold both as joint tort-feasors." 3A FLETCHER, § 1135, at 267.

holds only a specific officer liable,²² without requiring additional proof that the corporation lacks integrity.²³ In determining corporate officer liability under CERCLA, some courts employ the corporate actor theory rather than the veil piercing theory.²⁴

In 1980, Congress enacted CERCLA to address the problems posed by abandoned and inactive toxic waste dumps.²⁵ The Act authorizes the government, through the Environmental Protection Agency (EPA), to initiate immediately response procedures²⁶ when an actual or potential release of hazardous substances threatens the environment.²⁷ Response costs derive from the "Superfund,"²⁸ an environ-

22. *Id.*

It is thoroughly well settled that a person is personally liable for all torts committed by him . . . notwithstanding he may have acted as the agent or under the directions of another. And this is true to the full extent as to torts committed by the officers of agents of a corporation in the management of its affairs.

Id.

23. See *supra* note 15. Additionally, the burden of proof is generally on the plaintiff to establish the grounds for piercing the veil. See *Ramsay v. Adams*, 4 Kan. App. 2d 184, 187, 603 P.2d 1025, 1027 (1979).

24. *Donsco*, 587 F.2d at 606.

25. CERCLA Report, *supra* note 1, at 6119-20. The court in *United States v. Price*, 577 F. Supp. 1103 (D.N.J. 1983), commented on CERCLA's convoluted legislative history. The court describes the haste with which Congress enacted the legislation, criticizing the package as "inadequately drafted." *Id.* at 1109. The court concluded that "[b]ecause of the haste with which CERCLA was enacted, Congress was not able to provide a clarifying committee report, thereby making it extremely difficult to pin-point the intended scope of the legislation." *Id.* Lack of clear legislative direction underscores the courts' difficulty in applying the liability provisions of CERCLA to corporate officers and actors. 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).

In *United States v. Reilly Tar & Chem. Co.*, 546 F. Supp. 1100 (D. Minn. 1982), the court commented on the hurried consideration CERCLA received before Congress, and concluded that "the Committee Reports should be read with caution." *Id.* at 1111. The court noted two principal congressional concerns: 1) The EPA should have the tools to address the problems arising from improper disposal of toxic waste, and 2) responsible parties should bear the costs of clean-up of hazardous waste sites where a threat exists. *Id.* at 1112. Thus, the court found that "to give effect to these congressional concerns, CERCLA should be given a broad and liberal construction . . ." and should not be interpreted to limit the liability of those responsible for clean-up costs. *Id.*

26. 42 U.S.C. § 9607(a) (Supp. IV 1986). See *supra* note 3.

27. 42 U.S.C. § 9604(a)(1) (1982) provides:

Whenever (A) any hazardous substance is released or there is a substantial threat of such release into the environment or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may produce

mental trust²⁹ established to enable immediate cleanup.³⁰ Section 107(a)³¹ of CERCLA creates a federal cause of action³² against any "person" who arranges for the disposal, treatment, or transfer of toxic waste. Section 107(a)(1)³³ of the Act extends liability to "owners and operators" of waste facilities.³⁴ These provisions allow the government to recoup funds expended for cleanup.³⁵ Although the Act clearly contemplates that corporations are "persons,"³⁶ neither the Act nor its legislative history clearly imposes liability on corporate officers and owners acting within the scope of their employment.³⁷

In 1984, the United States District Court for the Western District of Missouri decided *Northeastern Pharmaceutical*.³⁸ With regard to the individual liability of Lee, the corporation's vice-president, under CERCLA, the court recognized that a corporate officer is generally not

an imminent or substantial danger to the public health or welfare, the President is authorized to act . . . to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time

28. 42 U.S.C. § 9611 (1982) provides:

(a) For the purposes of this section there is authorized to be appropriated from the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of the Internal Revenue Code of 1986 not more than \$8,500,000,000 (c) Uses of the Fund under subsection (a) of this section include—(3) . . . the costs of a program to identify, investigate, and take enforcement and abatement action against releases of hazardous substances.

29. 42 U.S.C. § 9604(a)(1) (1982).

30. CERCLA Report, *supra* note 1, at 6136.

31. 42 U.S.C. § 9607(a)(3) (Supp. IV 1986); *see supra* note 3 for pertinent text.

32. *See* CERCLA Report, note 1, at 6136.

33. 42 U.S.C. § 9607(a)(1) (Supp. IV 1986); *see supra* note 3 for pertinent text.

34. *See infra* note 42 for CERCLA's definition of "owner or operator."

35. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 749 (8th Cir. 1987), noting that CERCLA recovery suits are equitable actions for reimbursement or restitution of funds expended.

36. *United States v. Conservation Chem. Co.*, 619 F. Supp. 163, 186, 187 (W.D. Mo. 1985); *see also Northeastern Pharmaceutical*, 810 F.2d at 742.

37. The notion of imposing liability on a corporation for the acts of its officers is essentially an application of the traditional rule of *respondeat superior*, or vicarious liability. *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978). Hence, a critical question arises concerning whether an officer acted within the scope of his or her employment. This issue is, however, beyond the scope of this comment. *See generally* H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* § 230 (3d ed. 1983) (discussing officer liability for corporate debts).

38. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984).

accountable for the acts of the corporation.³⁹ The court noted, however, that CERCLA liability does not distinguish between individual and corporate entities.⁴⁰ Lee, a "person" who arranged for the transport of hazardous substances, was thus individually liable under section 107(a)(3).⁴¹ Because Lee was a NEPACCO stockholder, he was also liable as an "owner or operator"⁴² under section 107(a)(1).⁴³ Thus, the court supplied two grounds for holding corporate officers and owners individually liable for response costs under CERCLA. The court implicitly approved of the corporate actor liability rule in the CERCLA liability provisions.⁴⁴

Shortly after the *Northeastern Pharmaceutical* district court decision, the United States District Court for the District of New Hampshire decided *United States v. Mottolo*.⁴⁵ The president and principal

39. *Id.* at 847. The assertion of corporate capacity as a defense to personal liability may invoke the "business judgement rule." This rule is

[a] corollary of the usual statutory provisions that it is the directors who shall manage the corporation. The rule is simply that business judgement of the directors will not be challenged or overturned by the courts or shareholders and the directors will not be held liable for their exercise of business judgement . . . even for judgements that appear to have been clear mistakes.

R. CLARK, CORPORATE LAW § 3.4 (1986). The rule immunizes directors who act in concert as a board. *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Because there was no evidence that the decision to bury the waste arose from a formal meeting of NEPACCO's board, the business judgment rule does not apply. Even if the board did decide to bury the waste, this fact would not necessarily excuse Lee's actions because his liability springs from participation as an actor in the disposal. *See Donsco*, 587 F.2d at 606.

40. *See supra* note 3 for CERCLA definition of "person."

41. *Northeastern Pharmaceutical*, 579 F. Supp. at 847, 848.

42. *Id.* at 849. CERCLA defines "owner and operator": "in the case of an onshore facility, any person owning or operating such facility . . . Such term does not include a person, who, without participating in the management of [such] . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." 42 U.S.C. § 9601(20)(a) (Supp. IV 1986).

CERCLA defines "facility" as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft or (B) any site or area where a hazardous substance has been deposited, stores, disposed of, or placed, or otherwise . . . located

42 U.S.C. § 9601(9) (Supp. IV 1986).

43. *Northeastern Pharmaceutical*, 579 F. Supp. at 848. *See supra* note 3 for liability provisions.

44. *Northeastern Pharmaceutical*, 579 F. Supp. at 848-49. *See supra* notes 40-43.

45. 629 F. Supp. 56 (D.N.H. 1984).

shareholder of a small chemical firm authorized the removal of several drums containing toxic wastes.⁴⁶ Like Lee, the defendant president in *Mottolo* asserted corporate capacity as a defense to personal liability.⁴⁷ Due to his extensive personal involvement with the company, the court denied the president's defense of corporate capacity to personal liability.⁴⁸ The court imposed individual liability on the president because he was a "person," as defined by CERCLA, who arranged for the disposal of hazardous waste.⁴⁹ The court justified its holding by citing a First Circuit⁵⁰ case that imposed the corporate actor liability rule.

In *United States v. Carolawn Co.*,⁵¹ the United States District Court for the District of South Carolina held three men liable as "owners"⁵² of a waste dump under section 107(a)(1).⁵³ Interpreting CERCLA literally, the court noted the extensive use of personal pronouns in the Act's definitional language.⁵⁴ Drawing from the district court decision in *Northeastern Pharmaceutical* to support its analysis, the *Carolawn* court concluded that use of the corporate form failed to preclude the individual liability of corporate officers and shareholders under CERCLA.⁵⁵

46. The chemical firm, Lewis Chemical Company, set up its operations in an old leather processing plant. After moving in, the company cleaned up bits of leftover leather and latex. After defendant Mottolo's company unclogged a drain at the Lewis plant, Mottolo offered to carry away the remnants of leather and latex. The president of Lewis agreed. However, the rubbish was contaminated with various toxic substances, a fact unknown to either party. *Id.* at 58, 59.

47. *Id.*

48. *Id.*

49. *Id.* at 59, 60. 42 U.S.C. § 9607(a)(3) (1982); *see supra* note 3 for text.

50. *Escude Cruz v. Ortho Pharmaceutical Co.*, 619 F.2d 902, 907 (1st Cir. 1980). In *Escude Cruz* an employer of a Puerto Rican corporation sued his employer for failing to warn him of the dangerous chemicals to which he was allegedly exposed. To hold the corporate officer of the employer corporation liable, the court found that if the officer "directs or participates actively in the commission of a tortious act," he could be personally liable. *Id.* at 907.

51. 14 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,699 (D.S.C. 1984).

52. 42 U.S.C. § 9601(20)(A) (Supp. IV 1986); *see* note 42 for definitions of "owner" and "operator." The three individual defendants in the action purchased and received the property involved prior to incorporation of their enterprise. Later, the same three were the principal owners and operators of the defendant waste disposal company. *Carolawn Co.*, 14 *Envtl. L. Rep.* at 20,699.

53. 42 U.S.C. § 9607(a)(1) (Supp. IV 1986); *see supra* note 3 for text.

54. *Carolawn Co.*, 14 *Envtl. L. Rep.* at 20,700.

55. *Id.*

In *New York v. Shore Realty Corp.*⁵⁶ the United States Court of Appeals for the Second Circuit similarly found a corporate actor liable for dumping hazardous waste. The court construed the "owner and operator"⁵⁷ provision of CERCLA as excluding from liability those individuals who hold "indicia of ownership"⁵⁸ but do not participate in the firm's management. The court thus implied that individuals with "indicia of ownership" would be liable under CERCLA if they participate in their firm's management.⁵⁹ Therefore, Section 107(a) eliminated the need to "pierce the corporate veil" to attach liability to corporate owners.⁶⁰

Moreover, in *United States v. Conservation Chemical Co.*,⁶¹ the United States District Court for the Western District of Missouri reinforced the holdings in *Mottolo*,⁶² *Carolawn*,⁶³ *Shore Realty*,⁶⁴ and *Northeastern Pharmaceutical*.⁶⁵ The court recognized the corporate actor rule of individual liability for corporate torts when the individual personally participated in the harm.⁶⁶ The Special Master⁶⁷ refused to grant the government summary judgment against Conservation Chem-

56. 759 F.2d 1032 (2d Cir. 1985). In *Shore Realty* the State of New York sued the corporation and Donald LeoGrande, its officer and stockholder, to clean up a hazardous waste disposal site. The corporation acquired the site from the state for land development purposes. Although neither LeoGrande nor Shore participated in generating the waste, LeoGrande knew that over 700,000 gallons of hazardous waste were stored on the premises. 759 F.2d at 1038-39.

57. 42 U.S.C. § 9601(20)(A) (Supp. IV 1986); see *supra* note 42.

58. 42 U.S.C. § 9601(20)(A) (Supp. IV 1986). See also *Shore Realty*, 759 F.2d at 1052.

59. *Shore Realty*, 759 F.2d at 1052.

60. *Id.*

61. 619 F. Supp. 162 (W.D. Mo. 1985). In *Conservation Chemical*, a Kansas City corporation stored, treated, and disposed of numerous varieties of chemical wastes in six soil basins. 619 F. Supp. at 182.

62. *United States v. Mottolo*, 629 F. Supp. 56 (D.N.H. 1984).

63. *United States v. Carolawn, Co.*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,699 (D.S.C. 1984).

64. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

65. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984). The District Court for the Western District of Missouri thus decided both *NEPACCO* and *Conservation Chemical*.

66. *Conservation Chemical*, 619 F. Supp. at 189, 190.

67. Pursuant to FED. R. CIV. P. 53 the court appointed a Special Master to make initial conclusions of law. On all points relevant to the rule of direct officer liability under CERCLA, the district court adopted the Special Master's initial conclusions of law. *Id.* at 175.

ical's president, majority shareholder, and "sole technical person"⁶⁸ because the existing record was inadequate to establish the officer's liability without a trial on the merits.⁶⁹ Nonetheless, the officer stood subject to potential CERCLA liability due to his dominance of Conservation Chemical's affairs.⁷⁰

By the time the Eighth Circuit delivered its opinion in *Northeastern Pharmaceutical*,⁷¹ courts across the country had implemented the district court's rule of individual actor liability under CERCLA.⁷² The circuit court decision reiterated the two major propositions of the district court's holding. First, the term "person," as employed by CERCLA, encompasses both individual and corporate entities.⁷³ Second, an individual's status as a corporate shareholder or officer is entirely immaterial to determining individual liability.⁷⁴ Liability is personal and not derivative through the corporation.

The Eighth Circuit commented on the implications of strict⁷⁵ officer liability. First, the court noted that the corporate actor liability rule eliminates the need to "pierce the corporate veil,"⁷⁶ a traditional means of accomplishing shareholder liability. The court implied that its broad reading of CERCLA's liability provisions would ease the government's task of recovering response costs⁷⁷ from individuals by removing the need to prove that the corporation is "less than a bona fide entity."⁷⁸ In addition, the court expressly held that the corporate actor rule underlies section 107(a) liability.⁷⁹ This holding firmly grounds

68. *Id.* at 190. One person, Hjersted, occupied all three roles. *Id.*

69. *Id.* The question of Hjersted's liability centered on a question of the nature and degree of his participation in the dumping. *Id.* Hjersted "vigorously opposed the imposition of personal liability." *Id.* Recognizing the "caution" a court must exercise in ruling on summary judgment motions, the court deferred the question to trial. *Id.*

70. *Id.*

71. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986).

72. *See supra* notes 24, 44, 49, 55, 56, 66 and accompanying text.

73. *Id.* at 744.

74. *Id.*

75. CERCLA imposes a standard of strict liability under its liability provisions. Thus, the EPA need not produce evidence of negligence or misfeasance to demonstrate liability. CERCLA Report, *supra* note 1, at 6136.

76. *Northeastern Pharmaceutical*, 810 F.2d at 744.

77. *See CERCLA Report, supra* note 1, at 6136.

78. *Northeastern Pharmaceutical*, 810 F.2d at 744. The court thus followed the Third Circuit's holding in *Donsco*, 759 F.2d 602 (2d Cir. 1978).

79. *Northeastern Pharmaceutical*, 810 F.2d at 744.

the rule in strict tort liability terms rather than the more complicated rules of corporate law. Together with the Second Circuit's opinion in *Shore Realty*,⁸⁰ the *Northeastern Pharmaceutical* decision represents a potent precedent for plaintiffs in pending and future CERCLA litigation.⁸¹

The line of decisions culminating in *Northeastern Pharmaceutical*⁸² exhibits the highest judicial regard for Congress' intent to remedy the troublesome toxic waste situation. Apparently, the courts find the potential consequences of delayed toxic waste cleanup so pernicious that very little should impede the EPA in its response efforts. Certainly, the facts regarding the serious health consequences of improper toxic waste disposal support this motivation by emphasizing the urgency of the situation. However, notably absent from the court's discussion of section 107(a)⁸³ liability of corporate owners and officers is the impact of such potential liability on the chemical and waste management industries.

Response costs frequently reach millions of dollars,⁸⁴ sums startling to corporations and investors involved in the chemical and waste management industries.⁸⁵ Interestingly, no court has fully weighed the im-

80. *New York v. Shore Realty Corp.*, 759 F.2d 602 (2d Cir. 1978). See *supra* notes 56-66 and accompanying text.

81. The balance of the *Northeastern Pharmaceutical* decision includes several holdings with broad implications for pending and future CERCLA litigation. These holdings invariably favor the government in its restitution efforts. First, CERCLA liability applies retroactively to include pre-enactment dumping sites. *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 734 (8th Cir. 1987). Secondly, the government can recover its pre-enactment response costs under CERCLA. *Id.* at 737. Third, the court held that NEPACCO, a Delaware corporation which allowed its charter to lapse for failure to appoint an agent for service of process, was in a "suspended state from which it may be revived at any time." *Id.* at 746. Thus, because NEPACCO failed to file the formal voluntary dissolution papers with the Delaware Secretary of State, it was still viable as an entity and therefore subject to suit. *Id.* at 747. Fourth, the decision confirmed that the defendant has the burden of proof to demonstrate any irregularities in the government's response strategy and expenditures. *Id.* at 748. Finally, the Eighth Circuit affirmed the trial court's holding that CERCLA response efforts for restitution and reimbursement are equitable in nature. Despite the defendants' argument that the remedy is statutory, and therefore legal, the Eighth Circuit kept intact the trial court's denial of a jury trial. *Id.* at 749.

82. 810 F.2d 726 (8th Cir. 1987).

83. 42 U.S.C. § 9607(a) (Supp. IV 1986).

84. See *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595 (E.D. Ark. 1987) (response costs totalling a minimum estimate of \$52.2 million for treatment of dioxin facility).

85. See Note, *CERCLA Defendants: The Problem of Expanding Liability and Diminishing Defenses*, 31 WASH. U.J. URB. & CONTEMP. L. 289, 315-16 (noting that ex-

pect of shareholder liability for toxic cleanup on investment, research, and development within the industries. Only *Shore Realty* suggested that "abatement expenses may become prohibitive and disproportionate."⁸⁶ The proposition that toxic waste poses a serious threat to our nation's environmental well-being is at least as true as the proposition that the chemical and waste management industries perform useful social functions. Although the threat posed to our society and environment may eventually attain overriding precedence, a prudent and careful balancing of these differing interests is necessary.

The *Northeastern Pharmaceutical* decision evinces a judicial desire to accord the highest priority to the congressional goal of cleaning up the threat posed by inactive and abandoned toxic waste dumps. Though the problem may fully warrant such sanctions as personal shareholder and officer liability for response costs, Congress and the courts should consider the implications such liability may have upon affected parties.

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pansive CERCLA liability may produce a chilling effect on transactions within the chemical and waste industries).

86. *New York v. Shore Realty*, 795 F.2d 1032, 1053 (2d Cir. 1985). The court in *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 187 (W.D. Mo. 1985), echoed this same observation. Although these sentiments reflect some concern for the impact of potentially staggering CERCLA liability on smaller firms and their investors, the notion is still quite removed from exerting itself as a mature judicial standard.

