

# Suing Dissolved Corporations Under CERCLA: Does State or Federal Capacity Law Apply?

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Under the law, a corporation is a person.<sup>1</sup> This basic principle recognizes that corporations can incur debts, acquire assets, and enter into contractual relationships.<sup>2</sup> Yet, in enacting one of the nation's most significant pieces of environmental legislation, Congress failed to consider the corporation dissolution. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) which enables suits to be brought against corporations responsible for hazardous waste contamination.<sup>3</sup> Unfortunately, CERCLA makes no provision for when dissolved corporations may be sued. The significance of this oversight is troublesome, especially with regard to CERCLA's broad liability scheme.<sup>4</sup>

In the last decade, attention has turned to the practice of suing dissolved corporations to recover hazardous waste cleanup costs under

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1. See FLETCHER CYC. CORP. § 7 (West 1999).

2. See *id.* § 5.

3. See David C. Clark, Note, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300, 1300 (1990); see also CERCLA § 101, 42 U.S.C. § 9601(21) (2002).

4. See discussed *infra* Part I.

CERCLA.<sup>5</sup> However, in the absence of congressional guidance regarding the practice of suing dissolved corporations under the act, the courts are divided with respect to the standards that govern certain aspects of corporation law.<sup>6</sup> Primarily, the question has been whether the concepts of state or federal law apply to corporation law issues arising in CERCLA liability suits against corporations.<sup>7</sup>

This Comment will focus on the courts' struggle to determine whether state or federal corporation law applies to the question of whether a dissolved corporation may be sued under CERCLA. The significance of this question is apparent when one considers that the answer—assuming that state and federal law differ on the matter—determines at the outset whether a suit against a dissolved corporation may proceed.<sup>8</sup> In examining this question, this Comment will mention other areas of corporation law where the same question has appeared, including the process of piercing the corporate veil and corporate successor liability. This Comment will also highlight the structural similarities between CERCLA and other broad federal statutes that involve corporation law issues. However, this Comment will first begin with an overview of the relevant areas of law. Part I will briefly describe the CERCLA liability scheme. Part II will explore corporation law, especially with respect to the rights and obligations of dissolved corporations. Part III identifies the problem of corporation law issues under CERCLA and Part IV will briefly outline the creation of federal common law. Next, Part V will trace the evolution of the two primary means for analyzing the issue of dissolved corporations in CERCLA suits. Finally, Part VI proposes an analytic framework for addressing the question of whether state or federal common law that incorporates state law applies to suits against dissolved corporations under CERCLA.

## I. CERCLA

Congress enacted CERCLA in 1980 to address the national “problem of abandoned and improperly operated hazardous waste sites in

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5. See generally Robert D. Snook, *The Liability of Dissolved Corporations Under CERCLA: The Importance of Being “Dead and Buried”*, 66 CONN. B.J. 397, 397 (1992).

6. See *id.*

7. See *id.*

8. Some states' laws on corporation law limit the ability of parties to bring suits against dissolved corporations. Connecticut, for example, permits such suits only for a period of three years after the corporation initiates certain procedures necessary for proper dissolution. See *id.* at 404.

the United States.”<sup>9</sup> CERCLA’s enactment was partially in response to a perceived need to provide a remedial scheme to address the nation’s contaminated sites.<sup>10</sup> At that time, estimates placed the number of hazardous waste sites between 4802 and 50,000.<sup>11</sup> By the time Congress acted, several highly publicized environmental catastrophes, most notably the contamination at Love Canal, showcased the necessity of strong federal action.<sup>12</sup>

It should be noted that there existed at the time another federal statute designed to govern hazardous waste.<sup>13</sup> The Resource Conservation and Recovery Act (RCRA) was enacted by Congress in 1976 and was originally intended to encourage the responsible handling of hazardous waste through a “cradle-to-grave” regulatory program.<sup>14</sup> Nevertheless, it became apparent that RCRA alone was not enough to address the nation’s hazardous materials problem. Therefore, Congress responded with a statute that not only aimed to deter irresponsible hazardous material handling, but also provided a means for cleaning up sites that posed significant public health and environmental risks, even if they resulted from past acts.<sup>15</sup>

When Congress enacted CERCLA, it was cognizant of the shortcomings of earlier statutes intended to regulate hazardous waste, such as RCRA.<sup>16</sup> As a result, it included “three mechanisms designed to rectify the regulatory weaknesses of earlier legislation.”<sup>17</sup> First, it provided a means for the federal government, through the Environmental Protection Agency (EPA), to initiate cleanup projects at sites that posed serious danger.<sup>18</sup> This allows the EPA to issue orders and seek injunctions to prevent and clean up dangerous contamination.<sup>19</sup> Second,

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9. See Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 423-24 (1990); see also CERCLA § 101, 42 U.S.C. § 9601 (2002).

10. See Lynda J. Oswald & Cindy A. Schipani, *CERCLA And the “Erosion” of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259, 264 (1992). See generally Joel R. Burcat & Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA*, 50 BUS. LAW. 1273 (1995).

11. See Aronovsky & Fuller, *supra* note 9, at 423. Not surprisingly, the lower estimate originated from industry while the higher estimate came from a government study. See *id.*

12. See Oswald & Schipani, *supra* note 10, at 264.

13. See *id.*

14. See *id.* at 264 n.20; see also RCRA § 1001, 42 U.S.C. § 6901.

15. See De-Wayne Layfield, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 TEX. L. REV. 1237, 1240-41 (1990).

16. See Oswald & Schipani, *supra* note 10, at 264.

17. See *id.* at 265.

18. See *id.*; see also CERCLA § 104(a), 42 U.S.C. § 9604(a).

19. See Oswald & Schipani, *supra* note 10, at 265; see also CERCLA § 104(a), 42 U.S.C. § 9606(a).

Congress armed CERCLA with an aggressive liability scheme to ensure that responsible parties will be held liable for their contamination.<sup>20</sup> A third mechanism, known as Superfund, involves the creation of a trust fund designed to pay for site cleanup where either the responsible party cannot be found, or where it is unable to pay for the cleanup.<sup>21</sup>

CERCLA's ability to address past contamination is derived from its unique liability framework.<sup>22</sup> The liability framework, upon which the rest of CERCLA relies, is anchored in section 107.<sup>23</sup> Section 107 begins by identifying potentially responsible parties.<sup>24</sup> Potentially responsible parties under CERCLA can be organized into four categories: (1) past owners, (2) present owners, (3) generators, and (4) transporters.<sup>25</sup> Once a party is identified as a potentially responsible party under CERCLA, it may have to pay cleanup costs, or it may be required to reimburse the government or another private party for cleanup costs associated with the site.<sup>26</sup> Under this scheme, a party associated with the contamination of a hazardous material site faces the prospect of paying for the cleanup of the site.

As well as assigning liability under CERCLA, Congress also enumerated defenses against liability.<sup>27</sup> These defenses include contamination that results from "an act of God, act of war, or act of a third party."<sup>28</sup> CERCLA does not impose liabilities on lenders who do not participate in the management of the facility.<sup>29</sup> Additionally, CERCLA, pursuant to the 1986 Superfund Amendments and Reauthorization Act, does not necessarily assign liability to purchasers of contaminated property who, after completing a minimum level of due

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20. See Oswald & Schipani, *supra* note 10, at 265.

21. See *id.*; see also CERCLA § 111(a), 42 U.S.C. § 9611(a).

22. See Layfield, *supra* note 15, at 1241-42; see also CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4).

23. See Layfield, *supra* note 15, at 1241-42; see also CERCLA § 107, 42 U.S.C. § 9607.

24. See Layfield, *supra* note 15, at 1241-42; see also CERCLA § 107(a), 42 U.S.C. § 9607(a).

25. See Layfield, *supra* note 15, at 1241-42; see also CERCLA § 107(a), 42 U.S.C. § 9607(a).

26. See Layfield, *supra* note 15, at 1241-42; see also CERCLA § 107(a), 42 U.S.C. § 9607(a).

27. See Bradford C. Mank, *Should State or Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157, 1162 (2002).

28. *Id.* at 1163; accord CERCLA § 107(b), 42 U.S.C. § 9607(b).

29. See Mank, *supra* note 27, at 1163; see also CERCLA § 101(20)(e), 42 U.S.C. § 9601(20)(E).

diligence, purchase the property without knowledge of its contamination.<sup>30</sup>

The CERCLA liability scheme is retroactive in nature because it assigns liability to potentially responsible parties who may have contaminated a site prior to the enactment of CERCLA.<sup>31</sup> Furthermore, the courts have interpreted CERCLA to impose strict, joint, and several liability upon potentially responsible parties.<sup>32</sup> And with the ability of one potentially responsible party to seek payment from other responsible parties for a portion of the cleanup costs, CERCLA provides for contribution.<sup>33</sup>

As already stated, CERCLA's definition of "persons" includes corporations.<sup>34</sup> In some cases, the courts have assigned liability under CERCLA to the shareholder of a responsible corporation. Although this topic will be discussed briefly, it is worth mentioning that the courts have assigned liability to a corporation's shareholders directly, and by piercing the corporate veil under the traditional corporation law approach.<sup>35</sup>

## II. CORPORATION LAW

Traditionally, corporations have been state-registered entities.<sup>36</sup> Although they may conduct business in several states and have shareholders in more than one state, corporations are incorporated in a particular state of their choosing.<sup>37</sup> This decision is based on a myriad of factors, including legal benefits, tax considerations, and matters of convenience.<sup>38</sup>

Incorporation in a particular state invariably subjects that corporation to the laws of that state, especially in matters relating to the corporation's governance and internal workings.<sup>39</sup> This, of course, does not protect the corporation from exposure to the laws of the states in

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30. See Oswald & Schipani, *supra* note 10, at 266-67; see also CERCLA § 101(35), 42 U.S.C. § 9601(35).

31. See generally *United States v. Olin Corp.*, 107 F.3d 1056 (11th Cir. 1997).

32. See Oswald & Schipani, *supra* note 10, at 265.

33. See CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1); *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1132 (10th Cir. 2002).

34. See Oswald & Schipani, *supra* note 10, at 269; see also CERCLA § 101(21), 42 U.S.C. § 9601(21) (providing, "[t]he 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").

35. See *United States v. Bestfoods*, 524 U.S. 51, 58 (1998).

36. See FLETCHER, *supra* note 1, § 4054.

37. See FRANKLIN A. GERVETZ, CORPORATION LAW § 1.2.2 (2000).

38. See *id.*

39. See FLETCHER, *supra* note 1, § 4054; see also GERVETZ, *supra* note 37, § 1.2.

which it conducts business.<sup>40</sup> But for matters relating to the corporate structure, courts have long held that the law of the state of incorporation applies.<sup>41</sup> In fact, the Federal Rules of Civil Procedure recognize that when the question of whether a corporation may be sued is presented in federal court, the court shall look to the laws of the state in which the corporation has been incorporated.<sup>42</sup>

Corporations, at the will of its shareholders and directors, may dissolve at any time.<sup>43</sup> According to the Model Business Corporation Act of 1984 (MBCA), a corporation may dissolve after a shareholder vote on a proposal by the board of directors.<sup>44</sup> The effect of a corporation's dissolution is that it must cease its business activity and make arrangements with respect to the division of its remaining assets.<sup>45</sup> In other words, "[d]issolution terminates the capacity of a corporation to act as such and necessitates the orderly winding up of its affairs and liquidation of its assets."<sup>46</sup>

Under the traditional common law, once a corporation was dissolved, its debts were erased and its former shareholders were protected from the dissolved corporation's creditors.<sup>47</sup> However, with the proliferation of corporations, commentators realized the impracticality of the traditional common law approach.<sup>48</sup> Various schemes were devised to distribute the remaining assets of the dissolved corporation, including trusts.<sup>49</sup> The modern approach has been to balance the need to provide limited protection to the shareholders while enabling suits against the corporation for a limited time after dissolution.<sup>50</sup>

One view of balancing the interests of shareholders with those of parties bringing suit can be found in the MBCA.<sup>51</sup> In relevant part, the MBCA states, "[d]issolution of corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name."<sup>52</sup> The states, however, have adopted a wide variety of

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40. See GERVETZ, *supra* note 37, § 1.2.

41. See *id.*

42. See FED. R. CIV. P. 17(b), which in relevant part states, "[t]he capacity of a corporation to sue or to be sued shall be determined by the law under which it was organized."

43. FLETCHER, *supra* note 1, § 7971.

44. MODEL BUS. CORP. ACT § 14.02 (2001).

45. Keith H. Berk & Steven M. Scholl, *Closely Held Corporations: Corporate Aspects of Dissolution*, 1996 ILL. INST. FOR CONTINUING LEGAL EDUC. 402.

46. *Id.*

47. See Snook, *supra* note 5, at 402.

48. See *id.*

49. See *id.* at 402-03.

50. See *id.*

51. See *id.* at 403.

52. MODEL BUS. CORP. ACT § 14.05(b) (2001); see Snook, *supra* note 5, at 403.

statutes pertaining to whether dissolved corporations may be sued.<sup>53</sup> When such suits are permitted, the states have commonly specified time periods during which a suit may be brought. The Delaware General Corporation Law, for example, states:

With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporations shall, solely for the purpose of such action, suit or proceeding be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.<sup>54</sup>

Reviewing various state statutes pertaining to dissolved corporations' capacity to be sued reveals that the differences are sufficient to cause significantly different outcomes in different states for CERCLA suits against dissolved corporations.<sup>55</sup> Under state law, the result is that dissolved corporations in some states will be less exposed to CERCLA suits than those in states with fewer restrictions. This is because, in a state where the period during which a corporation may be sued after its dissolution is limited, a dissolved corporation may enjoy greater protection against suit than it would in a state without such a restriction. This could lead to a type of forum shopping.

### III. CORPORATION LAW ISSUES UNDER CERCLA

In a practice that is becoming increasingly common, parties are suing dissolved corporations in order to receive compensation for cleanup costs, or to ensure that responsible parties pay their fair share under CERCLA's joint and several liability scheme.<sup>56</sup> Due to a jurisdiction and venue prescribing provision in the CERCLA statute, all suits brought under the statute must be filed in the appropriate federal

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53. See Snook, *supra* note 5, at 404 (describing the Connecticut statute applicable to suits against dissolved corporations, Snook points out that Connecticut General Statutes § 33-378 permits suits against dissolved corporations for remedies or claims arising at or prior to dissolution, and that suits brought against a dissolved corporation must be initiated within three years of the corporation's dissolution of the corporation given proper notice).

54. DEL. CODE ANN. tit. 8 § 278 (2001).

55. See FLETCHER, *supra* note 1, § 8142.

56. See Oswald & Schipani, *supra* note 10, at 265. Note also the reality that under CERCLA, which is interpreted to assign liability retroactively, it is essential that dissolved corporations be available for suit if responsible parties are to share the costs equitably. See, e.g., *California v. Randtron*, 69 F. Supp. 2d. 1264, 1266 (E.D. Cal. 1999).

district court.<sup>57</sup> Among the difficulties facing these federal courts, the question of whether federal law preempts state law—as made applicable through Federal Rules of Civil Procedure 17(b)—has been especially troublesome in the area of corporation law.<sup>58</sup> Similar questions, of course, arise even when CERCLA is quiet on a particular question.<sup>59</sup>

Of these questions, issues pertaining to the application of corporation law principles have been particularly irksome. CERCLA, which was enacted by Congress to address the nationwide problem of improperly disposed hazardous waste, is largely silent on issues pertaining to corporation law. Although this may seem innocuous, the fact remains that an overwhelming percentage of CERCLA cases involve corporate defendants.<sup>60</sup> Typical issues of corporation law that occur frequently include problems of successor liability, piercing the corporate veil, and suits against dissolved corporations.<sup>61</sup>

#### IV. CERCLA AND THE FEDERAL COMMON LAW

In the absence of clear legislative intent on a particular issue relating to a federal statute, the courts have limited authority to create federal common law. Some commentators argue that Congress intended the “courts to apply federal common law principles to fill gaps in the statute.”<sup>62</sup> Nevertheless, there is considerable disagreement over whether Congress really intended federal common law to serve as the gap filler.<sup>63</sup>

Due to the fact that Congress did not enunciate whether it intended federal common law to apply to CERCLA suits, the courts have grappled with the choice of applying state laws or creating uniform federal rules.<sup>64</sup>

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57. See CERCLA § 113(a), 42 U.S.C. § 9613(a) (2002) (stating that appeals under CERCLA must be brought before the United States Court of Appeals of the District of Columbia Circuit); CERCLA § 113(b), 42 U.S.C. § 9613(b) (“[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principle office.”)

58. See Mank, *supra* note 27, at 1159.

59. See *id.*

60. See *id.* at 1158.

61. See generally Aronovsky & Fuller, *supra* note 9; Clark, *supra* note 3; Snook, *supra* note 5.

62. Mank, *supra* note 27, at 1170-71.

63. See *id.* at 1170. “Because CERCLA’s text and legislative history is poorly written and contradictory, there is considerable uncertainty about whether and when Congress intended courts to use common law doctrines to interpret the statute’s meaning.” *Id.*

64. See David E. Dopf, *Federal Common Law or State Law?: The Ninth Circuit Takes on Successor Liability Under CERCLA in Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 10 VILL. ENVTL. L.J. 171, 176-77 (1999).

In making this determination, courts consider the steps set forth by the United States Supreme Court in *United States v. Kimbell Foods, Inc.*<sup>65</sup> The Court, in *Kimbell Foods*, recognized that the existence of a federal statute alone does not necessarily require the formation of a uniform federal rule by stating, “[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules.”<sup>66</sup> Instead, the Court reasoned that various factors must be considered in making such a determination.<sup>67</sup> Thus, the Court developed a three-part test to determine whether courts should create a federal common law standard.<sup>68</sup> The first step considers whether the issue in question requires a nationally uniform body of law.<sup>69</sup> The second step asks whether existing state law would frustrate the policy objectives of the federal program.<sup>70</sup> And finally, the third step requires the court to consider whether a federal rule would interfere with existing commercial relationships based on state law.<sup>71</sup>

Courts applying the *Kimbell Foods* three-step inquiry have concentrated primarily on the first two factors.<sup>72</sup> In fact, some commentators have expressed skepticism towards the third *Kimbell Foods* step, where a court’s consideration of whether to create a federal rule should include an analysis of whether the federal rule would interfere with existing commercial relationships. Their argument suggests that the very nature of CERCLA and Congress’s intention to impose restrictions on the improper disposal of hazardous waste demonstrate that CERCLA’s drafters were not concerned with its effects on business relationships.<sup>73</sup> Whether the courts are even applying the third step in *Kimbell Foods* is doubtful.<sup>74</sup>

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65. See 440 U.S. 715 (1979).

66. *Id.* at 727-28.

67. See *id.* at 728-29.

68. See Mank, *supra* note 27, at 1170.

69. See *id.*

70. See *id.*

71. See *id.*

72. See *id.*

73. See Clark, *supra* note 3, at 1313.

Even if a uniform federal rule of successor liability had a greater effect on the business community than expected, CERCLA’s legislative history reveals that Congress was far more concerned with the substantial threats to human health and the environment posed by the national hazardous waste disposal problem than it was with disrupting commercial relationships based on state law.

*Id.*

74. See Mank, *supra* note 27, at 1170. “[C]ourts favoring the creation of federal common law have focused on the first two Kimbell factors, but have often ignored the third prong

## V. THE EVOLUTION OF CERCLA SUITS AGAINST DISSOLVED CORPORATIONS

One of the areas of corporation law that presents an important question relating to the application of either federal or state corporation law relates to whether dissolved corporations may be sued under CERCLA. Although the topic has received less commentary by scholars than the issue of successor liability, a growing body of case law has emerged regarding the question. This section will trace the evolution of the cases dealing with this question.

The first instance where an appellate court addressed this was in *Levin Metals v. Parr-Richmond Terminal Co.*, where Levin attempted to bring a suit for damages and declaratory relief under CERCLA against Parr-Richmond.<sup>75</sup> Levin was the current owner of real property formerly owned by Parr-Richmond, a dissolved corporation under California law that used the property for the “manufacture, storage, and distribution of fertilizers, herbicides, pesticides, and scrap metals, result[ing] in the release of hazardous substances which contaminated the property and surrounding water.”<sup>76</sup> Parr-Richmond was voluntarily dissolved in 1971.<sup>77</sup> Levin appealed against a grant of summary judgment in Parr-Richmond’s favor for failure to state a claim.<sup>78</sup> Levin argued that “the district court erred in applying California law pursuant to [Rule 17(b)] and that CERCLA preempts California law.”<sup>79</sup> Among Levin’s contentions was the argument that the suit against Parr-Richmond was not barred by California statute because Rule 17(b)—cited by the district court for why it referred to California law—should not be applied in this circumstance.<sup>80</sup> Levin asserted that Rule 17(b)’s application would thwart the purpose and effectiveness of CERCLA because it would direct the courts to state law, which, at times, would restrict a party bringing suit under the statute.<sup>81</sup> Referring to the language of the statute, Levin urged that CERCLA was intended to impose liability upon parties regardless of other laws.<sup>82</sup> Finally, Levin argued that the application of California’s

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regarding whether adopting a federal common law approach will disrupt existing commercial relationships based on state law.” *Id.*

75. See 817 F.2d 1448, 1449 (9th Cir. 1987).

76. *Id.*

77. See *id.*

78. See *id.*

79. *Id.* at 1449-50.

80. See *id.* at 1451.

81. See *id.*

82. See *id.*

restrictive statutes, through the gateway of Rule 17(b), would defeat the purpose of a statute specifically designed to address past contamination.<sup>83</sup>

Despite Levin's arguments, the United States Court of Appeals for the Ninth Circuit disagreed, affirming the district court's decision.<sup>84</sup> In an examination of the argument against the application of state law pursuant to Rule 17(b), the court first characterized the applicable California law as determining a dissolved corporation's *capacity* to be sued.<sup>85</sup> CERCLA, in the court's opinion, should be characterized as dealing with *liability*.<sup>86</sup> Upon this characterization, the court affirmed on the basis that CERCLA did not preempt the state statute dealing with a dissolved corporation's capacity to be sued.<sup>87</sup> The court also warned that the application of Levin's argument "would prevent courts from looking to state law to determine whether a dissolved corporation could be sued in any case involving a federal cause of action."<sup>88</sup>

One of the first published district court cases to consider whether Rule 17(b) is preempted by CERCLA was *United States v. Sharon Steel Corp.*, where the United States District Court of Utah discussed at length its holding that CERCLA preempts state laws pertaining to a dissolved corporation's capacity to be sued.<sup>89</sup> In this case, the EPA sued the current and former owners of a contaminated site for cleanup costs.<sup>90</sup> One of the former owners, UV Industries Inc. (UV), had dissolved shortly after the sale to Sharon Steel, posing before the court the question whether UV could be sued under CERCLA even though the potentially applicable state law may have barred the suit.<sup>91</sup> Although there was a question regarding whether Maine or Utah corporation law governed if Rule 17(b) was found applicable, the court nonetheless held that Rule 17(b) was preempted by CERCLA.<sup>92</sup> The court stated, "[C]ongress has plenary power to supersede any of the Federal Rules of Civil Procedure by statute."<sup>93</sup> The court reasoned that federal statutes must be harmonized with the existing law, but when it becomes apparent that Congress intended to supersede an existing rule, the courts must choose the statute

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83. *See id.*

84. *See id.* at 1448.

85. *See id.* at 1451.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See* 681 F. Supp. 1492, 1498 (D. Utah 1987).

90. *See id.* at 1493.

91. *See id.*

92. *See id.* at 1494-95.

93. *Id.* at 1495.

over the existing law.<sup>94</sup> Referring to the purposes of CERCLA, the court reasoned that Congress intended for CERCLA to supersede existing rules, stating:

[G]iven CERCLA's broad remedial purpose and Congress's expressed intent that those responsible for hazardous waste sites bear the cost of cleaning them up, the court concludes that CERCLA's language—"any person" who owned or operated a hazardous waste disposal site "shall be liable for" cleanup costs "[n]otwithstanding any other provision or rule of law"—clearly expresses Congress's intent to supersede any rule that would otherwise relive a responsible party from liability.<sup>95</sup>

The court also discussed the importance of construing CERCLA broadly in order for its purposes to be realized.<sup>96</sup> Given this analysis, the court adopted the view that suits against dissolved corporations under CERCLA were not precluded by state statutes made applicable under Rule 17(b) when the state statute would prevent a CERCLA suit from going forward.<sup>97</sup>

*Levin* and *Sharon Steel* represent the foundation of the case law that has emerged regarding the question of whether CERCLA preempts state law pursuant to Rule 17(b). Courts considering the question of capacity under CERCLA generally use *Levin* or *Sharon Steel* as the foundation for their decision.

In *United States v. Distler*, the United States District Court for the Western District of Kentucky addressed the question of whether a state law limiting the capacity of dissolved corporations was preempted by CERCLA.<sup>98</sup> In *Distler*, the federal government filed a CERCLA suit against the Angex Corporation, a dissolved Ohio corporation.<sup>99</sup> The government's complaint alleged that Angell Manufacturing Company, which later changed its name to Angex Corporation, improperly disposed of hazardous waste in violation of CERCLA.<sup>100</sup> At the time of filing, Angex had been dissolved for nine years.<sup>101</sup> Although it dismissed the suit against Angex, the district court voiced its acceptance for the reasoning of the *Sharon Steel* analysis.<sup>102</sup> The basis of its decision to

94. See *id.* (citing *United States v. Gustin-Bacon Div., Certain-Teed Prods. Corp.*, 426 F.2d 539, 542 (10th Cir. 1970)).

95. *Id.* at 1496 (citing CERCLA text).

96. *Id.*; see Troy A. Stremming, *Corporate Reincarnation: CERCLA Liability After Corporate Dissolution*, 33 WASHBURN L.J. 874, 891 (1994).

97. See *Sharon Steel*, 681 F. Supp. at 1496.

98. See 741 F. Supp. 643, 645 (W.D. Ky. 1990).

99. See *id.* at 644.

100. See *id.*

101. See *id.*

102. See *id.* at 646.

dismiss was the fact that Angex had been dissolved for nine years, thereby making the corporation “dead and buried.”<sup>103</sup> Distinguishing *Sharon Steel*, the court reasoned that the dissolved corporation in *Sharon Steel* was in the process of winding up its business.<sup>104</sup> In the words of the court, “[a]lthough there is abundant authority for CERCLA’s retroactive application, there is no precedent for imposing liability on a dissolved corporation nine years after it has wound down and distributed its assets.”<sup>105</sup>

One of the few cases to follow *Levin* is another case from the Ninth Circuit, *Louisiana-Pacific Corp. v. ASARCO, Inc.*<sup>106</sup> In this 1993 CERCLA case, ASARCO appealed the dismissal of a third-party complaint against Industrial Metal Products, Inc. (IMP), a dissolved Washington corporation.<sup>107</sup> Apparently, the complaint against IMP was dismissed on the reasoning that, although the suit was commenced within CERCLA’s statute of limitations, it was brought too late under the Washington statute of limitations applicable to dissolved corporations.<sup>108</sup> Relying primarily on *Sharon Steel*, ASARCO pleaded that CERCLA preempts Washington state law.<sup>109</sup> Nevertheless, the court rejected ASARCO’s argument, stating that because *Sharon Steel* and several of its successor cases had rejected *Levin*, it was not permitted to rely on *Sharon Steel*.<sup>110</sup>

Another case following the *Levin* analysis is *Columbia River Service Corp. v. Gilman*, which was heard in the United States District Court for the Western District of Washington.<sup>111</sup> In this case, Columbia River sued Yankee Country Flight Center Inc. (Yankee) under CERCLA to recover cleanup costs associated with contamination of a site that Columbia River purchased from Yankee.<sup>112</sup> In considering the defendant’s motion for summary judgment, the district court addressed the issue of whether CERCLA preempted Washington state corporation

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103. *Id.*

104. *See id.*

105. *Id.* at 647.

106. *See* 5 F.3d 431 (9th Cir. 1993).

107. *See id.* at 433.

108. *See id.* Under then existing section 23A.28.250 of the Revised Code of Washington, the statute of limitations for dissolved corporations extended only for two years. CERCLA, on the other hand, provides for a three-year statute of limitations (although wholly unrelated to dissolution) at CERCLA § 113(g), 42 U.S.C. § 9613(g).

109. *See ASARCO*, 5 F.3d at 434 n.4.

110. *See id.*

111. *See* 751 F. Supp. 1448, 1453 (W.D. Wash. 1990).

112. *See id.* at 1449.

law applicable to a dissolved corporation's capacity to be sued.<sup>113</sup> Like the previous cases, the defendant argued that Rule 17(b) directed the court to consider the dissolved corporation's capacity to be sued under the law in which it was incorporated, the Washington Business Corporation Act.<sup>114</sup>

In a complete analysis of the available case law on the issue, the Washington district court reviewed the reasoning of *Levin* and *Sharon Steel*, as well as the other cases that had adopted the reasoning of those decisions.<sup>115</sup> Like the majority in *Sharon Steel*, the *Columbia River* court discussed the policy rationale for federal preemption where the application of state rules would inhibit the purpose of the federal statute.<sup>116</sup> The court also looked to the language of CERCLA to determine that Congress must have intended CERCLA to preempt state law.<sup>117</sup> In fact, the *Columbia River* court stated:

It appears that a better rule is that expressed by the District Courts of Utah [*Sharon Steel*] and Kentucky [*Distler*]. Based on the law of preemption, the statutory language of CERCLA, and the legislative intent of Congress in passing CERCLA, CERCLA should preempt state capacity statutes which are in conflict with the policies and goals of the federal law.<sup>118</sup>

Nevertheless, the court in *Columbia River* followed *Levin* and *Louisiana-Pacific* because *Levin* was precedent, and therefore controlling on the issue of federal preemption.<sup>119</sup>

More recent decisions indicate that the courts are still following either the *Levin* or *Sharon Steel* analysis. One recent example is *Town of Oyster Bay v. Occidental Chemical Corp.*, where the issue of suing dissolved corporations under CERCLA was addressed by the United States District Court for the Eastern District of New York.<sup>120</sup> In this case, the town sued several parties to recover cleanup costs associated with a contaminated landfill operated by the town, but allegedly used by the defendants to dispose hazardous waste.<sup>121</sup> Two of the defendants argued that their status as dissolved corporations meant that their capacity to be

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113. *See id.* at 1450.

114. *See id.* (citing the Washington Business Corporation Act at § 23B.14.340 of the Revised Code of Washington (2003), the court noted that a corporation could only be sued for two years following its dissolution).

115. *See id.* at 1450-52.

116. *See id.*

117. *See id.* at 1451 (citing *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1496 (D. Utah 1987)).

118. *Id.* at 1453.

119. *See id.*

120. *See* 987 F. Supp. 182, 198 (E.D.N.Y. 1997).

121. *See id.* at 188.

sued under CERCLA rested upon the applicable state corporation law.<sup>122</sup> In considering whether to apply Rule 17(b), the court recognized that among the “courts that have considered the applicability of Rule 17(b) in the CERCLA arena, a split has emerged between the Seventh and Ninth Circuit Courts of Appeal on one hand, and numerous district courts from the remaining circuits on the other.”<sup>123</sup> Upon reviewing the *Levin* and *Sharon Steel* line of decisions, the district court concluded that Rule 17(b) should not be applied in this CERCLA suit.<sup>124</sup> The court explained its reason for adopting the *Sharon Steel* analysis stating, “[the] conclusion that corporate capacity should be determined on a state-by-state basis undermines the logic that exposure to CERCLA liability should be uniform throughout the country and not dependent upon variations of the states’ corporate capacity laws.”<sup>125</sup> Apparently, the court’s interest in promoting uniformity with respect to the ability to bring suit under CERCLA was one of its primary concerns.

#### VI. A NEW APPROACH

*Sharon Steel* and *Levin* mark the common starting point for courts addressing the issue of whether CERCLA preempts state law on dissolved corporations’ capacity to be sued. Overwhelmingly, the courts have adopted the *Sharon Steel* approach.<sup>126</sup> Nevertheless, “[t]he presence of two lines of authority regarding this issue presents obvious difficulties for practitioners.”<sup>127</sup> This section, however, raises the argument that the preemption issue has already been decided by two United States Supreme Court cases arising under another broad federal statute similar to CERCLA in scope. These two overlooked—at least as far as CERCLA is concerned—cases provide the Supreme Court’s approach to the preemption issue.

In 1997, the Ninth Circuit, in *Atchison, Topeka, & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, addressed the issue of successor liability under CERCLA.<sup>128</sup> In answering the question of whether state or federal

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122. *See id.* at 198-99.

123. *Id.* at 199.

124. *See id.*

125. *Id.* at 200.

126. *See* Stremming, *supra* note 96, at 891.

127. Snook, *supra* note 5, at 421.

128. *See* *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 361 (9th Cir. 1998); *Atchison, Topeka, & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1298 (9th Cir. 1997). Upon rehearing, the Ninth Circuit amended its original opinion because it reasoned that the applicable state and federal laws would lead to the same outcome, thereby eliminating the need for judicial determination of the preemption issue. *See Atchison*, 159 F.3d at 364. Notwithstanding the amendment to the original opinion, the court’s initial analysis of the

corporation law should govern the issue of corporate successor liability, the Ninth Circuit in *Atchison* analyzed the relationship between complex federal statutory programs and state corporation law.<sup>129</sup> In this case, *Atchison* brought suit against Brown & Bryant and PureGro under CERCLA seeking compensation associated with cleanup costs of a site allegedly contaminated by Brown & Bryant.<sup>130</sup> In bringing suit against PureGro, a competitor of Brown & Bryant, *Atchison* argued that because PureGro had purchased nearly all of Brown & Bryant's assets, it was a successor-in-interest to Brown & Bryant, and therefore liable under CERCLA for contribution costs associated with *Atchison's* cleanup expenses.<sup>131</sup> At issue was whether the court should apply California law or federal common law to determine liability in this CERCLA suit.<sup>132</sup> *Atchison* argued that the need for uniformity should direct the court to use federal common law to resolve the issue.<sup>133</sup> Furthermore, *Atchison* argued that the broad scope of CERCLA might be hampered by restrictive state laws.<sup>134</sup>

Nevertheless, the court rejected *Atchison's* argument.<sup>135</sup> The court was persuaded by PureGro's argument that the decision of the court was controlled by two Supreme Court decisions, *O'Melveny & Myers v. FDIC* and *Atherton v. FDIC*.<sup>136</sup> In order to explain the relevance of analyzing two cases brought under the Financial Institutions Reform, Recovery, and Enforcement Act the court stated:

Although *O'Melveny* and *Atherton* involve a different federal statute, the underlying analysis is applicable in any situation in which it is necessary to determine whether state law should be supplanted by judicially created federal rules of decision. These cases counsel that the need for such special federal rules will be only in "few and restricted" instances.<sup>137</sup>

Citing *O'Melveny*, the *Atchison* court explained that when considering matters "dealing with a 'comprehensive and detailed' federal statutory regulation, a court should instead presume that matters left

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relationship between CERCLA and state corporation law is persuasive in the sense that its conclusion is premised on a sound interpretation of Supreme Court precedent. Furthermore, the amended opinion reiterates the reasoning of the court in its original opinion.

129. See *Atchison*, 132 F.3d at 1295.

130. See *id.* at 1297.

131. See *id.*

132. See *id.* at 1299.

133. See *id.*

134. See *id.*

135. See *id.* at 1302.

136. See *id.* at 1299; see also *Atherton v. FDIC*, 519 U.S. 213, 213 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 79 (1994).

137. *Atchison*, 132 F.3d at 1299.

unaddressed in such a scheme are subject to state law.”<sup>138</sup> The court also cited *Atherton* when it explained that congressional action should be viewed within the entire framework of state statutes.<sup>139</sup> The court then, using the three-factor test gleaned from *Kimbell Foods*, rejected *Atchison*’s argument that there was a need for the application of a federal rule to supersede the state rule.<sup>140</sup>

The relevance of the Supreme Court’s reasoning in *Atherton* and *O’Melveny* to the immediate issue of the capacity of dissolved corporations to be sued was made apparent when the *Atchison* court said, “[t]he formation of corporations and dissolution and continuing liability of corporations are traditional areas of state law.”<sup>141</sup> This statement, along with the court’s discussion of why it would not apply federal common law, demonstrates that the courts have been analyzing the issue of dissolved corporations under CERCLA incorrectly. To be fair, the benefit of the Supreme Court’s opinions in *Atherton* and *O’Melveny* was not available when the *Levin* and *Sharon Steel* courts first addressed the issue. Nevertheless, the analysis presented provides the most straightforward and persuasive method of addressing not only the issue of suing dissolved corporations under CERCLA, but possibly all questions of corporation law that arise under broad federal statutes.

Another way of viewing the *Atherton* and *O’Melveny* analysis is to view it in terms of federal common law. In 1937, Rule 17(b) was adopted in an effort to codify the federal common law principle that the law under which a corporation is incorporated should also dictate its capacity to be sued once it is dissolved.<sup>142</sup> The rule was a codification of the principle set forth in *Oklahoma Natural Gas Co. v. State of Oklahoma*, where the Supreme Court in 1927 addressed the issue of capacity.<sup>143</sup> The court stated that the capacity of a dissolved corporation to be sued “concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.”<sup>144</sup> The codification of the rule further strengthens the idea that, where Congress is silent on a subject, the courts must defer to federal common law. In this case, federal common law, as codified in Rule 17(b), directs the courts to look at state law when considering a dissolved corporation’s capacity to be sued.

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138. *Id.* at 1300.

139. *See id.*

140. *See id.* at 1299; *see also* United States v. Kimbell Foods, 440 U.S. 715, 728 (1979).

141. *Atchison*, 132 F.3d at 1300.

142. *See* Burcat & Wilson, *supra* note 10, at 1281-82.

143. *See* 273 U.S. 257, 259-61 (1927).

144. *Id.* at 260.

The *Atherton* and *O'Melveny* decisions provide an analogous situation to demonstrate that, in the absence of a legislative directive, the courts should defer to state law. The Supreme Court decisions notwithstanding, the issues surrounding federal common law also inform us that there is no need, or justification, for the courts to create common law regarding the capacity question. To begin with, existing federal common law, codified at Rule 17(b), directs courts to look at state law. Furthermore, the three-step *Kimbell Foods* test indicates that courts would be permitted to create federal common law on this circumstance alone. The Supreme Court in *Atherton* seems to suggest that a perceived desire for uniformity is not sufficient to demonstrate its need, and therefore the creation of federal common law to facilitate such uniformity.<sup>145</sup>

Although, in the court's opinion, the application of the analysis would possibly lead to the same result as in the *Levin* analysis, the Supreme Court's informed analysis nevertheless sidesteps a potential obstacle facing a court considering *Levin*. As noted earlier, the *Levin* court dismissed the argument that Rule 17(b) was preempted by CERCLA on the grounds that the latter was designed to address *liability* and the former was solely related to *capacity* to be sued.<sup>146</sup> This reasoning allowed the *Levin* court to avoid a discussion of whether CERCLA preempted Rule 17(b) and state corporation law. As a result, subsequent courts were not provided with a comprehensive analysis and discussion of why they should apply Rule 17(b) and state law. In fact, some courts have even noted the impracticality of distinguishing between capacity and liability provisions on the basis of the fact that they are so interconnected. In its opinion in *Distler*, the Kentucky district court stated

[t]he distinction the *Levin Metals* court relied on between statutes limiting liability and those defining capacity to be sued is a distinction without a difference. Every statute limiting liability defines, at least in part, one's capacity to be sued, and every statute limiting one's capacity to be sued also limits liability.<sup>147</sup>

The application of the Supreme Court's reasoning in *O'Melveny* and *Atherton* to the issue of whether state corporation law is preempted by federal law resolves a great deal of uncertainty currently experienced

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145. See *Atherton v. FDIC*, 519 U.S. 213, 220 (1997). "To invoke the concept of 'uniformity' is not to prove its need." *Id.*

146. See 817 F.2d 1448, 1451 (9th Cir. 1987).

147. See 741 F. Supp. 643, 646 (W.D. Ky. 1990) (citing *United States v. Sharon Steel*, 681 F. Supp. 1492 (D. Utah 1987)).

by practitioners.<sup>148</sup> Currently, practitioners are left with the uncertainty of whether their circuit will apply the reasoning in *Levin* or the reasoning in *Sharon Steel*. This analysis, however, resolves the question definitively. Furthermore, its application would alert Congress that all future federal statutes involving corporation law will be subject to laws of the state in which the corporation was incorporated. If federal lawmakers decide that these state laws are either too restrictive, or are in any other way detrimental to the successful implementation of the federal program, they should enumerate where, and how, federal rules of decision will preempt state corporation law.

## VII. CONCLUSION

The purpose of this Comment is to identify an informed method of the Supreme Court for analyzing the question of whether federal law preempts state corporation law in a suit brought under CERCLA. By studying the reasoning used by the Supreme Court in *Atherton* and *O'Melveny*, it becomes apparent that the same reasoning is applicable not only to the issue of successor liability under CERCLA, but also to the issue of suing dissolved corporations under CERCLA. Furthermore, existing federal common law, as codified in Rule 17(b), directs the courts to look at state law of capacity. If a court were to do otherwise, it would not only ignore the Supreme Court's analysis, but it would also disrupt existing federal common law. After all, the strong advocate of the federal common law approach to determining a dissolved corporation's capacity to be sued would eventually reach the conclusion that state capacity law is determinative. Either way you look at it, state law determines whether a dissolved corporation may be sued in that particular state.

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148. See generally Snook, *supra* note 5 (discussing the various means by which courts analyze the issue of what law applies to whether a dissolved corporation may be sued under CERCLA).