1989

Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law

Audrey J. Anderson
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Business Organizations Law Commons](#), [Common Law Commons](#), [Environmental Law Commons](#), [State and Local Government Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Audrey J. Anderson, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131 (1989).

Available at: <https://repository.law.umich.edu/mlr/vol88/iss1/7>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")¹ was enacted by Congress in 1980 to provide for the cleanup of hazardous substances that have been released into the environment. CERCLA imposes liability for cleanup costs on those responsible for generating, transporting, or disposing of such hazardous substances.² CERCLA also established a "Superfund" financed jointly by the federal government and the petrochemical industry to compensate the federal and state governments for cleanup of hazardous substances when responsible parties cannot be found or are unable to finance cleanup themselves.³ In passing CERCLA, Congress sought to minimize the public health risk posed by hazardous wastes through imposing liability for cleanup costs on those who were responsible for, or have benefited from, careless disposal of hazardous substances.⁴

Occasionally, a corporation deemed a responsible party under CERCLA will have dissolved sometime before a CERCLA claim was filed against it. Typically, state law prevents a corporation from suing or being sued more than two years after dissolution.⁵ If dissolution stands as a bar to imposing liability under CERCLA, however, many responsible parties will be able to escape liability simply by dissolving.

This Note discusses CERCLA's preemption of state corporate dissolution law. Although CERCLA contains a preemption clause intended to specify CERCLA's relationship with other laws, this clause

1. 42 U.S.C. §§ 9601-75 (1982 & Supp. V 1987). In 1986, Congress passed the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 10, 26 & 42 U.S.C.). SARA made some substantive changes to CERCLA and extended it for five years.

2. CERCLA § 107(a), 42 U.S.C. § 9607(a) (Supp. V 1987).

3. The Superfund is known officially as the Hazardous Substance Superfund. 42 U.S.C. § 9507 (Supp. IV 1986). The procedure through which federal and state governments can make claims against the Superfund is codified at 42 U.S.C. §§ 9611-12 (1982 & Supp. V 1987).

4. CERCLA was designed to "provide that the [Super]fund be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society." 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph). See *infra* Part II.B for a discussion of CERCLA's legislative history.

5. Some state corporate dissolution statutes do not bar suits against corporations after dissolution, and a few contain provisions that allow a corporation to be revived after dissolution for the purpose of defending lawsuits. In these states, therefore, corporate dissolution law does not stand as an obstacle to CERCLA claims, and the following discussion of preemption by CERCLA does not apply. See *infra* Part III for a discussion of the liability of corporations after dissolution.

addresses only state laws that impose stricter standards than those contained in CERCLA, and does not address state laws that, like dissolution laws, remove liability from a party otherwise liable under CERCLA.⁶ Courts, therefore, have also looked to section 107 of CERCLA, which imposes liability against specified parties "[n]otwithstanding any other provision or rule of law,"⁷ to determine CERCLA's general relationship with state law. Through such an analysis, courts have agreed that CERCLA does preempt certain areas of existing state and federal law.⁸

The courts have reached no such agreement, however, as to whether CERCLA preempts state corporate dissolution law. In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*,⁹ the Ninth Circuit held, based primarily on its understanding of corporate dissolution law, that CERCLA does not preempt this area of state law and that the dissolved corporation was not liable. In reaching the opposite conclusion, a United States district court in Utah expressly refused to follow the Ninth Circuit and held, in *United States v. Sharon Steel Corp.*,¹⁰ that CERCLA does preempt state corporate dissolution law. In a similar case, a United States district court in Massachusetts held that a dissolved corporation could be held liable under CERCLA based on a unique feature of Massachusetts corporate law that allows for revival of a dissolved corporation for the purpose of defending suits.¹¹

Part I of this Note examines the cases that have held that CERCLA preempts existing law in certain aspects of state "minifund" legislation, the federal common law of hazardous substance release, and

6. "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." CERCLA § 114(a), 42 U.S.C. § 9614(a) (1982).

7. 42 U.S.C. § 9607(a) (Supp. V 1987).

8. Some courts have agreed that CERCLA preempts the federal common law of hazardous waste release that existed before CERCLA. See *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd.*, 688 F.2d 204 (3d Cir. 1982). Several courts have also held that CERCLA preempts state tort claims immunity acts. *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696 (S.D. Ind. 1988); *Artesian Water Co. v. Government of New Castle County*, 605 F. Supp. 1348 (D. Del. 1985). Finally, the Supreme Court has held that pre-SARA CERCLA partially preempted New Jersey minifund legislation. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

9. 817 F.2d 1448 (9th Cir. 1987). For a detailed discussion of this case, see *infra* notes 136-39 and accompanying text.

10. 681 F. Supp. 1492 (D. Utah 1987). For a detailed discussion of this case, see *infra* notes 90-93, 140-43 and accompanying text.

11. *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22 (D. Mass. 1987). In this case, a defendant corporation had been dissolved for almost three years at the time suit was filed. The plaintiffs took advantage of a feature of Massachusetts corporate dissolution law that allows the Secretary of State to revive a corporation that has terminated in any manner "for all purposes or for any specified purpose . . . with or without limitations of time" MASS. GEN. L. ch. 156B, § 108 (1988). Because the corporation could be sued under state law, CERCLA preemption of that law was not addressed by the court. 675 F. Supp. at 37-41.

state tort claims immunity acts.¹² This Part concludes that courts recognize the comprehensive nature of CERCLA and respect Congress' broad remedial intent by holding that CERCLA preempts federal and state laws that frustrate the fulfillment of CERCLA's goals. Part II explores CERCLA's language and legislative history and argues that, although CERCLA's language is far from clear, its legislative history shows that Congress clearly intended to tackle the large problem of inactive hazardous waste sites through imposing the cost of cleanup on the parties responsible for generating, transporting, or disposing the wastes. Part II concludes that CERCLA's language and legislative history compel a holding that it preempts state corporate dissolution law.

In Part III, this Note analyzes the liability of dissolved corporations for pre-dissolution and post-dissolution claims under common law and state statutes, using the Model Business Corporation Act's¹³ dissolution provision as an example. This Part next examines how CERCLA claims fit into the general framework of suits brought against dissolved corporations, and demonstrates that CERCLA claims cannot be analyzed within the existing statutory framework because that framework relies on distinctions that are virtually impossible to make regarding CERCLA claims and that have no relationship to CERCLA's language or purpose. Part III concludes that *Levin Metals Corp. v. Parr-Richmond Terminal Co.*,¹⁴ in which the Ninth Circuit held that CERCLA does not preempt state corporate dissolution law, was based on a misplaced reliance on these distinctions.

Part IV of this Note proposes a workable solution to the problem of CERCLA claims against dissolved corporations. This Part first examines the competing goals of CERCLA and state corporate dissolution laws, and concludes that although the goals of the different areas conflict, they do share a common ground. Next, this Part analyzes the contours of a solution and concludes that although a legislative solution would best solve the problem, preemption best furthers the competing goals until legislative action is taken. Finally, Part IV examines the problems attending preemption and concludes that analogous authority exists to confront these problems and that they are not sufficiently great to overcome the arguments in favor of preemption.

I. CERCLA PREEMPTION OF STATE AND FEDERAL LAW

CERCLA is a federal statute that imposes liability for cleanup costs upon those who have generated, transported, or disposed of haz-

12. See *infra* Part I.A for an example of state minifund legislation and its interaction with CERCLA.

13. A number of state corporate dissolution statutes are based on the MODEL BUSINESS CORP. ACT § 105 (1979). See *infra* Part III.A.2.

14. 817 F.2d 1448 (9th Cir. 1987).

ardous wastes.¹⁵ CERCLA also established a fund to be used by federal and state governments to pay for the cleanup of sites where no responsible party can be found.¹⁶ Unlike some other federal statutes that contain express provisions allowing for preemption of state law,¹⁷ CERCLA contains no preemption clause that addresses whether state law may remove liability from a party otherwise liable under CERCLA.¹⁸

As stated by the United States Supreme Court, federal preemption of state law may be based on one of three theories:

First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁹

This Part examines how these theories have been applied to CERCLA. Section A discusses the Supreme Court's application of the express preemption doctrine to New Jersey's state minifund legislation in *Exxon Corp. v. Hunt*.²⁰ While there is no language in CERCLA that would support a similar finding of express preemption with respect to state corporate dissolution law, that case usefully elucidates some

15. CERCLA § 107(a), 42 U.S.C. § 9607(a) (Supp. V 1987), provides:

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 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 . . . arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . and, (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . or sites . . . from which there is a release . . . 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 . . . (B) any other necessary costs of response incurred by any other person . . . [and] (C) damages for injury to, destruction of, or loss of natural resources . . . resulting from such a release . . .

16. CERCLA §§ 112-13, 131, 42 U.S.C. §§ 9611-12 (1982 & Supp. V 1987).

17. See, e.g., the preemption clause contained in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144 (1982). For a discussion of this clause, see *infra* notes 62-63.

18. Pre-SARA CERCLA contained a provision prohibiting the states from taxing corporations to establish funds that would pay for the same costs payable by CERCLA's Superfund. 42 U.S.C. § 9614(c) (1982). This provision was deleted by SARA. Pub. L. No. 99-499, § 114(a), 100 Stat. 1652 (1986). CERCLA also contains a clause stating that CERCLA does not prevent states from imposing additional liability with respect to the release of hazardous substances within that state. 42 U.S.C. § 9614(a) (1982).

19. *Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 469 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (citations omitted).

20. 475 U.S. 355 (1986). This case is discussed more fully at *infra* note 23.

more general principles regarding CERCLA preemption of state laws. Section B discusses courts' application of the "occupation of the field" theory to find that CERCLA preempts the federal common law of hazardous substance release.²¹ While there is no indication that CERCLA occupies the field of corporate dissolution, analysis of these cases evidences judicial recognition of congressional intent to provide a comprehensive set of regulations to solve a large-scale national problem. Logical extension of these policy considerations supports CERCLA preemption of state corporate dissolution law because preemption would allow a greater number of sites to be cleaned up with funds provided by responsible parties.

Section C discusses the application of the third preemption approach, preemption when state law stands as an obstacle to the fulfillment of congressional purpose. That approach has been consistently applied to find CERCLA preemption of state tort claims immunity acts.²² Section C argues that state corporate dissolution law ought to be preempted by CERCLA for much the same reason.

A. CERCLA Preemption of State Minifund Legislation Through Express Preemption: The Exxon Case

In *Exxon Corp. v. Hunt*,²³ both the New Jersey Supreme Court and, on appeal, the United States Supreme Court confronted the issue of CERCLA preemption of a state minifund statute. The New Jersey Spill Act,²⁴ a type of state minifund legislation, was passed before CERCLA and was designed to respond to the problem of hazardous substance release. At issue in the *Exxon* case was a preemption clause then contained in section 114(c) of CERCLA, which stated:

Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims *which may be compensated under this subchapter*. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazard-

21. See *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) (finding that CERCLA and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901-97 (1982), provide such a comprehensive set of regulations that the federal common law is preempted); *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd.*, 688 F.2d 204 (3d Cir. 1982) (same).

22. See, e.g., *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696 (S.D. Ind. 1988) (finding CERCLA preemption of state tort claims immunity act); *Artesian Water Co. v. Government of New Castle County*, 605 F. Supp. 1348 (D. Del. 1985) (same).

23. 475 U.S. 355 (1986).

24. New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11 to 58:10-23.11z (West 1982 & Supp. 1985).

ous substances which affects such State.²⁵

The New Jersey Spill Fund was established through an excise tax on major petroleum producers and chemical facilities in the state. Some of these companies brought suit contending that the spill tax was expressly preempted by CERCLA section 114(c). New Jersey, however, maintained that the phrase "which may be compensated under this subchapter" only covered expenses actually paid by the Superfund.²⁶ The New Jersey Supreme Court agreed with the state's argument and held that since the New Jersey Spill Act covered expenses not covered by the Superfund,²⁷ the Spill Act was not preempted by CERCLA.²⁸

The United States Supreme Court reversed in part, stating that the phrase "may be compensated" must be given its ordinary meaning.²⁹ According to Justice Marshall, writing for the majority, "[t]o say that the only expenses that 'may be compensated' are those that *are* compensated twists both language and logic further than we are willing to go."³⁰ Reviewing the legislative history of CERCLA, the Court determined that cleaning up the nation's hazardous waste spills as effectively as possible was not CERCLA's only purpose.³¹ For example, the Court noted, section 114(c) of CERCLA reflected congressional

25. 42 U.S.C. § 9614(c) (1982) (emphasis added). This provision was deleted by SARA, Pub. L. No. 99-499, § 114(a), 100 Stat. 1652 (1986).

26. Justice Stevens accepted this stance, arguing that "for the purpose of" should not be construed to mean for the sole purpose of and that a state fund created for purposes that overlapped with the purposes of CERCLA was not preempted by § 114(a). 475 U.S. at 377, 380-82 (Stevens, J., dissenting). When Congress passed SARA and deleted § 114(c) it stated that it intended this more narrow preemptive effect. In deleting the provision, Congress wished to make clear that the only preemption of state law intended in the area of minifunds was that of claims actually compensated by the Superfund. "[T]he proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund." H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 83-84, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2865-66. Some of the literature before *Exxon* argued for this view. See, e.g., Note, *The Preemptive Scope of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980: Necessity for An Active State Role*, 34 U. FLA. L. REV. 635 (1982) (pre-*Exxon* argument that states should be able to establish minifunds to compensate claims not compensated under CERCLA); Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197, 208-10 (1978) (pre-CERCLA argument that in an analysis of federal preemption of environmental law there should be a strong presumption for concurrent state and federal roles). But see Funk, *Federal and State Superfunds: Cooperative Federalism or Federal Preemption*, 16 ENVTL. L.J. 1, 37 (1985) ("In construing section 114(c) . . . the duty of the courts should be to give faithful effect to the legislative compromise, not to make the law as effective or efficient as possible.").

27. The New Jersey Supreme Court noted that the New Jersey Spill Fund compensated parties for containment costs not covered by the federal Superfund. *Exxon Corp. v. Hunt*, 97 N.J. 526, 543-44, 481 A.2d 271, 280-81 (1984), *modified*, 475 U.S. 355 (1986).

28. 97 N.J. at 544, 481 A.2d at 281.

29. 475 U.S. at 374.

30. 475 U.S. at 372 (emphasis in original).

31. 475 U.S. at 372. Some commentators have made a similar point. See Funk, *supra* note 26, at 37 (CERCLA represents a congressional compromise between competing goals, and this compromise should not be disturbed by the courts even if it means that the legislation will not be as effective as possible).

concern about overtaxing the petrochemical industry.³² The Court held, therefore, that the New Jersey Spill Act was preempted for any costs that were reimbursable by both the New Jersey Law and CERCLA.³³

The *Exxon* case shows that the congressional purpose underlying CERCLA was multifaceted: cleaning up hazardous wastes was not the sole concern of Congress. Although the Court in this case held that CERCLA preempted a state law that imposed additional liability on parties in the hazardous waste industry, this holding suggests that the Court respects the balancing of goals reflected in CERCLA. Section 114(c) of CERCLA contained language that, according to the Court, evidenced congressional concern with imposing a double tax on the chemical industry. There is no indication of a corresponding concern for the burden on corporations that have dissolved without providing for any potential environmental liability.

B. *CERCLA Preemption of the Federal Common Law of
Hazardous Substance Release Through "Occupation
of the Field"*

Prior to CERCLA's enactment, some federal district courts had created a federal common law of hazardous substance release.³⁴ This evolved from a federal common law of interstate air and water pollution.³⁵

32. 475 U.S. at 372. That Congress subsequently deleted this provision of CERCLA, thereby allowing states to impose additional liability on the chemical industry may evidence that Congress was not as concerned with overburdening that industry as the Court believed. *See supra* note 26.

33. According to the Court's determination, the reimbursement provided for by both CERCLA and the New Jersey Spill Act that was preempted was "to finance governmental cleanup of hazardous waste sites" and "to reimburse third parties for cleanup costs." 475 U.S. at 375-76. However, the remaining four costs reimbursed by the New Jersey statute, "to compensate third parties for cleanup costs; . . . to compensate third parties for damage resulting from hazardous substance discharges; . . . to pay personnel and equipment costs; . . . to administer the fund itself and to conduct research," were not contained within CERCLA and hence were permissible. 475 U.S. at 375. The Supreme Court remanded the case to the New Jersey court to determine if the preempted provisions of the Spill Act were severable from the remainder of the statute. 475 U.S. at 376-77. That court held the provision to be severable. 109 N.J. 110, 534 A.2d 1, 20 ERC 1953, 18 ENV'T'L L. REP. 20,412 (1987).

34. *See, e.g.,* United States v. Solvents Recovery Serv., 496 F. Supp. 1127 (D. Conn. 1980) (holding that the federal common law of nuisance provides standards for determining what conduct with respect to hazardous wastes constitutes an "imminent and substantial endangerment to health or the environment" under section 7003 of the RCRA).

35. In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"), the Court held that a water pollution claim by the state of Illinois against four Wisconsin cities and the sewerage commissions of the City and the County of Milwaukee could be decided based on a federal common law created by the courts. This holding was based on previous case law and the enactment of federal law in the area of water pollution that evidenced a federal interest in regulating the area. Although the Court in *Milwaukee I* held that the federal common law governed, it refused original jurisdiction and remanded the case to a federal district court to decide the substantive issue. 406 U.S. at 108. *See also* Note, *The Hazardous Waste Regulatory Programs and*

Less than one year after CERCLA went into effect, a New Jersey district court stated, in *United States v. Price*,³⁶ that CERCLA and its precursor, the Resource Conservation and Recovery Act ("RCRA"),³⁷ provide such a comprehensive set of regulations in the area of hazardous substance release that the federal common law in this area was preempted.³⁸ In *Price*, the government's claim for injunctive relief against the owner of a toxic waste site for pollution of groundwater was based on RCRA and the federal common law of hazardous waste disposal. Although skeptical that a common law of hazardous waste release had ever existed, the *Price* court acknowledged that other courts had based decisions on the existence of a federal common law of hazardous waste release,³⁹ and held that the common law was preempted by RCRA and CERCLA.

A Pennsylvania district court subsequently reached the same holding on preemption through a more rigorous approach. In *City of Philadelphia v. Stepan Chemical Co.*,⁴⁰ the court discussed the purposes of RCRA and CERCLA before determining that, together, these federal statutes preempted the federal common law of hazardous substance release.⁴¹ In reaching this holding, the court analogized to the area of interstate water pollution where the Supreme Court had already held that the "Clean Water Act"⁴² provided such a comprehensive set of regulations that the federal common law was preempted through "occupation of the field."⁴³ RCRA and CERCLA provided an equally

the Federal Common Law of Nuisance, 45 OHIO ST. L.J. 791 (1984) (describing the emergence of the federal common law of hazardous waste release).

36. 523 F. Supp. 1055 (D.N.J. 1981).

37. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-87 (1982). RCRA regulates hazardous wastes from "cradle to grave." CERCLA was passed because RCRA does not regulate hazardous wastes generated and disposed of before RCRA's enactment. See 126 CONG. REC. 26,359 (1980) (statement of Rep. Brown) ("[CERCLA] fills a critical gap in current law by providing EPA with the authority and resources to clean up inactive hazardous waste sites. There is no other authority under which EPA can act at this time.").

38. 523 F. Supp. at 1069.

39. See *supra* notes 34-35 and accompanying text.

40. 544 F. Supp. 1135 (E.D. Pa. 1982).

41. The court wrote:

Unquestionably, Congress has occupied the field of hazardous waste disposal. In the RCRA it has comprehensively set forth the standards which are to govern every aspect of this activity from generation to disposal. In CERCLA, it has established a system of responding to releases or threatened releases from hazardous dumpsites, mandated the adoption of an extensive plan to govern such responses, and imposed a standard of strict liability on those parties involved in the disposal of hazardous waste.

544 F. Supp. at 1148. But see Note, *supra* note 35, at 805-10 (arguing that Congress did not intend to preempt all federal common law through RCRA and CERCLA).

42. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1387 (1982 & Supp. 1987).

43. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*") (holding that the Clean Water Act preempts the federal common law of nuisance as to interstate waterways); see also *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1 (1981) ("*Milwaukee II*" holding extended to pollution of coastal waters).

comprehensive level of coverage in the area of hazardous substance release and therefore the federal common law in this area must also be preempted.⁴⁴

The cases that address CERCLA preemption of the federal common law of hazardous substance release based on an "occupation-of-the-field" theory evidence the courts' recognition of a congressional intention to remedy the substantial problem of hazardous substance release through the enactment of CERCLA and RCRA.⁴⁵ Although these cases provide little direct support for CERCLA preemption of state corporate dissolution law, they do show a judicial recognition of the need expressed by Congress for a consistent, national scheme to solve the problem.

*C. CERCLA Preemption of State Tort Claims Immunity Acts:
State Law as an Obstacle to the Fulfillment
of CERCLA's Goals*

Tort claims immunity acts are common provisions of state law that provide immunity for state and local governmental bodies from tort liability.⁴⁶ All courts that have addressed this issue have agreed that

44. 544 F. Supp. at 1147.

45. Although based on now-questionable precedent, one district court held, in *Allied Towing Corp. v. Great Eastern Petroleum Corp.*, that CERCLA and RCRA do not preempt the state common law of hazardous waste release. 642 F. Supp. 1339, 1350-52 (E.D. Va. 1986). The *Allied* court held that the "savings" clause of RCRA, 42 U.S.C. § 6972(f) (1982), and its legislative history prohibit a holding of preemption of the state or federal common law. 642 F. Supp. at 1351. In addition, the court concluded that there was "nothing in the legislative history of CERCLA" that would support preemption. 642 F. Supp. at 1352. One commentator has made a similar argument regarding CERCLA preemption of state common law remedies. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985). Professor Glicksman argues that the federal courts should strive to promote legitimacy, individual liberty, accommodation, and efficiency, in deciding whether federal environmental statutes preempt state common-law remedies. Using such an analysis, Glicksman concludes that CERCLA and RCRA do not preempt state common law remedies either for intrastate or interstate harm. *Id.* at 213-21.

The validity of the *Allied* decision is questionable because the Supreme Court held in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1982 & Supp. V 1987) (which has a savings clause identical to RCRA's), preempts state common law actions unless the action is based on stricter regulations promulgated by the state in which the source of the pollution is located. Because the Clean Water Act, like RCRA and CERCLA, allows states to pass more stringent regulations for intrastate activity than those provided by the federal statute, these intrastate common law remedies may be enforced. Professors Levy and Glicksman have argued that *Ouellette* is typical of the Supreme Court's recent trend in environmental law decisions that reach a pro-development result by retreating from the Court's usual presumption against preemption of state law remedies. Levy & Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 396-404 (1989). One student commentator has maintained that CERCLA does not preempt state common law remedies notwithstanding the *Ouellette* decision because of the different structure of CERCLA as compared to the Clean Water Act. Comment, *Federal Preemption of State Law Environmental Remedies After International Paper Co. v. Ouellette*, 49 LA. L. REV. 193, 207-10 (1988).

46. An example of such a provision in Michigan law provides: "Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein

CERCLA preempts state tort claims immunity acts.⁴⁷ These cases provide a strong analogy for CERCLA claims against dissolved corporations because in both instances, a state law removes liability from a party otherwise liable under CERCLA.

The first case to hold that CERCLA preempts state tort claims immunity acts was *Artesian Water Co. v. Government of New Castle County*.⁴⁸ In this case, a private water company sued New Castle County for the pollution of its well field caused by toxic substances that had been dumped into a nearby landfill owned by the county. The county asserted that it was immune from suit based on the Delaware County and Municipal Tort Claims Act ("Tort Claims Act").⁴⁹ However, the Delaware district court held that, regardless of whether the plaintiff's CERCLA claims could be characterized as tort claims,⁵⁰ the Tort Claims Act did not bar them because the state law was in conflict with the federal statute and thus, under the Supremacy Clause, had to fail.⁵¹

In a subsequent case, *United States v. Seymour Recycling Corp.*,⁵² an Indiana district court held, with minimal discussion, that a city and city agency defendants could not take advantage of the Indiana Tort Claims Act in a CERCLA proceeding because the state law was preempted by CERCLA.⁵³

The cases addressing CERCLA preemption of state tort claims im-

the government agency is engaged in the exercise or discharge of a governmental function." MICH. COMP. LAWS § 691.1407 (1979).

47. Also, the eleventh amendment does not bar CERCLA suits against states for cleanup costs because CERCLA's language shows that Congress intended for states to be liable under CERCLA. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989).

48. 605 F. Supp. 1348 (D. Del. 1985).

49. DEL. CODE ANN. tit. 10, §§ 4010-13 (Supp. 1988). This Act provides explicitly for governmental immunity from damage claims resulting from the sudden and accidental release of pollutants into the air or any body of water. DEL. CODE ANN. tit. 10, §§ 4011(b)(3), 4012(3) (Supp. 1988).

50. The issue of whether CERCLA claims are tort claims seeking recovery of damages was unresolved by the courts; because the court here found preemption, it did not have to reach the issue. 605 F. Supp. at 1354.

51. 605 F. Supp. at 1354. The court stated:

In the case at bar, federal law mandates that political subdivisions be legally responsible, *inter alia*, for response costs incurred in taking removal or remedial actions at sites owned or operated by such political subdivisions; state law purports to say that they are not so liable. If this is not an actual conflict situation, it clearly is one in which Delaware's Tort Claims Act stands as an obstacle to the accomplishment of the full purposes and objectives which Congress sought to fulfill in enacting CERCLA. Therefore, the Tort Claims Act is preempted.

605 F. Supp. at 1354. Nevertheless, Artesian's claim against the county was eventually dismissed because Artesian had not obtained governmental approval of its remedial action prior to incurring cleanup costs. 605 F. Supp. at 1362.

52. 686 F. Supp. 696 (S.D. Ind. 1988).

53. The *Seymour Recycling* court noted that "[t]he Indiana Tort Claims Act does not apply to defendants' contribution claims since the claims were brought under a federal statute, CERCLA. CERCLA preempts state tort claims statutes." 686 F. Supp. at 700 (citing *Artesian Water Co.*, 605 F. Supp. at 1354-55).

munity acts provide strong precedent for CERCLA preemption of state corporate dissolution law. In both areas, a state law removes all liability from a certain class of defendants, in the one case governmental bodies and in the other case dissolved corporations. The courts have held that CERCLA preempts state tort claims immunity acts because otherwise these laws stand as an obstacle to the fulfillment of CERCLA's purposes. Directly analogous to this, state corporate dissolution law, which removes all liability from a class of parties otherwise liable under CERCLA, must be preempted by CERCLA or else the fulfillment of the congressional intent reflected in CERCLA will be frustrated.

Overall, an examination of CERCLA preemption through the three theories of preemption as applied to the areas of state minifund legislation, federal common law, and state torts claims immunity acts demonstrates that courts are very receptive to preemption. Significantly, the courts that have found preemption recognize the broad congressional purpose of solving the large problem of hazardous substance release through comprehensive federal legislation. Such findings should lead to federal preemption of any state law that frustrates the fulfillment of this purpose.

II. CERCLA'S PREEMPTION LANGUAGE AND LEGISLATIVE HISTORY

Although an analysis of case law with respect to CERCLA preemption of other laws sheds some light on the present issue, it is not dispositive. In analyzing whether CERCLA preempts state corporate dissolution law, it is necessary to determine whether state corporate dissolution law stands as an obstacle to the fulfillment of congressional objectives in passing CERCLA.⁵⁴ This Part discusses congressional intent in passing CERCLA. This may be gleaned in part from the language of the statute itself and, to a greater extent, from an examination of CERCLA's legislative history. Section A examines the language of the statute, and concludes that it does not clearly compel preemption. Section B examines the statute's legislative history. Although CERCLA's passage through Congress was hasty,⁵⁵ recurring themes surface throughout the congressional debates and provide some information about Congress' purposes in passing CERCLA, purposes that weigh strongly in favor of preemption. Section C discusses *United States v. Sharon Steel Corp.*⁵⁶ in which the court relied on this

54. Of the three theories on which preemption may be based, the only one applicable to CERCLA preemption of state corporate dissolution law is that of determining whether the state law stands as an obstacle to the fulfillment of the federal law. For a full discussion of this conclusion, see *supra* Part I.

55. See *infra* notes 72-76 and accompanying text for a discussion of Congress' rush to enact CERCLA.

56. 681 F. Supp. 1492 (D. Utah 1987).

legislative history, found it to be determinative, and held that CERCLA preempts state corporate dissolution law.

A. CERCLA's Preemption Language

The interpretation of any statute must begin with the language contained within the statute itself.⁵⁷ Because CERCLA contains no applicable preemption clause, courts facing the issue of CERCLA preemption of state tort claims immunity acts—laws which, like corporate dissolution statutes, remove CERCLA liability from certain parties—have focused on CERCLA section 107, which imposes liability for cleanup and response costs “[n]otwithstanding any other provision or rule of law.”⁵⁸ Only one CERCLA case considering preemption has addressed specifically the interpretation of the term “notwithstanding” found in CERCLA section 107. In *United States v. Sharon Steel Corp.*,⁵⁹ the court, in holding that CERCLA preempts state corporate dissolution law, stated that “[section 107] clearly expresses Congress’s intent to supersede any rule that would otherwise relieve a responsible party from liability.”⁶⁰

Although this interpretation is supported by a “plain meaning” analysis of CERCLA’s language, it is difficult to reconcile with the omission from CERCLA of broad preemptive language contained in other federal statutes. The Employee Retirement Income Security Act of 1974 (“ERISA”),⁶¹ for example, was enacted before CERCLA, and contains an extremely broad statement of preemption.⁶² One could argue that if Congress had intended to give CERCLA broad preemptive effect, including preemption of state corporate dissolution law, it would have included a preemption clause in CERCLA similar to that found in ERISA.⁶³

57. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring) (“The starting point in every case involving construction of a statute is the language itself.”).

58. 42 U.S.C. § 9607(a) (Supp. V 1987); see *supra* note 15 and accompanying text.

59. 681 F. Supp. 1492 (D. Utah 1987).

60. 681 F. Supp. at 1496.

61. 29 U.S.C. §§ 1001-1461 (1982).

62. Section 514 of ERISA contains the following preemption clause:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter *shall supersede any and all State laws* insofar as they may now or hereinafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144 (1982) (emphasis added).

63. However, even the apparently unequivocal language of ERISA’s § 514 has not resulted in complete preemption. For example, courts have refused to preempt state family law because of the states’ paramount interest in that area of law. See *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), *aff’d*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981). ERISA’s broad preemptive language has also failed to prevent judicial inquiry into whether preemption is warranted in any particular instance. See *Irish & Cohen, ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 116 (1985) (“Although section 514(a) seems to preempt state law unequivocally, courts have often analyzed section 514 in terms of the tradi-

Comparison to other statutes, however, could also weigh in favor of application of CERCLA to dissolved corporations. CERCLA defines a "person" subject to suit under CERCLA as a "corporation" and not as an ongoing corporation.⁶⁴ This is in contrast to other laws enacted before CERCLA that impose liability only on existing corporations, thereby exempting corporations that have already dissolved.⁶⁵ Using the above analysis, one could argue that if Congress intended to place liability on only ongoing corporations, it would have done so clearly.

An analysis of CERCLA's preemption language produces contradictory results, therefore, and as with the interpretation of many statutes, the plain meaning is only the beginning of the interpretation.⁶⁶ Moreover, it has been widely recognized that CERCLA's language is far from an example of clear legislative drafting.⁶⁷ Many courts have recognized that CERCLA's sometimes muddled language resulted

tional judicial preemption doctrines that operate independently of any specific statutory preemption provision."); (citations omitted). In addition, some commentators have suggested that when dealing with a law of general application that is not directed at benefit plans, preemption under ERISA may rest upon the intensity of the state's interests. *See id.* at 129 ("In such cases . . . it sometimes appears that the *intensity* of the state interest, rather than its 'remoteness' from benefit plans, determines whether courts will hold that section 514(a) expresses a 'clear and manifest [preemptive] purpose' ") (emphasis in original; citations omitted); Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEXAS L. REV. 1313, 1320 (1984) ("Courts often weave into ERISA preemption analysis a consideration of the state interest at stake. Although there is no statutory support for this inquiry, courts commonly are 'guided by respect for the separate spheres of governmental authority preserved in our federalist system.' ") (footnote omitted).

If courts were to use a similar analysis for CERCLA (assuming the statute contained a broad preemption clause like ERISA § 514(a)), courts would consider the strength of the interest furthered by the state law and find preemption where the interest advanced by the federal law is stronger than that of the state law. The intensity of the federal interest reflected in CERCLA, as measured by congressional concern over the scope of the problem, is very strong and thus few state interests should be able to outweigh this important national concern. The state interests furthered by corporate dissolution law are especially weak when applied to CERCLA claims because of the uncertainty as to whether CERCLA claims are pre-dissolution or post-dissolution claims. *See infra* notes 144-50 and accompanying text. Therefore, an ERISA-type analysis would suggest that where, as in CERCLA, the state interest is weak or not furthered at all by application of the state law, and the federal interest is strong, preemption should be the result.

64. 42 U.S.C. § 9601(21) (Supp. V 1987).

65. For example, the Sherman Act definition of a "person" subject to suit includes "corporations and associations existing under or authorized by the laws of . . . any State." 15 U.S.C. § 7 (1982). This distinction was recognized by the court in *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1496 n.8 (D. Utah 1987).

66. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981) in which the Supreme Court stated: [A]scertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect. (citations and footnote omitted).

67. *See, e.g., United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985) ("CERCLA has acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.") (citations omitted).

from its whirlwind trip through the last days of the lame duck session of the 96th Congress.⁶⁸ Therefore, most courts have realized that exclusive reliance on the language of the statute is inappropriate and that an examination of CERCLA's legislative history is necessary to determine what Congress intended to accomplish in passing CERCLA.⁶⁹

B. CERCLA's Legislative History

In 1978, almost three years before CERCLA's enactment, the problem of inactive hazardous waste sites was brought to the attention of the public and Congress by the events at Love Canal in Niagara Falls, New York.⁷⁰ The residents of Love Canal discovered that part of their subdivision and the neighborhood elementary school had been built on a landfill containing highly toxic chemicals that could cause birth defects, miscarriages, epilepsy, and other diseases. In August of 1978, President Carter declared Love Canal a national emergency and the State of New York began evacuating the residents.⁷¹

68. See *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) ("[CERCLA] leaves much to be desired from a syntactical standpoint, perhaps a reflection of the hasty compromises which were reached as the bill was pushed through Congress just before the close of the 96th session."); *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1310 (N.D. Ohio 1983) ("CERCLA was rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting."). The legislative history demonstrates that Congress itself realized the haste with which it was passing CERCLA. Cf. 126 CONG. REC. 31,969 (1980) (statement of Rep. Broyhill) ("I have in my hand a three-page list of various defects and technical errors that are in this bill . . ."); *id.* at 31,975 (statement of Rep. Snyder) ("Our legislative counsel briefly looked at this bill and found 45 technical errors . . . in this one bill."). But see *id.* at 30,936 (statement of Sen. Stafford) ("In one way or another, 65 or 70 of the 100 Members of the Senate have been personally involved in the development of this legislation over a three year period . . . That does not count, at least in this Senator's book, as a rush to judgment.").

69. See, e.g., *United States v. Wade*, 577 F. Supp. at 1331 ("Any attempt to divine the legislative intent behind many of [CERCLA's] provisions will inevitably involve a resort to the Act's legislative history.").

70. The Senate Committee on Environment and Public Works, in reporting on the bill that would eventually become CERCLA, noted that Love Canal had spurred Congress into action, stating that "shocking incidents at Love Canal gained wide attention and propelled the problems of inadequate hazardous chemical waste disposal into the national spotlight . . ." SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS, ENVIRONMENTAL EMERGENCY RESPONSE ACT, S. REP. NO. 848, 96th Cong., 2d Sess. 7 (1980) [hereinafter SENATE REPORT NO. 848]. "The Love Canal tragedy, the most familiar example of the dangers of hazardous substances in our society, also paints the clearest picture of just how serious the problems involving toxic chemicals can be." *Id.* at 8. In the discussion of CERCLA on the Senate floor, Senator Moynihan of New York asked that a chronology of the events at Love Canal be included in the record. 126 CONG. REC. 30,937-39 (1980).

Ironically, because the final version of CERCLA contained no recovery provision for personal injuries, CERCLA, as enacted, provided no help for the victims of Love Canal. See *id.* at 30,942 (statement of Sen. Mitchell explaining why he would vote for CERCLA but with reluctance: "We have the opportunity to help [the victims of Love Canal and other toxic waste accidents] and we have not done that. Instead we have apparently decided that, as the chemical industry says, toxic chemicals are a societal problem . . .").

71. *Love Canal, U.S.A.*, N.Y. Times, Jan. 21, 1979, § 6 (Magazine) at 23, reprinted in LIBRARY OF CONGRESS FOR THE SENATE COMM. ON ENVIRONMENT AND PUBLIC WORKS 97th Cong., 2d Sess., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510 8-9

In late 1980, members of the lame duck session of the 96th Congress, having discussed for the previous three years legislation that would remedy the problem of inactive hazardous waste sites, became concerned that if legislation were not passed before the end of the session, it might never be passed.⁷² The final version of the bill that became CERCLA was a compromise worked out by an ad hoc bipartisan group of Senators.⁷³ This compromise bill was passed by the Senate and placed before the House in the form of an amendment to an earlier House bill.⁷⁴ The measure was considered by the House on December 3, 1980, in the last days of the session, and was passed with limited debate, under a suspension of the rules with no amendments allowed.⁷⁵ As noted by one commentator, "[f]aced with a complicated bill on a take it or leave it basis, the House took it, groaning all the way."⁷⁶

Because of its hasty passage, courts have very little legislative history to guide them in interpreting CERCLA; for many provisions there is contradictory history⁷⁷ or no history at all. For example, there is no direct discussion of the language of CERCLA's section 107, which imposes liability "[n]otwithstanding any other provision or rule of law."⁷⁸ The only reference to CERCLA's relationship with state law is found in the discussions of section 114(c), which, prior to its deletion, prevented states from taxing companies for purposes covered by the Superfund,⁷⁹ and of section 114(a), which allows states to

(Comm. Print 1983). At least 306 families were eventually relocated from Love Canal at government expense. 126 CONG. REC. 30,939 (1980).

72. See 126 CONG. REC. 30,941 (1980) (statement of Sen. Mitchell) ("The choice is between this compromise and no bill [on toxic waste disposal] at all."); *id.* at 31,968-69 (statement of Rep. Florio) ("[N]ow at the 11th hour [the Senate] has sent us a bill that we must act upon in order to have this bill enacted into law. . . . The concern is whether we are going to have legislation or whether we [are] not going to have legislation.").

73. See S. 1480, 96th Cong., 2d Sess. 126 CONG. REC. 30,782-96 (1980).

74. 126 CONG. REC. 30,956, 30,987 (1980).

75. *Id.* at 31,950-82.

76. 1A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.04[2] 1981, reprinted in Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982).

77. See *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) ("Unfortunately [CERCLA's] legislative history is unusually riddled by self-serving and contradictory statements."); Grad, *supra* note 76, at 2 ("In the instance of the 'Superfund' legislation, a hastily assembled bill and a fragmented legislative history add to the usual difficulty of discerning the full meaning of the law."); Comment, *Generator Liability Under Superfund For Clean-up Of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1242 (1982) ("Ascertaining 'congressional intent' from such a patch-work bill [CERCLA] is a complex, if not impossible task.").

78. 42 U.S.C. § 9607(a) (Supp. V 1987). See *supra* note 15 and accompanying text for a discussion of this provision.

79. CERCLA § 114(c), 42 U.S.C. § 9614(c) (1982). Section 114(c) was interpreted by the Supreme Court in *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). See *supra* Part I.A for a discussion of the *Exxon* case.

impose additional liability for intrastate harms.⁸⁰ No discussion appears in the legislative history, however, about whether a state law that completely removes liability from a class of potential defendants would be preempted by CERCLA.

Despite this lack of detailed guidance, some clear elements of congressional intent are contained in CERCLA and have been recognized by courts interpreting CERCLA. First of all, the history shows that Congress was concerned about the magnitude of the problem posed by inactive hazardous waste sites.⁸¹ Second, the record clearly shows that Congress created the Superfund in order to institute a mechanism by which government could act *immediately* to clean up waste sites before litigation resolved who would eventually be liable for the costs.⁸² Finally, statements by members on the floor demonstrate that Congress intended to impose the costs of cleanup on those who were responsible for the creation, transportation, and disposal of the hazardous substances.⁸³ A number of courts have observed these same purposes behind CERCLA.⁸⁴

One court, in *State ex rel. Brown v. Georgeoff*,⁸⁵ has recognized that CERCLA manifests the further congressional goal of cost spreading among responsible parties. In *Brown*, the defendant transporters of toxic wastes argued that any retroactive liability Congress intended to impose through CERCLA was to be imposed through the taxes levied on the industry to create the Superfund, rather than through

80. CERCLA § 114(a), 42 U.S.C. § 9614(a) (Supp. V 1987).

81. Throughout the Senate Committee report and the floor debate, numerous references were made to a report submitted by the EPA stating that in 1980 there were at least 2,000 dumpsites that posed a threat to the public health and that the average cost of cleanup per site would be \$3.6 million. See, e.g., SENATE REPORT NO. 848, *supra* note 70, at 2; 126 CONG. REC. 30,934 (1980) (statement of Sen. Stafford).

82. See, e.g., 126 CONG. REC. 30,939-40 (1980) (statement of Sen. Bradley) ("[A] single mechanism is established to permit Government to pay cleanup costs resulting from releases of hazardous substances into the environment [T]he legislation provides for emergency response without creating an elaborate regulatory bureaucracy.").

83. See *id.* at 30,971 (statement of Sen. Chafee) ("Governments must have a tool for holding liable those who are responsible for [cleanup] costs."); *id.* at 30,940 (statement of Sen. Tsongas) ("[CERCLA] puts the costs on the sector most responsible for pollution and which benefits most from chemical production"); *id.* at 30,941 (statement of Sen. Mitchell) ("The guiding principle of those who wrote S. 1480 was that those found responsible for harm caused by chemical contamination should pay for the costs of that harm.").

84. See, e.g., *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) ("What is clear . . . is that [CERCLA] is intended to facilitate the prompt clean-up of hazardous waste dump sites and when possible to place the ultimate financial burden upon those responsible for the danger created by such sites."); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("A review of [CERCLA] and the Committee Reports reveals at least two Congressional concerns that survived the final amendments to the Act. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.").

85. *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983).

private suits to recover cleanup costs. The court disagreed, holding that, in passing CERCLA, Congress considered the creation of the Superfund to be only part of the solution to the problem of hazardous waste cleanup and that private actions for cleanup cost recovery would be necessary as well.⁸⁶ Furthermore, in response to the transporters' other argument that they should not be held liable for cleanup costs because the generators of the materials and the owner-operators of dump sites were more responsible for the hazardous materials than were the transporters, the court held that Congress intended CERCLA to act as a form of cost spreading among responsible parties.⁸⁷

The contention that CERCLA was intended to be a cost-spreading mechanism is supported by comments made during the debates on the House floor concerning assertions of the chemical industry that taxing them to provide for the Superfund would only mean increased costs to consumers. Representative Brown of California responded that this was an equitable internalization of costs to compensate for previous benefits gained by the industry and its consumers from past cheap disposal of hazardous wastes.⁸⁸

The legislative history of CERCLA, therefore, shows that Congress was attempting to make an immediate response to the large problem of inactive hazardous wastes sites that would ultimately spread cleanup costs among the parties who had benefited from the hazardous wastes. Although not all courts have been persuaded by these goals,⁸⁹ other courts have recognized them.

C. *An Example of Judicial Application of CERCLA's Legislative History: United States v. Sharon Steel Corp.*

An examination of CERCLA's language and legislative history was central to a Utah district court's holding in *United States v.*

86. In reaching this conclusion, the court explained that "Congress probably believed there would be a substantial percentage of judgment proof defendants in these actions. Congress could not have intended to limit the potential defendants while accomplishing its purpose of making the responsible individuals pay for the cost of clean up." 562 F. Supp. at 1313.

87. 562 F. Supp. at 1313 ("Assuming *arguendo* that the cost of clean up [of all hazardous waste sites] could be held to \$10 billion, 84% of that cost must be recovered from sources other than the Superfund to complete the job.").

88. Representative Brown stated:

[The amount allocated to the Superfund] by no means would cover nearly the number of sites that need work, but would allow work to begin on the most urgent cases. . . .

[T]here is no equitable reason why the cost of the cleanup of hazardous waste sites should be the burden of the taxpayers. Industry points out correctly that the cost will be passed on to the consumer; this simply means that the true cost of a product in its broad sense will include the hidden costs which were previously omitted. This seems to me to be the only reasonable solution to a problem brought on by past improper waste disposal practices.

126 CONG. REC. 26,359 (1980).

89. The Ninth Circuit, for example, in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987) was not persuaded by CERCLA's legislative history. See *infra* Part III.B.

*Sharon Steel Corp.*⁹⁰ that CERCLA preempts state corporate dissolution law. In this case, the government sued Sharon Steel Corporation, the owner of a hazardous waste site, and UV Industries, who, as the prior owner of the site, had used the property from 1906 until 1971 to store tailings from its steel milling and smelting operations. In 1980, UV dissolved, selling most of its assets to Sharon Steel.⁹¹ Upon dissolution, UV set up a trust fund to wind up its affairs and distribute assets to the shareholders. As of 1986, when the government filed its suit, however, the trust had not distributed all of the corporation's remaining assets. UV Industries moved to dismiss the government's claim on the ground that it lacked the capacity to be sued based on the Maine law under which it was incorporated.⁹²

The court, however, after examining CERCLA's language and legislative history, held that CERCLA preempts the state corporate dissolution law. The court found that the language of CERCLA's section 107 provided strong preemptive force, stating:

[Congress] did not limit the preemptive force of section 107 to state liability laws, nor is this court willing to undermine congressional intent by reading such a restriction into the statute. This court concludes that, if the effect of a state capacity statute is to limit the liability of a party Congress meant to hold liable for cleanup costs, Congress intended CERCLA to preempt it.⁹³

This reasoning is consistent with the reasoning used by the courts that have held that CERCLA preempts state tort claims immunity acts.⁹⁴ The state corporate dissolution law removes capacity to be sued from a party that Congress otherwise meant to hold liable for cleanup costs under CERCLA, and therefore acts as an obstacle to the fulfillment of CERCLA's goals and must be preempted.

In summary, although an analysis of CERCLA's statutory language and legislative history does not yield a conclusive answer to the question of CERCLA preemption of state corporate dissolution law, the elements of congressional intent that can be found in the legislative history support a finding of preemption like that made by the *Sharon Steel* court. First, Congress recognized that hazardous waste cleanup was an urgent problem requiring a large amount of resources.⁹⁵ Second, Congress believed that where possible, the costs of cleanup should be borne by those responsible for, or who benefited from, the

90. 681 F. Supp. 1492 (D. Utah 1987).

91. 681 F. Supp. at 1493.

92. ME. REV. STAT. ANN. tit. 13-A, § 1122 (1964), is patterned after MODEL BUSINESS CORP. ACT § 105 (1979) and provides a two-year survival period after dissolution beyond which claims may not be brought by or against the dissolved corporation. See *infra* section III.A.2 for a discussion of state corporate dissolution statutes patterned after § 105 of the 1979 Model Act.

93. 681 F. Supp. at 1498.

94. See *supra* Part I.C.

95. See *supra* notes 81-82 & 84 and accompanying text.

production, storage, or transportation of hazardous wastes.⁹⁶

These elements of congressional intent strongly support preemption of state corporate dissolution law. Any dissolved corporation that would be a potential defendant in a CERCLA suit likely benefited from, and should be responsible for remedying, the hazardous wastes that are now endangering our environment and health. If the resources recoverable from these dissolved corporations could be used for cleanup costs, both of the primary goals noted by Congress would be furthered: more resources would be available to clean up more sites, and these resources would be recovered from those who benefited from cheap disposal of the wastes. Furthermore, allowing preemption would further the kind of cost spreading recognized by the *Brown* court and supported by the legislative history as another element of congressional intent. As the analysis of corporate dissolution law in the next Part demonstrates, because the goals of dissolution law are rarely furthered when CERCLA claims are brought within the context of currently written dissolution statutes, preemption by CERCLA of state corporate dissolution law is particularly appropriate.

III. SUING DISSOLVED CORPORATIONS

In federal court, a corporation's ability to sue and be sued is determined by the law of the state of incorporation.⁹⁷ Some states allow a corporation to be sued anytime after dissolution.⁹⁸ Other states allow corporations to sue or be sued anytime after dissolution for claims arising before dissolution.⁹⁹ In states with corporate dissolution statutes of these two types, therefore, corporate dissolution law may not stand as an obstacle to CERCLA claims.¹⁰⁰ More commonly, however, a state corporate dissolution statute provides that a corporation

96. See *supra* notes 82-84 and accompanying text.

97. FED. R. CIV. P. 17(b). This rule has been applied universally to dissolved corporations. See 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1563 (1971) ("Although not expressly dealt with in Rule 17(b), the federal courts have held that the capacity of a dissolved corporation to sue and be sued is determined by the law of the state in which it was organized.").

98. For example, Ohio law provides that any claim that accrues against the dissolved corporation may be brought anytime after dissolution. OHIO REV. CODE ANN. § 1701.88(B) (Baldwin 1989). New Jersey allows suit to be brought against the dissolved corporation anytime after dissolution provided that the Superior Court finds good cause and sufficient assets held by the corporation or, through distribution, by one of its shareholders. N.J. STAT. ANN. § 14A:12-13 (West Supp. 1989). Virginia law, which expressly allows suit to be brought anytime for claims arising before dissolution, has been interpreted to apply to post-dissolution claims as well. See *Oliver v. American Motors Corp.*, 616 F. Supp. 714 (E.D. Va. 1985) (post-dissolution claims for pre-dissolution acts that cause post-dissolution injuries may be brought against dissolved Virginia corporation at least within the five-year period following dissolution in which the corporation may gain reinstatement).

99. See, e.g., CAL. CORP. CODE § 2011 (Deering 1977); N.M. STAT. ANN. § 53-16-24 (Supp. 1989); MISS. CODE ANN. § 79-3-209 (1972).

100. Whether or not CERCLA claims may be brought against a dissolved corporation in a state allowing suit to be brought at any time for claims arising before dissolution will depend on

loses its capacity to sue or be sued a set number of years (usually two) after dissolution.¹⁰¹ This type of statute frequently stands as the primary obstacle to CERCLA suits brought against dissolved corporations because suit is not brought within the statutory time limit.¹⁰²

State statutes giving corporations the capacity to sue and be sued after dissolution were enacted as a reaction to the harshness of the common law rule that all actions by and against a corporation were abated at dissolution.¹⁰³ This Part first briefly discusses these common law provisions, including the common law trust fund theory, and then examines state statutory provisions as exemplified by the 1979 Model Business Corporation Act,¹⁰⁴ and the 1985 Revised Model Business Act,¹⁰⁵ respectively. This Part then analyzes the Ninth Circuit's reasoning in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*,¹⁰⁶ in which the court held, based on its understanding of corporate dissolution law, that CERCLA does not preempt state corporate dissolution law. Finally, this Part concludes with a discussion of how CERCLA claims fit into the existing framework of suits against dissolved corporations, arguing that the existing framework is ill-suited for handling CERCLA claims because it relies on distinctions between pre-dissolution and post-dissolution claims that cannot be made with regard to claims made under CERCLA.

A. Common Law and State Statutory Provisions Relating to Corporate Dissolution

1. Common Law Provisions and the Trust Fund Theory

Under the English common law, all actions both by and against a corporation abated upon dissolution and the assets of the corporation escheated to the King.¹⁰⁷ In the United States, with the institution of the business corporation in the 1800s, the English common law rule

how a particular court decides the issue of when a claim arises under CERCLA; this issue is currently unresolved. See *infra* notes 144-50 and accompanying text.

101. See *infra* note 114 and accompanying text.

102. This Note is concerned only with state corporate dissolution provisions that cut off the corporation's liability after dissolution and therefore may frustrate CERCLA claims. In states in which corporate dissolution law does not remove liability, CERCLA claims may continue to be brought against the dissolved corporation and there is no issue of preemption.

103. See *infra* Part III.A.1.

104. The MODEL BUSINESS CORP. ACT § 105 (1979) acts as the model for a great many state corporate dissolution statutes. See *infra* note 114 and accompanying text.

105. The revision of the Model Business Corporation Act in 1985 substantially changed the dissolution provisions. REVISED MODEL BUSINESS CORP. ACT §§ 14.06, 14.07 (1985). However, these revised provisions have yet to be adopted by any states. See *infra* note 134.

106. 817 F.2d 1448 (9th Cir. 1987).

107. See Marcus, *Suability of Dissolved Corporations — A Study in Interstate and Federal-State Relationships*, 58 HARV. L. REV. 675, 677-78 (1945) (citing 1 BLACKSTONE, COMMENTARIES 326 (Cooley's 2d ed. 1879)); Note, *Suits By and Against Dissolved Corporations*, 48 IOWA L. REV. 1006, 1006-09 (1963).

was changed so that the assets of the corporation constituted a trust fund upon dissolution for creditors and shareholders with outstanding claims.¹⁰⁸ This development, known as the trust fund theory, allowed a creditor to bring suit against the directors and shareholders of a dissolved corporation under the theory that the assets were distributed to these shareholders under a lien held by the creditor. Claims brought under the trust fund theory were only subject to general statutes of limitations applicable to the particular claim asserted.¹⁰⁹

It is unclear to what extent the common law trust fund theory continues to exist after the advent of state statutes governing corporate dissolution.¹¹⁰ Although claims clearly covered by statute are controlled by the statutory provisions and barred if not brought within the statute's time limitations,¹¹¹ some claims against dissolved corporations do not fall clearly within the statute; for these claims, the argument for continuing the trust fund theory is still made, especially in the field of products liability.¹¹²

108. See Marcus, *supra* note 107, at 679-80.

109. See *Curran v. Arkansas*, 56 U.S. 304 (1853); *Drew v. United States*, 367 F.2d 828, 830 (Ct. Cl. 1966) ("Under the general rule known as the 'trust fund theory' it is held that where stockholders receive the assets of a corporation upon liquidation and leave the corporation without sufficient assets to pay its creditors, then its stockholders are required to respond to the full value of the assets received."); *Cowden Mfg. Co. v. United States*, 340 F. Supp. 1204 (E.D. Ky. 1972); see also Henn & Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865, 879-82 (1971); Wallach, *Products Liability: A Remedy In Search of a Defendant — The Effect of a Sale of Assets and Subsequent Dissolution on Product Dissatisfaction Claims*, 41 MO. L. REV. 321, 327-29 (1976).

110. One commentator reports that the first state statute governing corporate dissolution was enacted in New York in 1811. See Note, *supra* note 107, at 1008 n.16. A thorough discussion of the continued existence of the trust fund theory is beyond the scope of this Note. The point of contention is whether a statutory provision continuing corporate liability for a limited time after dissolution contains sufficient legislative intent to supplant the trust fund theory completely. See Wallach, *supra* note 109, at 329; Friedlander & Lannie, *Post-Dissolution Liabilities of Shareholders and Directors for Claims Against Dissolved Corporations*, 31 VAND. L. REV. 1363, 1370-81 (1978).

111. Under the corporate dissolution provisions of most states, pre-dissolution claims are expressly covered by the statute. See *infra* notes 114-21 and accompanying text. One commentator has proposed that for these claims the only difference between suing under the abatement statute and suing under the trust fund theory is that the trust fund theory, as an equitable action, requires the exhaustion of all legal remedies first, meaning that the plaintiff would have to prove that he could not recover from the corporation. See Wallach, *supra* note 109, at 329 n.32.

112. Claims arising after a corporation has dissolved are often not addressed clearly by the statutory provisions. See *infra* notes 124-30 and accompanying text. Some commentators have argued that the trust fund theory should continue to exist for these claimants. See Friedlander & Lannie, *supra* note 110, at 1369 ("[T]he trust fund theory both by its nature and by its purpose should allow claimants with contingent [post-dissolution] claims to recover when those claims finally arise."); Henn & Alexander, *supra* note 109, at 896 ("[T]he statutory application to post-dissolution claims is so tenuous as to make it more probable that common law and equitable principles apply to the extent they are not inconsistent with the statute.").

The case of *Blankenship v. Demmler Mfg. Co.*, 89 Ill. App. 3d 569, 411 N.E.2d 1153 (1980), shows that a court may be reluctant to accept this reasoning. In this case, the plaintiff's hand was caught in a machine manufactured by the defendant. The accident occurred in 1976, but the defendant corporation had dissolved in 1968. Plaintiff sued both the corporation and its director under the common law trust fund theory because the applicable Illinois statutory period for

In some instances, legislative intent to supplant the trust fund theory with the statutory remedy may be found.¹¹³ However, in the great majority of cases, no legislative intent to supersede the trust fund theory is shown and the courts are left on their own to decide whether, and to what extent, the trust fund theory still exists. The trust fund theory is important background to the following discussion of CERCLA claims against dissolved corporations because it provides an analogy for the recovery of claims from shareholders of the dissolved corporation.

2. *State Statutory Provisions: Section 105 of the 1979 Model Business Corporation Act*

Despite the development of the trust fund theory, the common law rule abating all actions by and against dissolved corporations continued to produce harsh results for those with claims against the dissolved corporation. Therefore, the states developed statutory provisions giving corporations the capacity to sue and be sued for a limited period of time after dissolution.

The corporate dissolution statutes in many states today are patterned substantially after section 105 of the Model Business Corporation Act ("1979 Model Act").¹¹⁴ The relevant portion of the 1979 Model Act provides:

The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution.¹¹⁵

The Revised Model Business Corporation Act of 1985 ("1985 Model Act") made substantial changes to this provision,¹¹⁶ but most state statutes are patterned after the 1979 Model Act, varying only the amount of time in which to bring suit.¹¹⁷

claims against dissolved corporations had run. The court rejected the plaintiff's claim, stating, "[w]e agree with defendant that extension of the trust fund theory to cover plaintiff's claim would mean that the corporation could never completely dissolve but would live on indefinitely through its shareholders." 89 Ill. App. 3d at 573, 411 N.E.2d at 1156. The court weighted the dissolved corporation's interest in repose more heavily than the plaintiff's interest in recovery.

113. Friedlander & Lannie, *supra* note 110, at 1382 (discussing legislative history of Wisconsin Act); Schoone, *Shareholder Liability Upon Voluntary Dissolution of Corporation*, 44 MARQ. L. REV. 415, at 422-23 (1961) (same); Wallach, *supra* note 109, at 330 (same).

114. 16A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8169 (rev. perm. ed. 1988); Henn & Alexander, *supra* note 109, at 882; Wallach, *supra* note 109, at 324-25. See generally H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 1 (2d ed. 1970).

115. MODEL BUSINESS CORP. ACT § 105 (1979).

116. See *infra* notes 131-34 and accompanying text.

117. See, e.g., ILL. REV. STAT. ch. 32, ¶ 12.80 (1988) (providing a five-year period after dissolution in which to bring suit).

The 1979 Model Act's provision authorizing suits for two years after dissolution is typically described as a survival statute, determining capacity to be sued, and not a statute of limitations.¹¹⁸ Suit must be commenced within two years of dissolution for any claim against the dissolved corporation, even if the appropriate statute of limitations for the claim is longer.¹¹⁹ The Model Act thus ameliorates the harsh effects of the common law rule of complete abatement of claims at dissolution by allowing claimants a restricted period of time after dissolution in which to bring claims against the corporation.¹²⁰ However, the statutory period is limited to allow the corporation a point of repose after which it may be secure in winding up its affairs and distributing its assets. As stated by one court:

There should be a definite point in time at which the existence of a corporation and the transaction of its business are terminated. To allow . . . the continued prosecution of lawsuits perverts the definiteness and orderly process of dissolution so as to produce a continuous dribble of business activity contrary to the intent of the winding up provisions of the statute.¹²¹

Courts have been unsure about how strictly statutes based on section 105 of the 1979 Model Act should be applied. On the one hand, because section 105 is a remedial statute, it should be applied liberally to benefit claimants.¹²² On the other hand, a strict interpretation may be appropriate because these statutes abrogate the common law rule

118. See *Gordon v. Loew's, Inc.*, 147 F. Supp. 398, 400-08 (D.N.J. 1956) (where an action was instituted by the stockholders of three dissolved corporations five to eight years after dissolution, the claims were dismissed because the state law survival period was two years), *aff'd. on other grounds*, 247 F.2d 451 (3d Cir. 1957). "[The Illinois corporate dissolution provision] was 'not strictly a statute of limitation but . . . a conditional limitation' upon a creditor's right of action against a corporation which has been dissolved." 147 F. Supp. at 405 (citations omitted). See also *Wallach, supra* note 109, at 325. The court in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987), based its decision that CERCLA does not preempt state corporate dissolution law on this distinction. See *infra* notes 136-39 and accompanying text.

119. See *Johnson v. Helicopter & Airplane Serv. Corp.*, 404 F. Supp. 726, 729 (D. Md. 1975) ("Capacity is the ability of a particular individual or entity to use, or to be brought into, the courts of a forum. It has no direct correlation to the conducting of business, the existence of an enforceable right, interest, cause of action, claim or defense . . .") (citations omitted); *Schoone, supra* note 113, at 423; *Wallach, supra* note 109, at 325.

120. In *Friedlander & Lannie, supra* note 115, at 1400, the authors note: "[B]y postponing abatement for two years, the survival statute aimed to protect certain claimants against dissolved corporations and to protect dissolved corporations with claims, but the protection was limited. It extended only to predissolution claims brought within two years of dissolution." See also *Wallach, supra* note 109, at 324.

121. *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968) (holding that Iowa dissolution law's two-year survival period barred a suit filed three years after dissolution and based on a post-dissolution tort even though the corporation was still winding up its affairs); see *Friedlander & Lannie, supra* note 110, at 1400-04; *Wallach, supra* note 109, at 333.

122. *Chadwick v. Air Reduction Co.*, 239 F. Supp. 247, 251 (N.D. Ohio 1965) ("Statutes extending the vitality of a dissolved corporation for purposes of suit are remedial in nature and should be given a liberal construction."); *Henn & Alexander, supra* note 109, at 900; *Marcus, supra* note 107, at 686-87.

completely abating claims.¹²³

Courts also have had difficulty in applying section 105 (and statutes modeled after it) because its language provides no guidance regarding claims that arise after dissolution.¹²⁴ Consequently, courts that have struggled with post-dissolution claims brought under statutes based on the 1979 Model Act have reached inconsistent and unpredictable results.¹²⁵ These results have ranged from allowing post-dissolution claims to be brought at any time after dissolution¹²⁶ to allowing no post-dissolution claims to be brought whatsoever.¹²⁷

Because the statutes based on the 1979 Model Act generally do not address post-dissolution claims, it appears that courts have often decided these claims based on whether the survival period seems unreasonably short for the particular claim at issue.¹²⁸ For example, courts have allowed claims against dissolved corporations if there is some element of self-dealing by the corporation's directors before dissolution,¹²⁹ or if some other contingency has occurred which, in the

123. See *Blankenship v. Demmler Mfg. Co.*, 89 Ill. App. 3d 569, 411 N.E.2d 1153 (1980):

One of the main purposes of the survival statutes is to extend the life of a corporation for two years following dissolution so that suits which ordinarily would have abated may be brought by and against the corporation. Once this period extending the existence of the corporation has ended, however, the corporation cannot sue or be sued. Consequently, we believe that the survival statute reflects a legislative intent to establish a definite point in time when a corporation ceases to exist.

89 Ill. App. 3d at 574, 411 N.E.2d at 1156 (citations omitted).

As noted by one commentator, "[t]raditional canons of construction lead to contradictory results: statutes extending post-dissolution corporate existence, being in derogation of the common law, should be strictly construed; to the extent that they are remedial, they should be liberally construed." Henn & Alexander, *supra* note 109, at 898 (footnotes omitted); see also Marcus, *supra* note 107, at 686-87.

124. The comments to the 1985 Model Act admit this deficiency: "Earlier versions of the Model Act did not recognize the serious problem created by possible claims that might arise long after the dissolution process was completed and the corporate assets delivered to shareholders." REVISED MODEL BUSINESS CORP. ACT § 14.07 comment (1985).

125. For a thorough discussion of the options available to, and taken by, courts in this situation, see Friedlander & Lannie, *supra* note 110, at 1370-81.

126. See, e.g., *Levy v. Liebling*, 238 F.2d 505 (7th Cir. 1956) (holding that a claim did not accrue to shareholders of dissolved corporation until the time of dissolution and therefore was not covered by corporate dissolution provision patterned after the Model Act and could be brought anytime within the statute of limitations), *cert. denied*, 353 U.S. 936 (1957); see also Wallach, *supra* note 109, at 327 n.24.

127. See *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94, 95 (N.D. Iowa 1968) (quoting *Chadwick v. Air Reduction Co.*, 239 F. Supp. 247, 251 (N.D. Ohio 1965)) ("It is, therefore, quite clear that under the Model Business Corporation Act, and those state statutes patterned after it, a corporation may be sued for pre-dissolution torts only."). In *Chadwick*, however, the court was interpreting the Ohio corporate dissolution statute, which differs significantly from the 1979 Model Act. 239 F. Supp. at 251.

128. See *Friedlander & Lannie*, *supra* note 110, at 1404-08.

129. See *United States v. Palakow*, 438 F.2d 1177 (7th Cir. 1971). In *Palakow*, suit was filed against a dissolved corporation's director for breach of fiduciary duty when the director retained distributed assets of the corporation that were owed to the Small Business Administration. Although the state dissolution provision (modeled after § 105 of the 1979 Model Act) covered directors of dissolved corporations, the court held that the suit was filed against the director as an individual or, alternatively, that such a claim would not have abated at common law and there-

court's judgment, makes barring the claim after two years seem unfair.¹³⁰

The failure of the 1979 Model Act to clearly address claims arising after dissolution was resolved by the Revised Model Business Corporation Act of 1985. However, in the large number of states that still have corporate dissolution statutes based on section 105 of the 1979 Model Act, the result of a claim brought after the corporation has dissolved is unpredictable. This lack of predictability threatens one of the primary goals sought by corporate dissolution law, namely, a fixed time after dissolution when shareholders may securely receive assets distributed from the corporation.

3. *Corporate Dissolution Under the Revised Model Business Corporation Act of 1985*

The 1985 Model Act alleviates the problems caused by the 1979 Model Act by creating a longer survival period and by directly addressing claims that arise after dissolution. The 1985 Model Act addresses pre-dissolution and post-dissolution claims separately: section 14.06 provides for claims that are known at the time of dissolution¹³¹ and section 14.07 provides for claims that are unknown at the time of dissolution.¹³²

Pre-dissolution claims are generally addressed by section 14.06, because they are usually known at the time of dissolution. Section 14.06 requires the dissolving corporation to send a notice of dissolution to all known claimants; in the notice, the corporation must indicate a time (as short as 120 days) after which no claims may be filed against it. For claims unknown at the time of dissolution (which would include all post-dissolution claims), section 14.07 of the 1985 Model Act sets a five-year period in which claims must be filed. Therefore, the 1985 Model Act continues to impose an arbitrary cut-off point as a means of balancing the interests of the injured claimant against the dissolved corporation's interest in repose. The comments to section 14.07 note, however, that "it is believed that the great bulk of post-dissolution claims will arise during this [five-year] period."¹³³

fore the statutory limitation did not apply. See also Friedlander & Lannie, *supra* note 110, at 1378-81 (discussing *Palakow* and similar cases).

130. See, e.g., *People v. Parker*, 30 Ill. 2d 486, 197 N.E.2d 30 (1964) (the statutory limitation does not apply to a claimant who has not received notice of the corporation's intent to dissolve where such notice is required by statute).

131. REVISED MODEL BUSINESS CORP. ACT § 14.06 (1985).

132. Section 14.07 requires a dissolved corporation to give notice by publication of its dissolution. If notice is given, no claims may be brought against the dissolved corporation more than five years after the published notice of dissolution. If no published notice is given, then the claims are barred only by the applicable statute of limitations. REVISED MODEL BUSINESS CORP. ACT § 14.07 (1985).

133. REVISED MODEL BUSINESS CORP. ACT § 14.07 comment (1985).

Despite the advances made by the 1985 Model Act,¹³⁴ it is still inadequate for addressing CERCLA claims. Section 14.07 continues to place a five-year limitation on claims that are unknown at the time of dissolution. Therefore, the Model Act does little to alleviate the problem of CERCLA claims against dissolved corporations because many of these claims may not be known until long after the five-year period has elapsed. Much of the hazardous waste dumping which needs to be cleaned up now was undertaken thirty or more years ago.¹³⁵ It is highly likely that many of the corporations that were generating, transporting, and storing these hazardous substances at that time are dissolved now. If a five-year limit after dissolution is placed on CERCLA claims against these corporations, many such claims will never be litigated.

B. *Corporate Dissolution Law Applied to CERCLA Claims: Levin Metals Corp. v. Parr-Richmond Terminal Co.*

The Ninth Circuit's denial of preemption in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*¹³⁶ turned on its formalistic understanding of the nature of corporate dissolution law. In *Levin Metals*, the plaintiff sought recovery of \$600,000 in costs it had incurred in cleaning its land of pesticides and hazardous chemicals that had polluted the land and surrounding water. The defendant, Parr-Richmond Terminal Company, later doing business as Parr Industrial, had previously owned the land and released chemicals there from 1947 to 1981 in the process of its pesticide manufacturing business. Parr Industrial, however, dissolved in 1971 under a California dissolution provision that allows dissolved corporations to be sued anytime after dissolution based on a cause of action arising prior to dissolution.¹³⁷ The court, however, characterized CERCLA claims as arising after dissolution in this case, because CERCLA was enacted after the corporation had dissolved.¹³⁸ Therefore, according to the court, California dissolution

134. Another consideration is that the 1985 Model Act's separate provision for claims arising after dissolution has not yet been adopted by any state. See W. FLETCHER, *supra* note 114, at §§ 8143, 8148. Most states continue to follow the 1979 Model Act. See *supra* note 114.

135. In *United States v. Sharon Steel Corp.*, the dumping that necessitated cleanup was begun in 1906. 681 F. Supp. 1492, 1493 (D. Utah 1987). In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, storage of hazardous chemicals started in 1947. 817 F.2d 1448, 1449 (9th Cir. 1987). See also *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1105 (D. Minn. 1982) (dumping began in 1917); S. EPSTEIN, L. BROWN & C. POPE, *HAZARDOUS WASTE IN AMERICA* 7 (1982) (listing amounts of hazardous waste production in United States since the end of World War II).

136. 817 F.2d 1448 (9th Cir. 1987).

137. CAL. CORP. CODE § 2011 (Deering 1977) provides: "In all cases where a corporation has been dissolved, the shareholders may be sued in the corporate name of such corporation upon any cause of action against the corporation arising prior to its dissolution."

138. The court stated that "the effect of [CERCLA's] retroactivity is that a cause of action may arise *after* CERCLA's enactment, based on *pre-enactment* conduct. Therefore, since CERCLA was enacted after Parr Industrial's dissolution, Levin's cause of action logically arose *after*

law barred suit against Parr-Richmond.

The court devoted only one paragraph of its opinion to the plaintiff's preemption claim, stating:

Levin's preemption argument turns on its characterization of the California law here involved as law limiting imposition of *liability*. A more accurate characterization is that the law determines *capacity* to be sued. Levin's interpretation, if followed, 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. We reject this reasoning and hold that CERCLA does not preempt California law determining capacity to be sued.¹³⁹

For the *Levin Metals* court, therefore, the fact that corporate dissolution law acts as a survival statute and not as a statute of limitations was determinative in deciding whether the state law was preempted.

The distinction made by the *Levin Metals* court, although correct as a matter of corporate dissolution law, is irrelevant to the analysis of preemption. The court in *United States v. Sharon Steel Corp.*,¹⁴⁰ refusing to follow the Ninth Circuit, termed the differentiation between limiting the liability of a party and determining its capacity to be sued "a distinction without a difference."¹⁴¹ The *Sharon Steel* court explained that "[e]very 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."¹⁴² The court reasoned that CERCLA preemption of state corporate dissolution law does not mean that every federal statute preempts state corporate dissolution law, stating that "[o]nly where, as here, Congress clearly expresses its intention to supersede the general capacity provisions would a court be free to ignore state capacity law."¹⁴³ As recognized by the *Sharon Steel* court, the dire consequences predicted by the Ninth Circuit as a result of CERCLA preemption of state corporate dissolution law are simply not going to occur because all federal statutes do not evidence the kind of broad, retroactive, remedial intent shown by CERCLA.

For the Ninth Circuit, a formalistic understanding of corporate dissolution law was central to its holding that CERCLA does not preempt state corporate dissolution law. However, as next discussed, this formalistic analysis is misplaced when applied to CERCLA claims. CERCLA claims simply do not fit within the general framework of corporate dissolution law, and therefore corporate dissolution's formalistic distinctions ought not apply.

the dissolution, and may not now be asserted against Parr Industrial." 817 F.2d at 1451 (emphasis in original).

139. 817 F.2d at 1451 (emphasis in original).

140. 681 F. Supp. 1492 (D. Utah 1987).

141. 681 F. Supp. at 1497.

142. 681 F. Supp. at 1497.

143. 681 F. Supp. at 1498.

C. *CERCLA Claims Within the Existing Framework of Corporate Dissolution Law*

Fitting CERCLA claims into the existing framework for claims against dissolved corporations is problematic for a number of reasons. First, although most corporate dissolution statutes hinge on whether a claim arises before or after dissolution, CERCLA claims are not easily characterized as either pre-dissolution or post-dissolution claims. Second, when considering the purpose of corporate dissolution statutes, the concerns with a CERCLA claim may be different from those arising out of other claims because the liability under CERCLA is retroactive and could not have been predicted by a responsible party at the time the action initiating liability was taken; therefore similar treatment of dissolved and solvent corporations is fair.

1. *CERCLA Claims Cannot Be Characterized as Pre-Dissolution or Post-Dissolution*

Typically, it is important to characterize a claim against a dissolved corporation as arising either before or after dissolution because corporate survival statutes in most states directly apply only to pre-dissolution claims.¹⁴⁴ In addition, determining when a claim arises is important, generally, because it dictates when the statute of limitations for the claim begins to run.

CERCLA actions to recover cleanup costs, however, have no limitations period. The sections of CERCLA establishing and describing the use of the Superfund do contain a limitations period.¹⁴⁵ In *United States v. Mottolo*,¹⁴⁶ however, a New Hampshire district court held that this statute of limitations applied only to claims against the Superfund for reimbursement and to claims by the government for damages to natural resources, not to actions brought under section 107 of CERCLA for the recovery of cleanup and response costs.¹⁴⁷

144. See *supra* notes 118-30, and accompanying text for a discussion of the importance of differentiating between pre-dissolution and post-dissolution claims.

145. When CERCLA was originally passed, the statute of limitations was set at three years. However, SARA lengthened the period to six years. CERCLA § 112(d), 42 U.S.C. § 9612(d) (1982 & Supp. V 1988).

146. 605 F. Supp. 898 (D.N.H. 1985).

147. In *Mottolo*, the state of New Hampshire filed a CERCLA § 107 claim five years after it had cleaned up a site owned by the defendant. The defendant moved to have the suit dismissed because it was filed after the three-year statute of limitations set by § 112(d) had run. The court, however, after an extensive analysis of CERCLA's language and legislative history, 605 F. Supp. at 901-10, held that the statute of limitations in § 112(d) did not apply to judicial actions brought under § 107, but only limited claims against the Superfund and for damages to natural resources. As stated by the court, "[section 112(d) of CERCLA] is properly interpreted as imposing a three-year statute of limitations upon all claims against the Fund and also upon judicial actions for damages to natural resources, but not upon judicial actions for reimbursement of removal, remedial, or response costs." 605 F. Supp. at 902. This holding was subsequently adopted by another district court in *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 213 (W.D. Mo. 1985).

Because CERCLA section 107 actions have no limitations period, there has been no judicial determination of when CERCLA claims begin or end. Therefore, there is uncertainty about whether they are pre-dissolution or post-dissolution claims for purposes of applying corporate dissolution law. In the two cases that have discussed CERCLA preemption, the corporations being sued had dissolved *before* CERCLA was even enacted.¹⁴⁸ One of the courts maintained that the claim could not have arisen before the date of CERCLA's enactment,¹⁴⁹ and the other court failed to address the issue.¹⁵⁰

Because of this confusion regarding when CERCLA claims arise, many corporate dissolution statutes, as they presently exist, are of no help in resolving CERCLA claims against a dissolved corporation. States with statutes based on section 105 of the 1979 Model Act clearly address only claims that arise prior to dissolution. A CERCLA claim could arise after dissolution: at the time the injury (contamination) was discovered; when clean up costs are incurred; or, arguably, at the time of the injury (disposal, manufacture, or transportation). No matter which interpretation is correct, as long as the issue is unsettled, shareholders receiving assets have no certainty that CERCLA liability will not later attach to the assets. The distinction between pre-dissolution and post-dissolution claims under CERCLA also loses its force because CERCLA claims, unlike most other lawsuits, rely on a federal statute that imposes retroactive liability.

2. CERCLA's Retroactive Liability

CERCLA was enacted in 1980, but it imposes liability for actions taken before the statute's enactment.¹⁵¹ Congress had already set standards for the ongoing disposal of hazardous wastes with the enactment of RCRA in 1976.¹⁵² Through CERCLA, Congress expressly intended to hold companies liable for their past conduct so that cleanup costs for existing sites could be paid by those who had benefited from cheap disposal of the hazardous wastes.¹⁵³ A unique attri-

148. In *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, the corporation at issue, Parr Industrial, had dissolved nine years before CERCLA's enactment. 817 F.2d 1448, 1449 (9th Cir. 1987). In *United States v. Sharon Steel Corp.*, the corporation at issue, UV Industries, had dissolved only nine months before CERCLA's enactment. 681 F. Supp. 1492, 1493 (D. Utah 1987).

149. The *Levin Metals* court failed to decide the specific issue, but stated that a cause of action could not arise prior to the date of CERCLA's enactment. 817 F.2d at 1451. See *supra* notes 136-43 and accompanying text for a discussion of this case.

150. The court in *Sharon Steel*, finding the state corporate dissolution law preempted, did not need to address the issue of when the claim arose. 681 F. Supp. at 1496-99.

151. See *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986) ("Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect."), *cert. denied*, 484 U.S. 848 (1987).

152. 42 U.S.C. §§ 6901-87 (1982). See *supra* note 37.

153. See *supra* Part II.B for a discussion of CERCLA's purposes and legislative history.

bute of any CERCLA claim is that, prior to 1980, no corporation, at the time the toxic substance was released, had any knowledge that liability would later be incurred for that release.¹⁵⁴ Congress believed that such liability should be imposed nevertheless, because these companies had benefited from the production of these substances and from being able to dispose of them in a relatively cheap manner.¹⁵⁵

The retroactive liability imposed by CERCLA is in tension with the certainty goals of corporate dissolution laws. Corporate dissolution statutes seek to provide certainty for shareholders by assuring that assets received by shareholders will not have to be relinquished later to satisfy claims against the dissolved corporation.¹⁵⁶ However, CERCLA's policy choice is to impose liability for the cleanup costs of hazardous wastes on those who manufactured, stored, or transported those substances even though, at the time of manufacture, storage, or transportation, those parties did not know and could not have known that liability would later be imposed for their actions. Therefore, simply by enacting CERCLA, Congress chose to upset certainty for particular parties as to whether or not liability would be imposed on them for actions taken in the past. Although the harm to expectations is greater, the actual monetary damages of a CERCLA suit against the shareholders of a corporation that has dissolved and distributed its assets are no greater than those of a CERCLA claim against an *operating* company for actions it took twenty or more years ago.¹⁵⁷

In addition, pursuing the goal of shareholder certainty in retaining assets distributed by a dissolved corporation is nonsensical when applied to CERCLA claims. Shareholders in such instances merely replace the ongoing corporation as the parties who have benefited from the production of the hazardous wastes and should now pay for the danger those wastes pose to our environment and health. Thus it is consistent with the congressional policy that the beneficiaries of inexpensive disposal now pay cleanup costs for those shareholders to be liable. In summary, it is clear that CERCLA claims against dissolved corporations cannot be meaningfully analyzed or resolved within the

154. Some authors argue that the corporations actually did know of the potential danger posed by these substances at the time of their release. See, e.g., S. EPSTEIN, L. BROWN & C. POPE, *supra* note 135 at 94, 131 (1982) (providing example of corporation that knew of potential dangers posed by building on land that it previously had used for chemical-waste dumping). However, there was no known legal liability for their release before the enactment of CERCLA and RCRA.

155. See *supra* Part II.B for a discussion of CERCLA's legislative history.

156. See *Bishop v. Schield Bantam Co.*, 293 F. Supp. 94, 96 (N.D. Iowa 1968); Friedlander & Lannie, *supra* note 110, at 1401. See *supra* notes 114-21 and accompanying text for a discussion of the purposes of corporate dissolution statutes.

157. The risk to the ongoing corporation is potentially much greater because, while a corporation may be forced into bankruptcy by a large CERCLA claim against it, a shareholder's liability would be limited to the amount of the corporation's assets the shareholder had received. See *infra* note 177 for two recent articles discussing CERCLA claims within a bankruptcy proceeding.

usual framework of suits against dissolved corporations because the policy choice of retroactive liability embodied in CERCLA is contrary to the primary goal of corporate dissolution law of promoting certainty for shareholders.

The resolution of CERCLA claims within this framework (which depends on the differentiation between pre-dissolution and post-dissolution claims) is hindered by the lack of a consensus as to when CERCLA claims arise. Moreover, the *Levin Metal* court's focus on corporate capacity to be sued and fear that preemption by CERCLA will provide precedent for preemption of dissolution law by every federal statute is misplaced because there are few, if any, other federal statutes that solve such large national problems through the imposition of retroactive liability. CERCLA preemption of state corporate dissolution law is the only way to effectuate Congress' goal of placing the costs of cleaning up hazardous wastes on those who are responsible for, or have benefited from, those wastes.

IV. A WORKABLE SOLUTION: CERCLA PREEMPTION OF STATE CORPORATE DISSOLUTION LAW

This Part attempts to devise a workable solution to the problem of CERCLA claims against dissolved corporations through the means of CERCLA preemption of state corporate dissolution law. Section A examines the goals that an optimal solution to the problem of CERCLA suits against dissolved corporations would serve and argues that there is a shared ground between the apparently conflicting goals of CERCLA and corporate dissolution statutes. Section B explores the contours of a solution that would meet the optimal goals. This section argues that a legislative solution differentiating between corporations based on whether they dissolved before or after CERCLA's enactment would promote the most equitable solution, but recognizes that such a differentiation is impossible to make within the current contours of the law and concludes that the solution of preemption also serves the optimal goals. In section C, this Part confronts the practical and conceptual problems of recovering assets from shareholders of the dissolved corporation that flow from preemption. This section argues that analogous authority points to the resolution of this problem and that the conceptual problem is not as large as it may first appear. The section concludes that any practical problems that do flow from preemption are more than outweighed by the goal of preventing corporations from dissolving in order to escape CERCLA liability.

A. *Optimal Goals*

Defining the optimal goals of a solution to the problem of CERCLA claims against dissolved corporations may seem impossible because the goals of CERCLA are in direct conflict with the goals of

corporate dissolution law. On the one hand, CERCLA's primary goal is to remedy the problem of inactive hazardous waste sites by imposing the costs of cleanup on those responsible for generating, transporting, or disposing of the hazardous materials.¹⁵⁸ CERCLA seeks to achieve this goal through imposing liability retroactively, without fault, for actions taken by companies or individuals many years before the statute was even passed.¹⁵⁹ Corporate dissolution law, on the other hand, seeks to provide an organized and certain path for corporations to end their affairs and thereby to ensure that shareholders may receive assets subsequently distributed without a threat of later liability.¹⁶⁰ To further this goal, most corporate dissolution statutes cut off all liability at the end of a specified time period.¹⁶¹ The two areas of laws operate on different and conflicting principles: while CERCLA imposes liability today for a continuing problem caused by actions taken years ago, corporate dissolution law seeks to provide a definite end to liability for actions taken in the past.

Within these conflicting goals, however, there is a shared ground. CERCLA's goals could be substantially furthered by a solution that would keep the problem from expanding by preventing corporations from dissolving to escape liability.¹⁶² The goals of corporate dissolution law would be substantially furthered by a solution that allows corporations seeking dissolution to provide for potential CERCLA liability in an orderly fashion before dissolution is final.¹⁶³

An optimal solution to the problem would prevent a corporation from escaping CERCLA liability through dissolution and would encourage these corporations to provide for potential CERCLA liabilities before dissolution is complete; thereby allowing a corporation with potential environmental liabilities to make some provision for those liabilities before dissolving to ensure that its shareholders have some security from CERCLA liability in the future. For corporations that have already dissolved, this solution would provide a balance that

158. See *supra* notes 81-84 and accompanying text.

159. See *supra* notes 81-87 and accompanying text.

160. See *supra* notes 114-21 and accompanying text.

161. See *supra* note 114 and accompanying text.

162. CERCLA's goals would be somewhat harmed by this because some funds from potentially responsible parties would be lost. However, the possibility that corporations in existence today will be able to dissolve in order to escape liability is a major concern. The court in *United States v. Sharon Steel Corp.* seemed most troubled about this eventuality, stating "[i]f for example, under state law a dissolved corporation lacked the capacity to be sued, any corporation could escape CERCLA liability simply by dissolving before the government brought suit, perhaps to incorporate again after someone else had paid to clean up its hazardous wastes." 681 F. Supp. 1492, 1498 (D. Utah 1987).

163. Any solution that increases the predictability of result when a CERCLA claim is brought against a dissolved corporation would further the primary goal of corporate dissolution law which is to protect a period of repose for shareholders. However, corporate dissolution law does not aim to provide a mechanism through which a corporation may escape its potential liabilities.

would promote the cleanup of hazardous waste sites using funds from parties responsible for the wastes (rather than taken from the taxpayers) while leaving some measure of security for shareholders who have received assets.

B. *The Contours of the Solution*

The ground shared by common goals of CERCLA and corporate dissolution statutes converges on whether the corporation had knowledge, before dissolution, of potential CERCLA liability. This common ground is based on a differentiation between corporations, which is based on whether dissolution occurred before or after the enactment of CERCLA. A solution based on this common ground, however, could only be attained through legislation because the framework of preemption does not allow for this differentiation to be made. Until a legislative solution is reached, however, preemption best furthers the primary goal of preventing corporations from dissolving in order to escape CERCLA liability.

The following section first discusses a legislative solution to the problem of CERCLA claims against dissolved corporations, arguing that a legislative solution that differentiates between corporations based on whether they dissolved before or after CERCLA's enactment would best achieve the optimal goals of a solution. This section next establishes that this differentiation cannot be made outside of legislative action and concludes with the realization that until a legislative solution is reached, CERCLA preemption of state corporate dissolution law best furthers the optimal goals.

1. *A Legislative Solution*

A legislative solution to the problem of CERCLA liability for dissolved corporations could be achieved by changing the definition of a "person" who can be held liable under CERCLA.¹⁶⁴ This solution would differentiate between corporations that dissolved before CERCLA's enactment and those that dissolved after CERCLA's enactment. Currently CERCLA identifies a "corporation" as a "party" who may be held liable for cleanup and response costs.¹⁶⁵ The definition could be changed to read: "'person' means a . . . corporation existing under the laws of any state, as of or after the effective date of this chapter." If this change were instituted, CERCLA would no

164. CERCLA § 101(21), 42 U.S.C. § 9601(21) (Supp. V 1987), defines "person" for the purposes of CERCLA. Section 107 of CERCLA depends on this definition to impose liability on "any person" who owned or operated a hazardous waste site, transported hazardous wastes for disposal, or contracted for the disposal of hazardous wastes. 42 U.S.C. § 9607(a) (Supp. V 1987). See *supra* note 15 for a more complete text of this section.

165. The definition currently reads, "'person' means [a] . . . corporation." 42 U.S.C. § 9601(21) (Supp. V 1987).

longer impose liability on corporations that dissolved prior to its enactment on December 11, 1980.¹⁶⁶ A legislative solution based on this differentiation would best further the optimal goals identified above from both an equitable and a practical standpoint.

Imposing CERCLA liability on corporations dissolving after CERCLA's enactment promotes fundamental fairness because the directors of any corporation that dissolved after the enactment of CERCLA had knowledge of the possibility of CERCLA liability and could have provided for that liability before dissolving. Corporations that dissolved before CERCLA's enactment, however, had no knowledge of potential liability and therefore no way to prepare for resolution of that liability.

From a practical standpoint, a legislative solution which differentiates between corporations based on whether they dissolved before or after CERCLA's enactment also appears to satisfy best the identified optimal goals. This solution recognizes that with the passage of time, the assets of a dissolved corporation become more difficult to trace and recover. For a corporation that dissolved before CERCLA's enactment almost nine years ago, the transaction costs of bringing and maintaining a suit against shareholders are likely very high, which decreases the amount of funds that would actually go towards cleanup.¹⁶⁷ The passage of time also increases the shareholders' interest in repose and lessens the deterrent aspect gained by imposing liability on dissolved corporations who knew or should have known about CERCLA liabilities and provided for them prior to dissolution.

A legislative solution that would redefine a "person" subject to CERCLA liability to exclude corporations that dissolved before the statute's enactment, would strike the best balance between the interests of corporate dissolution law and the pressing national need to clean up hazardous waste sites. However, such a legislative change does not appear to be approaching and until it does, the avenue left

166. Under this legislative solution, the defendant corporations in *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492 (D. Utah 1987), and *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448 (9th Cir. 1987) would both escape CERCLA liability because both corporations dissolved before CERCLA was enacted. See *supra* notes 136-43 and accompanying text. This solution might seem inequitable for corporations that dissolved only months before CERCLA was enacted and conceivably could have dissolved to escape liability that appeared likely to be imposed as Congress considered CERCLA. See *Sharon Steel*, 681 F. Supp. at 1498 (corporation at issue dissolved "while Congress was considering forerunners of CERCLA"). However, for ease of administration, and the efficiency gains of not having to prove subjective intent, drawing the line at the date of CERCLA's enactment seems to be the most equitable solution. This differentiation represents a compromise position to the extent that it runs counter to CERCLA's basic scheme of imposing liability without fault. However, as a practical matter, the amount that would be recovered from corporations that dissolved before CERCLA's enactment nearly nine years ago is most likely *de minimis*.

167. Conceivably, if a large number of shareholders received assets, the costs in tracking down the shareholders might be larger than the amount that would eventually be recovered.

open to the courts that are faced with this problem is that of preemption.

2. *A Preemptive Solution*

Although the optimal goals of a solution appear to be best addressed through the legislative solution proposed above, within the current framework of CERCLA and state corporate dissolution law a differentiation between corporations dissolving prior to CERCLA's enactment and those dissolving after CERCLA's enactment is not possible. Preemption could not be used to differentiate between corporations based on when dissolution occurred; if the state dissolution law were preempted by CERCLA, any previously existing corporation could be held to be a responsible party under the statute. Therefore, the choice is one between upsetting the repose of dissolved corporations and their shareholders through CERCLA preemption of state corporate dissolution law, or allowing corporations to escape CERCLA liability through dissolution if CERCLA does not preempt the state procedures.

Preemption meets the primary goal of the optimal solution by preventing corporations from dissolving to escape CERCLA liability. The solution of preemption, however, also raises the specter of imposing liability on shareholders of the dissolved corporation whose assets have already been distributed. This is a problem that has troubled the courts but, as discussed below, it is not so grave as to overshadow the important national goals of CERCLA.

C. *Shareholder Liability: A Conceptual and Practical Problem*

The practical and conceptual problems of allowing a dissolved corporation to be sued loom large in a discussion of CERCLA preemption of state corporate dissolution law. The courts that have addressed the issue have been troubled by the possibility of imposing liability on a dissolved corporation that has already distributed assets to its shareholders. As the cases indicate, some courts have been unwilling to allow recovery of cleanup costs from a dissolved corporation that has already distributed its assets.¹⁶⁸ Even the district court in *United*

168. The Eighth Circuit discussed the issue of whether a CERCLA claim could be recovered from assets distributed to shareholders in the case of *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). The corporation at issue, NEPACCO, had forfeited its charter and distributed its assets to shareholders without filing for dissolution. The court held that the corporation still had the capacity to be sued, but as a practical matter, a recovery would be unlikely. The court stated: "Because NEPACCO's assets have already been liquidated and distributed to its shareholders, however, it is unlikely that the government will be able to recover anything from NEPACCO." 810 F.2d at 742. Similarly, it is possible that in *Levin Metals* the fact that the corporation's assets had been distributed and suit was brought against former shareholders played a role in the court's refusal to consider seriously the plaintiff's preemption argument. 817 F.2d at 1451.

*States v. Sharon Steel Corp.*¹⁶⁹ refused to address the issue of whether its holding of preemption would allow a judgment to be recovered from the corporation's former shareholders.¹⁷⁰

However, analogous authority exists both for the recovery of assets from shareholders of a dissolved corporation, and for the direct liability of shareholders as responsible parties under CERCLA. Corporate dissolution law provides for the reclamation of assets distributed to shareholders at dissolution both in the common law trust fund theory¹⁷¹ and in some state statutory dissolution provisions.¹⁷² Within CERCLA jurisprudence, shareholders of a responsible corporation may be held directly liable if they have actively participated in the affairs of the corporation.¹⁷³ The courts' conceptual problem, therefore, of holding shareholders responsible is not as overwhelming as it may first appear.

Moreover, as a practical concern, this problem can be placed in perspective by recognizing that in the class of dissolved corporations, as in any other class of potential defendants, some will be judgment proof. This was the view of the *Sharon Steel* court, which held that the trust fund established by the corporation at dissolution could be sued even if it contained no assets, stating,

[T]he fact that a defendant may be judgment proof does not affect its capacity to be sued. It may be that the trust has all the assets. If [the corporation] is ultimately found liable, the government may have to decide whom it can collect from — the trust or the corporation.¹⁷⁴

The fact that a certain defendant within a category is judgment proof does not mean that the entire category of defendants should not have the capacity to be sued; it merely means that plaintiffs deciding whether to sue must consider whether a particular defendant will eventually be able to pay any judgment entered. The risk, therefore, of judgment proof defendants should not keep the courts from imposing liability upon shareholders of dissolved corporations that are otherwise liable under CERCLA.

169. 681 F. Supp. 1492 (D. Utah 1987).

170. See *supra* notes 108-09 and accompanying text for a description of the trust fund theory.

171. See *Sharon Steel*, 681 F. Supp. at 1499. Because the corporation's trust fund still existed, addressing such a question would be premature, according to the court. The issue of whether the government could recover cleanup costs from assets already distributed to shareholders was "best left for another day." 681 F. Supp. at 1499.

172. See, e.g., CAL. CORP. CODE § 2011 (Deering 1977); N.J. STAT. ANN § 14A:12-13 (West Supp. 1989).

173. See, e.g., *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985) (principal shareholder held directly responsible because of decision made, as president of the corporation, illegally to dispose of hazardous wastes). See also Comment, *The Threat to Investment in the Hazardous Waste Industry: An Analysis of Individual and Corporate Shareholder Liability Under CERCLA*, 1987 UTAH L. REV. 585, 602-18 (shareholders of corporations are held directly responsible for CERCLA liability where they have control over or active participation in decisions regarding disposal of hazardous wastes).

174. 681 F. Supp. at 1498.

Allowing suits against former shareholders of the dissolved corporation is a logical application of Congress' purpose in passing CERCLA and promotes CERCLA's goals. If shareholders of dissolved corporations are liable for cleanup costs, there will be another source of funds available to clean up hazardous waste sites, thus fulfilling Congress' intent to clean up as many of these sites as possible through recovering costs from those who had benefited from the hazardous waste industry in the past.¹⁷⁵ Holding shareholders liable is a logical application of this idea because a corporation that benefited from hazardous waste production, storage, or transportation, but dissolved before providing for cleanup of the hazardous wastes has merely passed these benefits on to the former shareholders in the form of greater assets at dissolution.¹⁷⁶ The shareholders, therefore, step into the shoes of the corporation as the party that Congress intends should pay the cleanup costs.¹⁷⁷ The shareholders' liability would not extend past the amount of assets actually received from the corporation and therefore would be limited.¹⁷⁸

As for corporations now facing dissolution, CERCLA preemption of state corporate dissolution law would provide an incentive for these corporations to take care of potential CERCLA liabilities before dissolution. This is consistent with the goal of dissolution law to allow the corporation to wind up its affairs before dissolving.¹⁷⁹ It is also consistent with the goals of CERCLA because, through preemption, corporations would have an incentive to provide for cleanup before dissolution. If the directors of a corporation know that after dissolution the corporation's former shareholders will be liable for cleanup

175. CERCLA's policy choice was that any person involved in the generation, disposal, or transportation of hazardous wastes before regulation benefited from past cheap disposal methods. See *supra* notes 87-88 and accompanying text.

176. A related consideration is that of the corporation that, upon dissolution, sells its assets to another corporation. These cases, however, are analyzed within the scope of parent corporation liability and are beyond the scope of this discussion. For a detailed analysis of parent corporation liability under CERCLA, see Note, *Liability of Parent Corporations For Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986).

177. This is in contrast to CERCLA claims against corporations in bankruptcy proceedings. There has been a great deal of literature addressing the issue of CERCLA claims within bankruptcy, arguing over whether CERCLA claims should be dischargeable and what priority they should have in the proceedings. See, e.g., *Developments in the Law: Toxic Waste Regulation*, 99 HARV. L. REV. 1458, 1585-1601 (1986) (arguing that CERCLA claims should be placed ahead of all other claims in a bankruptcy proceeding in order to reflect the true costs of investment in these industries); cf. Funsten & Hernandez, *The Toxic Waste Generator in Bankruptcy: Should Environmental Cleanup Costs Be Given A Priority?*, 6 STAN. ENVTL. L.J. 108 (1986-87) (arguing that CERCLA claims should be dischargeable in a bankruptcy proceeding). The main objection for those arguing that CERCLA claims should not have a priority in bankruptcy is that to give them a priority merely leaves other innocent creditors with unsatisfied claims and does not, therefore, actually make the corporation pay for cleanup. See *id.* at 142-44. In the dissolution context, on the other hand, those paying the cleanup costs are actually those who have benefited in the past from the production of these hazardous wastes.

178. See REVISED MODEL BUSINESS CORP. ACT § 14.07(d)(2) (1985).

179. See *supra* note 163 and accompanying text.

costs, the directors will have an incentive before dissolution to clean up the wastes, provide a trust fund from which cleanup costs can be recovered later, or inform the shareholders at the time of distribution that they may be liable for future cleanup costs.¹⁸⁰ This would further CERCLA's objectives by encouraging the corporation to provide for cleanup of hazardous wastes before dissolution and by not allowing a corporation to escape liability through dissolution.

CONCLUSION

Congress enacted CERCLA to provide a comprehensive solution to the significant problem of inactive hazardous waste sites. Congress intended that these sites, which are endangering our health and environment, be cleaned up with funds from parties who had created or benefited from them, rather than with funds from taxpayers. The corporate dissolution provisions of many states, however, frustrate this intent and allow corporations to escape CERCLA liability through dissolution. A legislative solution differentiating between corporations based on whether dissolution occurred before or after CERCLA's enactment would resolve the problem most clearly and equitably. However, until legislative action is taken, CERCLA preemption of state corporate dissolution law is the best solution to this problem. The resulting disruption to the goals of corporate dissolution law is not unprecedented, and is more than justified by the urgent national policy goals embodied in CERCLA.

— *Audrey J. Anderson*

180. If CERCLA does preempt state corporate dissolution law, trustees of a corporation who did not take such precautions before distribution might be liable to shareholders for a breach of fiduciary responsibility. See 1985 Model Act at § 14.06(a) & § 14.07 comment ("Directors must generally discharge or make provision for discharging all of the corporation's liabilities before distributing the remaining assets to the shareholders.").