Pace Environmental Law Review

Volume 4
Issue 1 *Fall 1986*

Article 8

September 1986

United States v. Pollution Abatement Services of Oswego, Inc.: Expansion of Shareholder Corporate Officer Liability in a Closely-Held Corporation

Amelia M. Wagner

United States v. Pollution Abatement Services of Oswego, Inc.: Expansion Of Shareholder Corporate Officer Liability In A Closely-Held Corporation

I. Introduction

A principal consideration in the decision to incorporate is the concept of limited liability.[1] Corporate shareholders are traditionally considered to be a distinct entity separate from the corporation.[2] As such, these individuals are insulated from the liabilities that the corporation may incur and their personal wealth will not be subjected to the risks inherent in a business enterprise.[3] The rationale behind this concept is to encourage commerce and free enterprise.[4] However, when a corporation is perceived as not complying with corporate formalities or that it is perpetrating acts that result in an injustice to innocent parties, courts will disallow the corporate form and "pierce the corporate veil."[5] Once the corporate form is disallowed, limited liability of corporate shareholders vanishes and they may be held personally liable. Courts, in general, are reluctant to disallow the corporate form and start with the presumption that it is valid.[6]

Closely-held corporations may be defined as corporations whose shares are held by a single shareholder or a closely-knit group of shareholders who control corporate policy and are active in the conduct of the business.[7] Usually, shareholders of closely-held corporations exercise their control by serving on the board of directors or as corporate officers. As will be seen

1. H. Henn & J. Alexander, Laws of Corporations § 73 (1983).
2. *Id.* § 68, at 127.
3. Barber, *Piercing the Corporate Veil*, 17 Willamette L. Rev. 371, 371 (1981).
4. *Id.*
5. H. Henn & J. Alexander, *supra* note 1, § 146.
6. *Id.*
7. Black's Law Dictionary 308 (5th ed. 1979).

in this Note, participation in the management of a closely-held corporation may subject the shareholder corporate officer to personal liability, without the need to "pierce the corporate veil" when the corporation is involved in environmental pollution. This liability is premised on the authority and control that the corporate officer has to either prevent or correct these unlawful situations from developing.

Since the 1960's, environmental issues, including corporate pollution, have raised public and governmental interest. As a result, environmental protection laws were passed by Congress.[8] Supplementing these recent laws is the Rivers and Harbors Appropriations Act of 1899[9] (Rivers and Harbors Act) which prohibits the pollution of the navigable waters and harbors of the United States.[10] In particular, section 13 of the Rivers and Harbors Act,[11] which bans the discharge of refuse into navigable waters or onto its banks, has been instrumental in litigating cases involving the seepage of chemicals or waste into navigable waters.[12]

---

8. *See, e.g.*, Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp III 1985); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982 & Supp. III 1985); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982 & Supp. III 1985); Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-10 (1982); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985).

9. Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1121 (codified at 33 U.S.C. §§ 401-415 (1982)).

10. *See* Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761 (1971); Tripp & Hall, *Federal Enforcement Under the Refuse Act of 1899*, 35 Alb. L. Rev. 60 (1970); Comment, *The Refuse Act of 1899: Its Scope and Role in Control of Water Pollution*, 58 Calif. L. Rev. 1444 (1970); Comment, *Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899*, 33 U. Pitt. L. Rev. 483 (1972); Note, *The Refuse Act of 1899: New Tasks for an Old Law*, 22 Hastings L.J. 782 (1971); Note, *The Refuse Act: Its Role Within the Scheme of Federal Water Quality Legislation*, 46 N.Y.U. L. Rev. 304 (1971).

11. Rivers and Harbors Appropriations Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407 (1982)).

12. *See, e.g.*, United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp., 362 U.S. 482 (1960); United States v. American Cyanamid Co., 480 F.2d 1132 (2d Cir. 1973); United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964); United States v. Ballard Oil Co. of Hartford, 195 F.2d 369 (2d Cir. 1952).

In *United States v. Pollution Abatement Services of Oswego, Inc.*[13] (*Pollution Abatement Services*), the Court of Appeals for the Second Circuit held for the first time that individual corporate officers in closely-held corporations could be found civilly liable for violations of the Rivers and Harbors Act based only on their personal involvement in directing the company and held so without the need to "pierce the corporate veil." The court stated that the enforcement section of the Rivers and Harbors Act[14] allows a corporate officer to come under the definition of a "person" and, as a result, can then be held personally liable for violations under the Act.[15] The court also stated that while this enforcement section explicitly refers only to criminal sanctions, civil liability could be imposed for section 13 violations of the Rivers and Harbors Act.[16]

This Note will discuss the issue of holding corporate officers liable without "piercing the corporate veil." Part II includes background discussions on the Rivers and Harbors Act and the liability of corporate officers in general. Part III sets forth the factual aspects of *Pollution Abatement Services* in which a corporation was charged with polluting a navigable water in violation of section 13 of the Rivers and Harbors Act. This part will also discuss the opinions of both the District Court and Second Circuit Court of Appeals. Part IV analyzes the Second Circuit's opinion and how it may affect future determinations of corporate officer liability under section 13 of the Rivers and Harbors Act and other environmental statutes. Finally, Part V concludes with an examination of the conditions which courts may consider in holding corporate officers liable.

---

13. United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133 (2d Cir.), *cert. denied*, 106 S. Ct. 605 (1985).

14. Rivers and Harbors Appropriations Act of 1899, ch. 425, § 16, 30 Stat. 1121, 1153 (codified at 33 U.S.C. § 411 (1982)).

15. *Pollution Abatement Servs.*, 763 F.2d at 135.

16. *Id.*

II. Background

A. *The Rivers and Harbors Act*

The Supreme Court in *Willamette Iron Bridge Co. v. Hatch,* stated that "[t]here must be a direct statute of the United States in order to bring within the scope of its laws . . . obstructions and nuisances in navigable streams within the States."[17] As a result of the *Willamette* holding, Congress enacted several statutes,[18] the culmination of which established the Rivers and Harbors Act of 1899. The Act was passed with the original purpose of "[m]aking appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes."[19] It gave the government statutory authority to regulate activities that affected navigable waters and harbors of the entire nation.

Section 13 of the Rivers and Harbors Act, the section litigated in *Pollution Abatement Services,* evolved from the following statutes. Section 3 of the Act of August 5, 1886, prohibited discharges into the navigable waters of New York harbor only.[20] This 1886 Act was superseded by the Act of June 29, 1888 which again applied only to the navigable waters of New York harbor but added a penalty provision for a violation of the section.[21] The Act of September 19, 1890[22] was

---

17. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888). Owners of a wharf and tow-boat unsuccessfully tried to prevent a company from building a bridge across a navigable water on the grounds that it would impede and obstruct navigation.

18. The statutes, which the 1899 Act consolidated, were not designed as environmental laws per se but were actually appropriations bills designating funds to be spent on improvements of navigable rivers and harbors that also contained some general legislation. Some members of Congress expressed concern about putting general legislation into an appropriations bill during the floor debate of the Rivers and Harbors Act of 1894. The concern centered on the fact that most members would ignore the import of the general legislation in their zeal to get money appropriated for their particular district. "I would like to know why it is that all this general legislation on these subjects is put in an appropriation bill appropriating money for the improvement of rivers and harbors?" 26 Cong. Rec. 4,358 (1894) (statement of Rep. Ray). *See also* Comment, *Discharging New Wine Into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899,* 33 U. Pitt. L. Rev. 483, 497-501 (1972) (provides detailed legislative history of the Rivers and Harbors Act).

19. Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1121.

20. Act of Aug. 5, 1886, ch. 929, § 3, 24 Stat. 310, 329.

21. Act of June 29, 1888, ch. 496, § 3, 25 Stat. 209.

the first Act to prohibit discharges into navigable waters across the entire country and was the statute passed in response to *Willamette Iron Bridge Co. v. Hatch.*[23] The 1890 Act also prohibited the deposit of material onto the banks of navigable waters.[24] Later, Congress passed the Act of August 18, 1894,[25] which still contained the prohibition against discharging or dumping refuse into navigable waters but omitted the provision prohibiting the deposit of material onto the banks of navigable waters.[26] Penalty provisions, similar to the 1888 Act to protect New York Harbor, were also added.[27]

The Act of March 3, 1899, known as the Rivers and Harbors Act of 1899 (Rivers and Harbors Act) was a consolidation of these previous Acts and is still currently in force.[28] Section 13 of the 1899 Act was a combination of section 6 of the 1890 Act which prohibited discharges into navigable waters and section 6 of the 1894 Act which prohibited the depositing of material onto the banks of navigable waters.[29] The penalty provision of the 1894 Act was placed separately in section 16 of the 1899 Act and provided criminal penalties for

---

22. Act of Sept. 19, 1890, ch. 907, 26 Stat. 426.

23. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

24. Act of Sept. 19, 1890, ch. 907, § 6, 26 Stat. 426, 453.

25. Act of Aug. 18, 1894, ch. 299, 28 Stat. 338.

26. *Id.* § 6.

27. *Id.* § 7-8.

28. Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1121 (codified at 33 U.S.C. §§ 401-415 (1982)).

29. Rivers and Harbors Appropriations Act of 1899, ch. 425, § 13, 30 Stat. 1121, 1152 (codified at 33 U.S.C. § 407 (1982)). The provision states in part:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed. . . .

section 13 violations.[30]

Even though a violation of the Rivers and Harbors Act should result in criminal penalties, the Supreme Court has modified the enforcement section to include the use of injunctions[31] and civil penalties.[32] This was the remedy (preliminary injunction and reimbursement of costs) sought by the United States in *Pollution Abatement Services.*

B. *Liability of Corporate Officers In Closely-Held Corporations*

Limited liability is one of the principal objectives of incorporation.[33] Its purpose is to encourage individuals to invest capital into a corporation, thus promoting free enterprise and commerce, by not subjecting all of the individual's personal wealth to the risks associated with the business venture.[34] The concept of limited liability is based on the theory that the corporation is a separate entity, distinct from its shareholders.[35]

---

30. Rivers and Harbors Appropriations Act of 1899, ch. 425, § 16, 30 Stat. 1121, 1153 (codified at 33 U.S.C. § 411 (1982)). This provision enforces section 13 and provides in part:

> Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court. . . .

31. United States v. Republic Steel Corp., 362 U.S. 482 (1960). United States was granted an injunction to stop companies from depositing industrial solids in a navigable water. The Court stated, "Congress has legislated and made its purpose clear; it has provided enough federal law . . . from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation." *Id.* at 492.

32. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967). United States was allowed to recover, from the corporation, the costs of removing a vessel which it claimed had been negligently sunk. The Court stated that "[t]he inadequacy of the criminal penalties explicitly provided by § 16 of the Rivers and Harbors Act is beyond dispute. That section contains only meager monetary penalties. . . . [The penalties] would not serve to reimburse the United States for removal expenses." *Id.* at 202.

33. H. Henn & J. Alexander, *supra* note 1, § 73.

34. Barber, *supra* note 3, at 371.

35. H. Henn & J. Alexander, *supra* note 1, § 68, at 127.

A de jure corporation, one which observes corporate formalities, possesses adequate initial financing, and is not formed to evade the law, will enable a controlling shareholder to generally enjoy limited liability and be insulated from attacks on the basis of incorporation defects.[36]

A closely-held corporation is defined as a corporation whose shares are held by a single shareholder or by a closely-knit group of shareholders, and are not issued or traded publicly.[37] Since such a corporation concentrates control and knowledge in a single shareholder or small group of shareholders, usually serving as corporate officers or on the board of directors, courts have imposed compliance with two requirements: (1) the "business must be conducted on a corporate and not [on] a personal basis," and (2) the "enterprise must be established on an adequate financial basis."[38] Incorporation formalities must also be met, such as, "drafting articles of incorporation, bylaws, forms of share certificates, shareholder and other agreements . . . and agenda or minutes for any required organization meetings."[39] Maintenance of the corporate form is important so that shareholders or officers can take advantage of limited liability, which is applicable only as long as the corporate form is maintained.[40]

---

36. *Id.* § 139.

37. H. Henn & J. Alexander, *supra* note 1, § 257, at 695. *See also* Donahue v. Rodd Electrotype Co., 367 Mass. 578, 586, 328 N.E.2d 505, 511 (1975) (defining a closely-held corporation as having a small number of shareholders, no ready market for corporate shares, and substantial shareholder participation in the management, direction and operations of the corporation).

38. H. Henn & J. Alexander, *supra* note 1, § 147, at 353. *See* DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co., 540 F.2d 681 (4th Cir. 1976). In *DeWitt*, the court listed eight factors for consideration of whether the corporate entity should be disregarded and shareholders could be held personally liable: (1) insufficient capitalization for purposes of corporate undertaking, (2) failure to observe corporate formalities, (3) nonpayment of dividends, (4) insolvency of debtor corporation at time of transaction in question, (5) siphoning of funds by dominant shareholder, (6) nonfunctioning of other officers and directors, (7) absence of corporate records, and (8) existence of corporation as mere facade for individual dealings. *Id.* at 685-87. *Accord* Victoria Elevator Co. v. Meriden Grain Co., Inc., 283 N.W.2d 509 (Minn. 1979); Ramsey v. Adams, 4 Kan. App. 2d 184, 603 P.2d 1025 (1979); Amoco Chemicals Corp. v. Bach, 222 Kan. 589, 567 P.2d 1337 (1977).

39. H. Henn & J. Alexander, *supra* note 1, § 166, at 266.

40. *See* Barber, *supra* note 3, at 371; Dobbyn, *A Practical Approach to Consis-*

A court might ignore the corporate form in situations which involve inadequate initial financing, where corporate formalities are disregarded, or where the incorporation is a fraud that was set up to avoid existing obligations or statutes.[41] In closely-held corporations, courts will also consider the control and knowledge that is concentrated in the principal shareholder or shareholders who have the ability to prevent, stop, or correct situations which may be unlawful.[42] In these types of situations, even though the incorporation is technically correct, the court may disregard the corporate form and metaphorically, "pierce the corporate veil,"[43] and "regard the corporation as an association of persons."[44] Theoretically, negation of the corporate form should apply equally to both publicly-held corporations and closely-held or family corporations. However, it appears that the corporate veil is

---

tency in Veil-Piercing Cases, 19 U. Kan. L. Rev. 185 (1971); Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 Den. L.J. 1 (1978); Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853 (1982).

41. H. Henn & J. Alexander, *supra* note 1, § 146, at 347. *See* Comment, *Limited Limited Liability: A Definitive Judicial Standard for the Inadequate Capitalization Problem*, 47 Temp. L.Q. 321 (1974); Note, *Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation*, 45 So. Calif. L. Rev. 823 (1972).

42. H. Henn & J. Alexander, *supra* note 1, § 147, at 353.

43. *Id.* § 146, at 344.

44. *Id.* § 146, at 346 (quoting Sanborn, J., in United States v. Milwaukee Refrigerator Transit Co., 142 F.2d 247, 255 (C.C.E.D. Wis. 1905)). There is some disagreement in the use of phrases such as "piercing the corporate veil" and "disregarding the corporate entity" as unnecessarily clouding a decision. One court has stated it is unnecessary to use these terms:

> Corporate presence and action no more than those of an individual will bar a remedy demanded by law in application to facts. Hence the process is not accurately termed one of disregarding corporate entity. It is rather and only a refusal to permit its presence and action to divert the judicial course of applying law to ascertained facts. The method neither pierces any veil nor goes behind any obstruction, save for its refusal to let one fact bar the judgment which the whole sum of facts requires. For such reasons, we feel that the method of decision known as "piercing the corporate veil" or "disregarding the corporate entity" unnecessarily complicates decision. In re Clarke's Will, 204 Minn. 574, 578-79, 284 N.W. 876, 878-79 (1939).

However, these and other terms will most likely continue to be used. *See* H. Henn & J. Alexander, *supra* note 1, § 146, at 344 n.2.

pierced primarily in closely-held corporations.[45]

III. Pollution Abatement Services: The District and Court of Appeals Decisions

A. *The District Court Decision*

On July 19, 1977, the United States Attorney filed an action in the United States District Court for the Northern District of New York, alleging that, since April 1, 1976, Pollution Abatement Services of Oswego, Inc. (PAS) was intermittently discharging refuse matter into Wine Creek, a navigable waterway, and depositing material onto the banks of Wine Creek, which could be washed into the water in violation of section 13 of the Rivers and Harbors Act.[46] The refuse matter consisted of oil, chemical wastes, polychlorinated biphenyls (PCB's) and other pollutants.[47] The United States Attorney filed an amended complaint on August 15, 1977, naming H. Willard Pierce, President, and Jack Miller, Vice-President, of PAS as additional party-defendants.[48] Pierce and Miller were not only officers, but also stockholders and directors of PAS.[49]

The government moved for a preliminary injunction on August 16, 1977.[50] After a hearing, the district court issued the preliminary injunction on August 26, 1977, holding that the government had demonstrated a "likelihood of success on the merits" and ordered PAS to stop "irreparable injury to the Plaintiff, the United States, its citizens, and navigable waters."[51] The court determined that the site had to be cleaned

---

45. Barber, *supra* note 3, at 372.

46. Brief for the United States at 3, United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133 (2d Cir. 1985) (No. 85-6005) [hereinafter Brief for United States].

47. *Id.* at 4.

48. *Id.*

49. United States v. Pollution Abatement Servs. of Oswego, Inc., No. 77 Civ. 271, slip op. at 4 (N.D.N.Y. Aug. 26, 1977).

50. Brief for United States at 4. Injunctive relief is allowed under the Rivers and Harbors Act even though it is not specifically stated. United States v. Republic Steel Corp., 362 U.S. 482 (1960). *See supra* note 31.

51. United States v. Pollution Abatement Servs. of Oswego, Inc., No. 77 Civ. 271, slip op. at 5 (N.D.N.Y. Aug. 26, 1977).

up to prevent any further damage. During the hearing, the district court requested the parties to submit proposals for cleaning up the site.[52] The court determined that the United States had the technical expertise to carry out the cleanup and ordered the cleanup to be done under the supervision of the Environmental Protection Agency.[53] The court then issued a judgment stating that the cost of the cleanup was to be borne by the individual defendants, Pierce and Miller, jointly and severally, and would be assessed after the cleanup was finished.[54]

The district court characterized section 13 of the Rivers and Harbors Act as a malum prohibitum statute. It stated that "[t]he doing of the act in and of itself, or the omission or failure to do a required act, in and of itself creates the violation."[55] The court based the personal liability of the corporate officers, Pierce and Miller, on facts which demonstrated that "[t]he individual defendants, by reason of their respective positions and activities in the Corporation, and by reason of their activities, had the responsibility and the authority either to prevent, in the first instance, or promptly to correct the violations complained of, and they failed to do so."[56] Pierce and Miller "were in a position to control the activities of the Company in such a manner as to have in the first instance, not caused the pollutants to flow into the navigable waters, and in the second instance, to have remedied the situation." [57] The court considered the nature of the corporation (PAS was a small closely-held corporation) and its size (four stockholders) to infer that there were "overlapping reponsibilities of the officers and managers who were running the Company . . .

---

52. *Id.* at 13.

53. *Id.* at 13-14.

54. Pierce and Miller appealed the court's decision pertaining to the preliminary injunction on October 21, 1977, but subsequently withdrew the appeal after a prebriefing conference where it was decided that the appeal could be reinstated after the actual dollar amount of the cleanup was determined by the United States and the district court judgment finalized. Brief for the United States at 6-7.

55. United States v. Pollution Abatement Servs. of Oswego, Inc., No. 77 Civ. 271, slip op. at 6 (N.D.N.Y. Aug. 26, 1977).

56. *Id.* at 5.

57. *Id.* at 7.

[and they could not] claim to be insulated from the prohibited conduct."[58] Relying on *United States v. Park*,[59] the court reasoned that due to Pierce and Miller's involvement in running the company, they could have prevented the discharges from flowing into Wine Creek since they, as corporate officers, had the authority and responsibility to act and could have quickly remedied the problem.[60]

The cost of the cleanup, in the amount of $411,269.10, was certified by the United States in March 1983.[61] In May 1983, the district court entered this amount against Pierce and Miller.[62] The corporation itself was not assessed, having been dissolved by proclamation for nonpayment of taxes.[63] Pierce and Miller appealed the decision on the grounds that corporate officers could not be held personally liable for a violation by the corporation of section 13 of the Rivers and Harbors Act of 1899.[64]

B. *The Decision of the Second Circuit Court of Appeals*

The issue on appeal to the Second Circuit Court of Ap-

---

58. *Id.* at 8.

59. United States v. Park, 421 U.S. 658 (1975). The president of a large food chain was held criminally liable under the Federal Food, Drug, and Cosmetic Act for allowing interstate food shipments to be exposed to rodent contamination when stored in a company-owned warehouse. Liability was based on the fact that the president "had a responsible relation to the situation" and could have remedied the problem. *Id.* at 674.

60. United States v. Pollution Abatement Servs. of Oswego, Inc., No. 77 Civ. 271, slip op. at 7 (N.D.N.Y. Aug. 26, 1977).

61. Brief for United States at 7.

62. *Id.*

63. *Id.* at 2.

64. Brief for Pollution Abatement Servs. at 4, United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133 (2d Cir. 1985). Pierce and Miller were actually renewing the appeal they had filed in 1977. *See supra* note 54. After a pre-argument conference held under the Civil Appeals Management Program, the case was remanded to the district court to "determine whether it had the authority to enjoin the defendants from further discharging, to require the government to clean up the site, and to authorize the government to certify the costs of the clean-up, and to consider whether the sum expended for the clean-up costs was reasonable." United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133, 134 n.1. (2d Cir. 1985). The district court answered in the affirmative to all three issues, and entered a final judgment on October 18, 1984. Pierce and Miller then renewed their appeal.

peals was "whether personal liability may be imposed upon the individual defendants,"[65] Pierce and Miller, for a corporate violation of section 13 of the Rivers and Harbors Act. The Second Circuit held that the defendants, as corporate officers of PAS, could be held civilly liable for violations of section 13 of the Rivers and Harbors Act. The court relied mainly on the statutory language of an enforcement section of the Act, section 16,[66] that "[e]very person and every corporation that shall violate . . ." section 13 may be held liable.[67] The court further reasoned that corporate officers fell within the category of "every person." Thus, the theory for this liability was based on the personal involvement of those who were "directly responsible for statutorily proscribed activity."[68] The Second Circuit agreed with the district court that Pierce and Miller had overlapping responsibilities as officers and managers in running the company in its day to day operations and, as a result, were responsible for its illegal dumping and storage activities.[69]

The court acknowledged that section 16 referred explicitly to criminal sanctions but relied on the Supreme Court decision in *Wyandotte Transportation Co. v. United States,*[70] and a case which the Second Circuit had previously decided, *United States v. Perma Paving Co.*,[71] to support its position that civil liability could be imposed upon corporations and, in turn, corporate officers. The court considered civil penalties as a more appropriate remedy for violations of the Rivers and

---

65. *Pollution Abatement Servs.*, 763 F.2d at 134.

66. Rivers and Harbors Appropriations Act of 1899, ch.425, § 16, 30 Stat. 1121, 1153 (codified at 33 U.S.C. § 411 (1982)).

67. *Pollution Abatement Servs.*, 763 F.2d at 135.

68. *Id.*

69. *Id.*

70. Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967). *See supra* note 32.

71. United States v. Perma Paving Co., 332 F.2d 754 (2d Cir. 1964). United States was allowed to recover costs it incurred in dredging a portion of a navigable waterway to remove a shoal that resulted from improper use of riparian land. The court stated, "We see no basis for thinking that the imposition of criminal penalties and the specific authorization of injunctive relief for a particular purpose indicated a Congressional desire to withhold a remedy which in many instances will be more appropriate." *Id.* at 758.

Harbors Act than the criminal penalties provided therein.[72]

In their argument, the defendants, Pierce and Miller relied on two Fifth Circuit decisions, *United States v. Sexton Cove Estates, Inc.*[73] (*Sexton Cove*), and *United States v. Joseph G. Moretti, Inc.*[74] (*Moretti*), where corporate officers in closely-held corporations were found not civilly liable under section 12 of the Rivers and Harbors Act[75] for the cost of restoration work. In both *Sexton Cove* and *Moretti,* a developer had dredged canals that connected to navigable waters without obtaining the necessary permits from the Army Corps of Engineers and, therefore, violated section 10 of the Rivers and Harbors Act[76] which requires approval from the Army Corps of Engineers before any such work can be started. The Fifth Circuit held that the corporations were to restore the canals back to the condition they were in before the dredging with the cost to be borne by the corporations. However, the court held that the president of each corporation could not be held personally liable for the costs of the restoration work. The Fifth Circuit stated, "[a] corporate officer may not be held civilly liable for a corporate violation of the Rivers and

---

72. United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133, 135 (2d Cir. 1985).

73. United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976).

74. United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976).

75. Rivers and Harbors Appropriations Act of 1899, ch. 425, § 12, 30 Stat. 1121, 1151 (codified at 33 U.S.C. § 406 (1982)) provides in part:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court.

This enforcement section can be compared with the enforcement section litigated in *Pollution Abatement Services* as both contain similar wording. *See supra* note 30.

76. Rivers and Harbors Appropriations Act of 1899, ch. 425, § 10, 30 Stat. 1121, 1151 (codified at 33 U.S.C. § 403 (1982)) provides in part:

> [I]t shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Harbors Act unless either the Act itself authorizes such liability, or there are sufficient allegations and proof to permit negation of the corporate form."[77] The court found that section 12 did not provide that a corporate officer could be held "personally liable on a subsequent civil judgment obtained against the corporation."[78]

The Second Circuit distinguished *Sexton Cove* by finding that *Sexton Cove* involved a corporate violation of the Rivers and Harbors Act and that "the Fifth Circuit viewed the officer's liability in that case as derivative rather than personal."[79] In *Pollution Abatement Services,* the Second Circuit stressed that the corporate officers' liability "was not premised solely on their corporate offices or ownership, but was bottomed on their personal involvement in the firm's activities."[80] Due to Pierce and Miller's personal involvement in running the company and the fact that the violation fell within the description of section 13 of the Act, the court saw "no reason to shield from civil liability those corporate officers who are personally involved in or directly responsible for statutorily proscribed activity."[81] Citing its decision in *United States v. American Cyanamid Corp.,*[82] the court noted that remedial environmental statutes were to be given expansive construction and thus the courts could impose civil liability instead of criminal liability as called for in the Rivers and

77. *Sexton Cove,* 526 F.2d at 1300.

78. *Id.* But citing *United States v. Park,* 421 U.S. 658 (1975), the court did note that had the government proceeded with criminal charges against the corporate officer, the result might have been different since the statute specifically provided for criminal sanctions. *Sexton Cove,* 526 F.2d at 1300 n.19. It is apparent that the Fifth Circuit used the canon of statutory construction that criminal statutes are to be strictly construed and, therefore, did not expand the statute to include civil liability. Sutherland Statutory Construction § 59.03 (4th ed. 1974).

79. United States v. Pollution Abatement Servs. of Oswego, Inc. 763 F.2d 133, 135 (2d Cir. 1985).

80. *Id.*

81. *Id.*

82. United States v. American Cyanamid Corp., 480 F.2d 1132 (2d Cir. 1973). Corporation was convicted of violating section 13 of the Rivers and Harbors Act on the grounds that there was a likelihood that the discharged refuse would wash into navigable water. The government did not have to prove that the refuse actually washed into the water. *See* United States v. Standard Oil Co., 384 U.S. 224 (1966).

Harbors Act.[83]

The Second Circuit also noted its recently decided *New York v. Shore Realty Corp.*[84] (Shore Realty) decision, where, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980,[85] it had "held a corporate officer individually liable without piercing the corporate veil."[86] In *Shore Realty,* the corporate officer was held liable for costs incurred by the State of New York for cleanup of a hazardous waste site.[87] The corporate officer was liable for the costs since it was shown that he specifically directed, sanctioned, and actively participated in the violations.

In summary, the Second Circuit based its decision of corporate officer liability in closely-held corporations on several factors. First, considering the statutory language of section 16, "every person" could be construed to include not only individuals but also corporate officers. Second, corporate officer liability was based on the officer's personal involvement in running the company including the control and authority the officer had in running the company's day to day activities. Third, while the Rivers and Harbors Act called for criminal sanctions, the Act could be given an expansive reading allowing civil penalties to be imposed. Finally, the Second Circuit, while holding corporate officers personally liable, stated their holding was closely analogous to *Shore Realty,* in which a corporate officer was held liable while not "piercing the corporate veil."

IV. Analysis

The *Pollution Abatement Services* decision allowed the Second Circuit Court of Appeals to clarify standards of conduct for corporate officers in closely-held corporations who

---

83. *See supra* notes 31-32.

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

85. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985).

86. United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133, 135 (2d Cir. 1985).

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

manage a company that can directly or indirectly affect the health, safety and welfare of the public through violation of environmental laws. However, in doing so, the court broke new ground and held corporate officers personally liable without negating the corporate form. This section will analyze the reasoning the court used and the conduct the court considered in reaching its conclusion.

The Second Circuit stated that the corporate officer liability imposed "was not premised solely on their corporate offices or ownership, but was bottomed on their personal involvement in the firm's activities."[88] Personal involvement was determined by who made the decisions and was responsible for the day to day operations of the company. At PAS, the corporate officers, Pierce and Miller,

> had broad responsibilities because the company was so small; that Miller had been involved in the company's operations and engineering activities since its establishment; that Pierce had become actively involved in PAS operations in 1976; that both state and federal government employees dealt directly with Pierce and Miller and not subordinates on the problems at the PAS site.[89]

Because of their active and intimate knowledge of the operations of the company, the corporate officers should have known about the violations taking place at the company and, due to their authority, could have taken corrective actions as quickly as possible to prevent any environmental damage. Therefore, the Second Circuit established that corporate officers can be held personally liable without negating the corporate form and without explicit statutory authorization from the Rivers and Harbors Act.

As discussed previously, the Fifth Circuit is the only other circuit court to have been presented with the issue of corporate officer liability under the Rivers and Harbors Act.[90]

---

88. *Pollution Abatement Servs.*, 763 F.2d at 135.

89. Brief for the United States at 19, United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133 (2d Cir. 1985).

90. United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976);

That court held that corporate officers could not be held civilly liable but only criminally liable for violations of the Act.[91] This was due to the language of the Rivers and Harbors Act enforcement section which authorizes only criminal liability of corporate officers.[92] However, what is important to extract from this case is how the Fifth Circuit defined "every person" and at what level of personal involvement did the court require in holding a corporate officer personally liable when he had been charged criminally. The Fifth Circuit implied two conclusions: that a corporate officer did come under the definition of "every person," and that there could be enough personal involvement by the corporate officer to warrant holding him personally liable.[93]

The corporate officer involvement that the Fifth Circuit relied on was set forth in the *Sexton Cove* district court opinion.[94] The district court, in its findings of fact, found that the corporate officer had been president and resident agent of Sexton Cove Estates, had authority to bind the company to contracts and that all government correspondence was addressed to him. He had also signed the contract which authorized the work in question on the Sexton Cove Estates.[95] The district court went on to state that, "[t]he defendants . . . conducted these operations for their personal gain, failing to obey the law applicable and ignoring the warnings sent out by the Corps of Engineers." [96] The district court held the corporation and corporate officer liable for the restoration work and its cost, noting that the public was entitled to a broad construction of the Rivers and Harbors Act as interpreted by the Supreme Court in *Wyandotte Transportation Co. v. United States.*[97]

United States v. Joseph G. Moretti, Inc., 526 F.2d 1306 (5th Cir. 1976). *See supra* text accompanying notes 73-79.

91. *Sexton Cove*, 526 F.2d at 1300.

92. *Id.*

93. *Id.* at 1300 n.19.

94. United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602 (S.D. Fla. 1975).

95. *Id.* at 605.

96. *Id.* at 606.

97. *Id.* at 610, 613. *See supra* note 32.

Although the Fifth Circuit held the corporation civilly liable under the Rivers and Harbors Act (following *Wyandotte*), the court refused to hold the corporate officer civilly liable, and reversed the district court decision stating that the statute authorized criminal liability only.[98] Had the Fifth Circuit decided to hold the corporate officer liable, it would have destroyed the limited liability enjoyed by corporate officers and in effect would have "pierced the corporate veil."[99] The Fifth Circuit chose not to do so by stating that there would have to be "allegations in the complaint . . . [and] proof at trial to warrant 'piercing the corporate veil' "[100] in order to hold the corporate officers civilly liable.

In *Pollution Abatement Services*, the Second Circuit held corporate officers civilly liable while claiming that the liability was not based on "piercing the corporate veil," but was instead, "bottomed on their personal involvement in the firm's activities."[101] This is an apparently conflicting result considering that traditional corporate law requires that the corporate form be negated in order to hold corporate officers personally liable.[102] The reasoning is that if a corporate officer is held liable, he has lost his limited liability, and with this loss of limited liability, the corporate veil has been pierced and the corporate form negated.

The Second Circuit stated its test for "piercing the corporate veil" in *New York v. Shore Realty Corp.*[103] The court would negate the corporate form only if "the opposing party shows that the corporate form is being used fraudulently or as a means of carrying on business for personal rather than corporate ends."[104] When determining whether or not to "pierce the corporate veil", the term "fraud" has been interpreted to

---

98. United States v. Sexton Cove Estates, Inc., 526 F.2d 1293, 1300 (5th Cir. 1976).

99. *See supra* text accompanying notes 33-43.

100. *Sexton Cove*, 526 F.2d at 1301.

101. United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133, 135 (2d Cir. 1985).

102. *See supra* text accompanying notes 33-43.

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

104. *Id.* at 1052.

include not only fraud or intent to defraud, or bad faith, but "a showing that injustice may result if the veil is not pierced."[105] Under this interpretation, the fraudulent prong of the Second Circuit's two-prong test would be satisfied since it was clear that an injustice would develop if the corporate officers were not held liable. If the corporate officers in PAS were not held liable, the United States could recover its cleanup costs only from the corporation. However, the corporation had been dissolved for nonpayment of taxes.[106] This left no wrongdoer from which to recover and an injustice would result unless the corporate officers were held liable. If they were held personally liable, their limited liability was destroyed and the corporate form negated. Thus, the Second Circuit did "pierce the corporate veil" when it held the corporate officers liable even though the court stated it had not done so.[107]

The Second Circuit also relied on its holding in *Shore Realty* where it stated, "it is beyond dispute that . . . [the corporate officer] specifically directs, sanctions, and actively participates in Shore's maintenance of the nuisance."[108] But it is important to note that *Shore Realty* involved a Comprehensive Environmental Response, Compensation, and Liability Act of 1980 [109] (CERCLA) violation, not a Rivers and Harbors Act violation. CERCLA specifically authorizes that corporate officers can be held civilly liable while the Rivers and Harbors

105. Barber, *supra* note 3, at 377. *See* Maley v. Carroll, 381 F.2d 147 (5th Cir. 1967); Contractors Heating & Supply v. Scherb, 163 Colo. 584, 432 P.2d 237 (1967); Action Plumbing & Heating Co. v. Jared Builders, Inc., 368 Mich. 626, 118 N.W.2d 956 (1962); Associated Meat Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825, 26 Cal. Rptr. 806 (1962).

106. United States v. Pollution Abatement Servs. of Oswego, Inc., 763 F.2d 133, 134 n.2 (2d Cir. 1985).

107. The court had compared the Rivers and Harbors Act with CERCLA, considering it as an analogous statute, and stated that since it had held "a corporate officer individually liable without piercing the corporate veil" under CERCLA in a previous case, it could do so here by "eschew[ing] a 'cramped reading' of the Rivers and Harbors Act, [and] focusing on its broad remedial purposes." *Id.* at 135.

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

109. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 (1982 & Supp. III 1985).

Act does not.[110] In addition, the corporate officer was given adequate notice from the language of CERCLA that he may specifically be held liable for his actions.[111] Therefore, in *Shore Realty,* the Second Circuit was correct in holding the corporate officer liable without "piercing the corporate veil" under CERCLA. There was adequate notice and Congress specifically stated who will be held liable.[112]

---

110. 42 U.S.C. § 9607 (1982 & Supp. III 1985). The provision states in part:

(a) 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 and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a 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 disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility 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 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 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; and

(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.

111. *Id.*

112. Two district courts, likewise, have held corporate officers liable under CERCLA. In United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO), 579 F. Supp. 823 (W.D. Mo. 1984), a Missouri district court found that the corporate officer "had direct knowledge and supervision" for the disposal of hazardous waste. *Id.* at 847. The court, in reaching its decision for corporate officer liability under CERCLA considered the following factors: that, as a major stockholder in the company and actively participating in the management of the company as vice-president, the corporate officer had the capacity to control the disposal of the hazardous waste, the power to direct the negotiations concerning disposal of hazardous waste, and the capacity to prevent and abate the damage caused by disposal of hazardous waste. *Id.* at 849. One year later, this same court decided United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985). The court again stated that those who take personal responsibility for the operation of hazardous waste disposal may be held liable. However, the court did not make a judgment on the case since there was an

The Second Circuit could have stayed within the boundaries of traditional corporate law by using inadequate capitalization as an additional factor, along with personal involvement, to hold corporate officers liable for the costs of the cleanup. One major problem with PAS was its finances. From the findings of fact by the district court, PAS had inadequate capitalization from the start. The judge stated:

> From listening to the evidence, it is clear to me that from the very start of this Company, it was plagued by a lack of resources, both technical and financial. This deficiency throughout the history of the Company, I think, was the primary cause of the problem that we are meeting today.[113]

From this finding, it is clear that PAS did not meet one of the requirements of a corporation, that of adequate initial capitalization.[114] As stated previously, PAS "was dissolved by proclamation for nonpayment of taxes."[115] This opened up the possibility of ignoring the corporate form and allowing corporate officer liability.[116] Therefore, the corporate officers could be held personally liable due to the inadequate capitalization of PAS.[117] The United States would still be able to recover its costs for cleaning up the PAS site and avoid the injustice "of

---

incomplete factual record available under a summary judgment motion. In United States v. Carolawn Co., 14 E.L.R. 20699 (D.S.C. 1984), the South Carolina district court imposed personal liability under CERCLA on corporate officers who managed the operations of a hazardous waste disposal facility. The court stated, "CERCLA contemplates personal liability of corporate officials . . . who are responsible for the day-to-day operations. . . ." *Id.* at 20700. This reasoning was based on the fact that the individual had control and authority over the facilities at which the hazardous substances were released.

113. United States v. Pollution Abatement Servs. of Oswego, Inc., No. 77 Civ. 271, slip op. at 9 (N.D.N.Y. Aug. 26, 1977).

114. Adequate capitalization has been defined as "a function of the size, nature and reasonably expected hazards and risks of the particular business entity being examined." Note, *Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation*, 45 So. Calif. L. Rev. 823, 840 (1972).

115. *See supra* note 106 and accompanying text.

116. *See supra* text accompanying notes 38, 42.

117. *See also* Comment, *supra* note 41, at 321.

a wrongdoer shifting responsibility for the consequences of his negligence onto his victim."[118]

Premising its holding on inadequate capitalization would have enabled the Second Circuit to hold corporate officers personally liable and still remain within the confines of traditional corporate law without breaking new ground as it did by finding corporate officers liable without "piercing the corporate veil." Holding corporate officers personally liable when not authorized by statute and based only on their personal involvement appears to put closely-held corporations at a disadvantage. By their very nature, closely-held corporations have corporate officers who are involved directly in managing the day to day operations of the firm. Therefore, limited liability for these individuals will be practically non-existent based on the Second Circuit's holding. This is not to suggest that wrongdoers need not be punished but rather that more traditional areas of corporate law should be explored before breaking new ground.

This holding may also allow corporate officers of large corporations to avoid personal liability by insulating themselves with layers of bureaucracy and putting the blame on lower levels of management when violations occur. The district court in *Pollution Abatement Services* alluded to this possibility and cited *United States v. Park*,[119] to indicate that corporate officers in corporations of all sizes should be held accountable and liable equally under the law.

V. Conclusion

In view of the Second Circuit's decision, it may be helpful to summarize guidelines that may be used in holding corporate officers liable, particularly those associated with small, closely-held corporations. To begin with, the courts will look at the characteristics of the company. These include the nature of the company's business, its size, the corporate management structure, relationships between management and board

118. Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967).
119. United States v. Park, 421 U.S. 658 (1975). *See supra* note 59.

of directors, control of subordinates, and the overlapping responsibilities of officers in both managing and directing the company. The corporate officer will be presumed to have a position of authority and control within the corporate structure. With this authority and control will come a duty to act in a responsible manner. Should an unlawful situation develop, the corporate officer must ensure that a workable system or method be in place whereby the corporate officer is informed and can take steps to prevent, abate, stop or correct the situation. It is also important that subordinates are informed of proper working procedures in order to prevent unlawful situations from developing.[120] In summation, authority, knowledge, direction and control by the corporate officer in the corporation will be considered in determining liability under environmental laws.

Amelia M. Wagner

120. The government has attempted to ensure that employees are informed of hazardous chemicals by promulgating a Hazard Communication Standard. *See* 29 C.F.R. § 1910.1200 (1986).