

INDIVIDUAL LIABILITY UNDER ENVIRONMENTAL LAW NOTWITHSTANDING CORPORATE FORM

By: John P. Beyel

People who are not trained in the law believe if they are employed by a corporate entity they are shielded from personal liability for their actions. This should come as no surprise because the lawyers to whom they look for guidance routinely repeat this basic proposition which they learned in Corporations 101. Unfortunately, it is not always correct. This is particularly true in the area of environmental law.

As one might expect, personal liability can be established where the corporate veil is pierced. In *New York v. Villa*, 186 Misc. 2d 490, 717 N.Y.S. 2d 831 (N.Y. Sup. Ct. 2000), the State of New York succeeded in claims against individuals for illegally operating a solid waste disposal facility. The court noted in order to pierce the corporate veil, under New York law, it must be proven that the owners "exercised complete domination of the corporation and that such domination was used to commit fraud or a wrong against the plaintiff which resulted in plaintiff's injury." *Villa*, 186 Misc. 2d at 500, 717 N.Y.S. 2d at 839. In broad terms, courts will disregard the corporate form or, to use accepted terminology, "pierce the corporate veil," whenever necessary to prevent fraud or to achieve equity.

Using similar language, the Court of Appeals for the Sixth Circuit, in *Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745 (6th Cir. 2001), affirmed a decision piercing the corporate veil to find a shareholder personally liable where control over a corporation was so complete that it had no separate existence and where the control was used in a manner to commit fraud or illegal acts to the plaintiff's loss. This case makes the additional point that it is state and not federal common law which governs the veil piercing ques-



tion.

Personal liability also can be established without need to pierce a corporate veil. Individuals have been found personally liable under several statutes and causes of action where they have personally participated in decisions regarding the handling and disposal of hazardous substances or have acquiesced to the decisions made by their subordinates. In *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), the United States Court of Appeals for the Eighth Circuit noted a corporate officer may be individually liable for personally committing a tort and cannot stand behind a corporate shield when an active participant in the tort. While the officer acting for a corporation may also serve to make the corporation vicariously or secondarily liable, the existence of the corporation does not relieve the individual of responsibility.

The Eighth Circuit also reviewed the language of Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9607(a)(3), and noted strict liability is imposed upon "any person" who arranged for the dis-

posal or transportation for disposal of hazardous substances. The term 'person' includes both individuals and corporations and does not exclude corporate officers or employees. The Court observed that Congress could have limited the statutory definition of "person" but chose not to do so. The court thus opined:

"[C]onstruction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances, would open an enormous, and clearly unintended, loophole in the statutory scheme."
810 F.2d at 743.

Without any effort to pierce the corporate veil, the Eighth Circuit determined Lee could be found personally liable under CERCLA because, as a corporate employee, he had immediate supervision over and was directly responsible for arranging the transportation and disposal of the plant's hazard-

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-ous substances. Lee was personally liable not because he was an owner of the corporate entity but because he personally participated in conduct that violated CERCLA.

The Eighth Circuit also found a basis for personal liability under the Resource Conservation and Recovery Act of 1976. (RCRA). Lee was the corporation's vice-president, a shareholder and supervisor of a plant. Michaels was a major shareholder and the corporation's president. Both were found liable under RCRA as persons who had contributed to the disposal of hazardous substances that may present an imminent and substantial endangerment to health or the environment. Although unlike Lee, Michaels had not been personally involved in the actual decision to transport and dispose of the hazardous substances. As corporate president and as a major shareholder, however, Michaels was the individual in charge of and directly responsible for all of the corporation's obligations and had ultimate authority to control the disposal of its hazardous substances.

In *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), Shore Realty Corp. had been created by LeoGrande to acquire title to certain property. LeoGrande was found personally liable under CERCLA and under a state law nuisance theory. All corporate decisions were made, directed or controlled by LeoGrande. LeoGrande was found personally liable under CERCLA based upon his status as the owner of the corporation who had engaged in its management in contrast to someone who may hold indicia of ownership primarily to protect a security interest. LeoGrande was also found personally liable under CERCLA based upon conducting the operations of the corporation. The Court of Appeals for the Second Circuit also determined that without piercing the corporate veil LeoGrande was personally liable under New York law for the abatement of a nuisance, stating, "New York courts have held that a corporate officer who controls corporate conduct and thus is

an active individual participant in that conduct, is liable for the torts of the corporation." *Shore Realty Corp.*, 759 F.2d at 1052 (citations omitted).

In *United States v. Conservation Chemical Company of Illinois*, 733 F. Supp. 1215 (N.D. Ind. 1989), the court determined that Norman Hjersted, who was the president, chairman of the board of directors, treasurer and principal shareholder of the corporate defendant, could be personally liable for

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RCRA violations, whether or not he met the strict definition of an operator, so long as he was actively involved in the corporation.

While the Court of Appeals for the Third Circuit, in *United States v. USX Corporation*, 68 F.3d 811 (3d Cir. 1995), expressed the position that liability under CERCLA cannot be predicated solely on the basis of an officer's or shareholder's active involvement in the corporation's day-to-day affairs and that there must be a showing that the person sought to be held personally liable actually participated in the liability - creating conduct, the court hastened to add personal participation is not a prerequisite to liability. "Liability may be imposed where the officer is aware of the acceptance of materials for transport and of his company's substantial participation in the selection of the

disposal facility. An officer who has the authority to control disposal decisions should not escape liability under §107(a)(4) when he or she has actual knowledge that a subordinate has selected a disposal site and, effectively, acquiesces in the subordinate's actions." *USX Corp.*, 68 F.3d at 825; cf., *Don-sco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978) (a corporate president's knowledge and approval of wrongful acts "is sufficient actual participation in the wrongful acts" to make him individually liable).

Even where the corporate veil is not pierced and it is not shown that the corporate officer personally directed or participated in violations, a corporate officer may still face personal liability under the responsible corporate officer doctrine. That concept was developed by the United States Supreme Court in the context of the Federal Food, Drug and Cosmetics Act, 21 U.S.C. §301, et seq., as a basis to impose individual liability upon corporate officers. The concept was first identified by the Court in *United States v. Dotterweich*, 320 U.S. 277 (1943).

In discussing that concept in the context of violations under the New Jersey Water Pollution Control Act in *State v. Standard Tank*, 284 N.J. Super. 381, 665 A.2d 753 (App. Div. 1995), it was noted that the concept had been expanded upon by the Supreme Court in *United States v. Park*, 421 U.S. 658, 672-675 (1975) as follows:

In providing sanctions which reach and touch the individuals who execute the corporate mission . . . the [Federal Food, Drug and Cosmetics] Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur.

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The concept of a “responsible relationship” to, or a “responsible share” in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.

....
[T]he main issue for determination [is] not respondent’s position on the corporate hierarchy, but rather his accountability, because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him.

[Standard Track, 284 N.J. Super. at 401-02.]

The New Jersey Court noted this doctrine had been applied in an action involving the Federal Clean Water Act and that it was applicable in *State v. Standard Tank*, supra, as a basis upon which to find liability against two individuals who, although perhaps not directly responsible for violations of the Water Pollution Control Act, were in a position to have prevented the continuation of violations but failed to do so.

In *re Dougherty*, 482 N.W. 2d 485 (Minn. Ct. App. 1992), review was sought of an administrative penalty order issued by the Commissioner of the Minnesota Pollution Control Agency. The court noted evidence had not demonstrated that *Dougherty* directed or participated in certain violations. Nevertheless, he was found to be liable under the responsible corporate officer doctrine.

The Minnesota court found the re-

sponsible corporate officer doctrine appropriate in the context of environmental laws where three elements are satisfied:

- (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities;
- (2) there must be a nexus between the individual’s position and the violation in question, such that the individual could have influenced the corporate actions which constituted the violations; and
- (3) the individual’s actions or inaction facilitated the violations.

In *re Dougherty*, 482 N.W. 2d at 490 (citations omitted).

That doctrine was also adopted in *BEC Corporation v. The Department of Environmental Protection of the State of Connecticut*, 1999 W.L. 300649 (Conn. Super. Ct. 1999). *Irvin Shiner* and his son, *Michael*, were president and vice president, respectively, of *BEC* and were in charge of the company’s operations. The Connecticut court recognized that the imposition of personal liability would raise an issue of first impression with respect to the application of Connecticut’s Clean Water Act. The court noted individual liability for environmental violations is recognized under federal statutes such as CERCLA, RCLA and the Clean Water Act. The court also discussed the responsible corporate officer doctrine as applied in *In re Dougherty*, supra, and determined personal liability was appropriate in the matter at hand without the need to first pierce the corporate veil.

In *Washington v. Lundgren*, 971 P. 2d 948 (Wash. Ct. App. 1999), the Court of Appeals, applying the responsible corporate officers doctrine, found *Lundgren* personally liable for a civil penalty because he exercised control of the sewage treatment facility with knowledge of its violation.

CONCLUSION

Personal liability for environmental conditions has been established in many

jurisdictions under a variety of federal or state statutes and common law theories. The purpose of this article was not to provide an exhaustive review of all cases under all theories but to serve as a reminder that the practitioner doing business through a corporate form will not be completely insulated from personal liability. ■

John P. Beyel is a partner with the law firm of McElroy Deutsch & Mulvaney, LLP located in Morristown, New Jersey and a member of its Commercial Litigation Group. He acknowledges the assistance of Ryan P. Mulvaney in the completion of this article.

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