On the Application of CERCLA to Noncorporate Entities: An Analysis of the *Redwing* Decisions

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INTRODUCTION

Since the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 19801 ("CERCLA"), environmental liability has become one of the most important considerations in deciding whether to own or operate a business on a particular piece of land.2 The rationale that CERCLA is a remedial statute has been used by courts to stretch the language of CERCLA to the point where environmental liability attaches itself to land. Consequently, anyone who owns, operates on, or develops the land is likely to join the group of potentially responsible parties ("PRPs") who face joint, several, strict, and retroactive liability for the entire cost of the environmental cleanup.3 Once found responsible for the contamination of a CERCLA facility or site, PRPs face potentially unlimited liability, since liability is not based on the price paid for property.4

The liability scheme imposed by CERCLA produces two clear effects. First, because CERCLA liability can easily exceed the value of the land, the best way to control this liability is to avoid

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3. See id. ("CERCLA’s strict, joint and several, and retroactive liability for all owners or operators of sites where hazardous substances have been disposed of is of concern to any party that might acquire interest in contaminated property."); S. Rep. No. 103-349, at 7 (1994).
4. See infra notes 34-38 and accompanying text (discussing how the structure of CERCLA’s strict liability scheme results in essentially unlimited liability).
triggering it in the first place.\textsuperscript{5} Therefore, property with a questionable environmental history is routinely avoided by potential owners or developers. This intentional avoidance has led to what is often referred to as the "brownfield" problem: contaminated property becomes essentially untouchable by anyone because of the liability for cleanup that has attached to it.\textsuperscript{6} The other effect of CERCLA's broad coverage is that parties try to structure their transactions to limit exposure to liability.\textsuperscript{7} Thus, contractual indemnity agreements (where a party remains a PRP but is indemnified against CERCLA liability) are common, as is the use of business entities, like corporations, that give liability protection to their owners.\textsuperscript{8}

While the options of avoiding the land in the first place or only using land where contractual indemnity can be obtained are common methods of minimizing CERCLA liability, the option of using business entities offering limited liability protection is subject to substantial uncertainty. The most common such entity historically, the corporation, has been the focus of much CERCLA litigation. Unfortunately, the protection the corporate form offers against unlimited CERCLA liability varies widely by circuit.\textsuperscript{9} As for other

\textsuperscript{5} See generally Gordon & Weintraub, supra note 2, at S2.
\textsuperscript{6} See id. Gordon and Weintraub note:

The uncertainty over the extent to which a particular site is contaminated and the standard of cleanliness that the applicable agency will require for the site's remediation, together with the legendary cost of litigating under CERCLA has led to a situation where buyers are extremely wary of purchasing brownfield sites and where, in certain circumstances, it is less costly for an owner to abandon a site rather than clean it up. Moreover, lenders shun such sites, concerned about the borrower's ability to repay the loan and about their own potential liability as a holder of interest.

\textit{Id. See also infra note 28 and accompanying text (discussing the brownfields phenomenon).}

\textsuperscript{7} See, e.g., United States v. Cordova Chemical Co., 59 F.3d 584, 590 (6th Cir. 1995) (describing how the party indicating an interest in participating in the development of contaminated property would only consider the investment if it could cap its potential liability for environmental cleanup through the use of a subsidiary corporation).

\textsuperscript{8} See, e.g., Brian O. Dolan, Comment, Misconceptions of Contractual Indemnification Against CERCLA Liability: Judicial Abrogation of the Freedom to Contract, 42 CATH. U. L. REV. 179, 187-88, 194 (1992) (discussing how parties have a strong incentive to enter into indemnity agreements in an attempt to allocate liability under CERCLA, and how such agreements do not relieve a party from CERCLA liability but do create an enforceable indemnity obligation that has the effect of relieving liability to the extent the indemnitor is financially solvent).

\textsuperscript{9} Compare, e.g., Cordova, 59 F.3d at 591 (holding that the liability protection of the
entities, such as limited partnerships and limited liability companies ("LLCs"), there is a paucity of case law interpreting the application of CERCLA in these contexts. The effect of the unsettled nature of this application is that a party contemplating rehabilitation of brownfield property faces substantial uncertainty as to whether the liability protection of a business entity will provide an effective shield from the dreaded CERCLA liability.

A recent district court decision, Redwing Carriers, Inc. v. Saraland Apartments, Ltd., and its appeal to the Eleventh Circuit, may help resolve some of this uncertainty. These cases consider, for the first time, the application of CERCLA to a limited partnership that developed a building on contaminated land. For parties seeking to limit potential CERCLA liability, the important issues addressed in the Redwing cases are (1) the extent of protection that limited partnerships offer limited partners and (2) the acts for which the limited partners can lose their liability protection. In addition, however, both cases go beyond a simple consideration of the limited partnership issues; they reach unique interpretations of CERCLA that are important for both the answers they provide and the questions they raise.
The discussion of the Redwing cases that follows first presents some background material in Part I on how CERCLA applies generally and, more specifically, how it has been applied in the corporate context. Since most of the same issues arise in the corporate and limited partnership context, and because the Redwing courts analogize frequently to corporate rules, this background is important. It leads to an appreciation of the significance of the Redwing courts' choices between following established corporate CERCLA law and creating new law tailored to the circumstances of limited partnerships.

Part II presents the factual background of the Redwing cases and the legal issues considered by the courts. This Part then analyzes the district court opinion, Redwing I, in detail. It highlights the legal analysis of Senior District Court Judge William Brevard Hand in considering how CERCLA should apply to limited partnerships, as well as several novel rulings that would limit the breadth of CERCLA's coverage.\(^{16}\)

Part II continues with an analysis of the Redwing II decision. Redwing II represents the first time a federal appellate court has considered how CERCLA applies to parties having the liability protection normally offered by a noncorporate entity. In addition to solid analysis that gives limited partners protection from CERCLA liability, the opinion contains miscellaneous rulings on CERCLA implementation that appear to break new ground (even though the court does not expressly recognize them as doing so). Since the Eleventh Circuit Court of Appeals has been highly influential in

\(^{16}\) While Judge Hand's limited partnership analysis was essentially affirmed on appeal, his more novel interpretations were largely rejected. See infra notes 140-42 (discussing some of Judge Hand's more unconventional rulings). Despite the novelty of his position, it may prove influential. See Mark D. Tucker, 'Retroactive Liability' is Challenged, Nat'L L.J., Oct. 14, 1996, at C1 (discussing Judge Hand's "unanticipated decision" in United States v. Olin Corp., 927 F.Supp. 1502 (S.D.Ala. 1996), that CERCLA could not be applied retroactively). This decision caused an immediate uproar from the Department of Justice, which warned that CERCLA would be crippled if this ruling were upheld, and from Congressional Republicans, who proclaimed this ruling to be a watershed event in reform of the statute. Id.
this area, both the entity law and the miscellaneous CERCLA rulings of *Redwing II* are likely to have significant effect.

Finally, Part III considers the unresolved issues in *Redwing II* and points out the limits of the decision as legal precedent. Part III demonstrates that the *Redwing II* analysis ignores critical questions of partnership succession in deciding the CERCLA responsibility of the general partners, with the result that the treatment of general partners remains unsettled. Then, the implications of *Redwing II* for LLCs are discussed. While the limited partnership rulings can answer many implementation questions, others specific to LLCs remain unclear.

I. CERCLA ISSUES

A. Background

CERCLA was enacted in 1980 by a “lame duck” Congress, partially as a response to high profile environmental contamination cases like Love Canal and the Valley of the Drums. Passed in haste and without much legislative history, CERCLA was intended to provide the funding and means for government to clean up environmental problems without delay. It was apparently designed as much to rectify existing environmental problems as to prevent future contamination. CERCLA’s remedial character is important to the implementation of the statute, which has generally been interpreted broadly to ensure that its dual purpose (enabling the EPA to respond quickly to environmental spills and holding the parties responsible liable for the costs of cleanup) is met.

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17. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 (11th Cir. 1990) (holding a lender as a PRP under CERCLA because it had the authority to control the debtor’s property that was contaminated). This ruling shocked the lending industry and was ultimately overruled by Congress through an amendment to CERCLA. See Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, H.R. 3610, 104th Cong. § 2502.
18. See Dolan, supra note 8, at 179 n2.
19. See id. at 179-80.
21. See Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL.
amples of this broad interpretation are that CERCLA liability has been threatened for events that happened more than one hundred years ago and against such small nonprofit organizations as a Little League baseball team. CERCLA responsibility reaches so widely that one third of all cleanup sites involve more than one hundred PRPs, and another third involves between twenty and one hundred PRPs.

Although CERCLA has been in effect for more than fifteen years, it remains controversial and many important issues concerning it remain unresolved. The three most common complaints against CERCLA were nicely summarized in the Superfund Reform Act of 1994: (1) the liability system of CERCLA, applying jointly, severally, strictly and retroactively, is unfair; (2) in implementation, CERCLA imposes heavy transaction costs; and (3) the liability scheme is too broad and includes certain parties never intended to be included. The effect of CERCLA has been to raise environmental issues to the forefront of all decisions concerning real estate. CERCLA’s impact on real estate investment has been so significant, in fact, that the implementation of the statute led to the

L. Rev. 199, 273 (1996) (arguing that the remedial purpose canon of judicial interpretation heavily influences the application of CERCLA). Another way of stating the purpose of CERCLA is to say Congress intended that the “polluter pays” instead of the public. Id. at 280.


24. Id. at 40-41.


coining of a new word, "brownfields," to describe vacant hazardous waste sites that developers avoid because of the environmental liability that attaches to the land.\(^2\) While brownfields would still exist without CERCLA in its present form, the potential unfairness, cost, and broad scope of CERCLA have created a situation where, from a market perspective, brownfields cannot compete with non-brownfield (sometimes called "greenfield") property.\(^2\) This has led many to remark that the only thing fair about CERCLA is that it is unfair to everyone.\(^3\)

A significant aspect of the controversy surrounding CERCLA arises not from the language of the statute itself, but from the expansive judicial interpretation given it. To give effect to the remedial purpose of the statute and to make "polluters pay," courts have broadly construed the language in CERCLA.\(^3\) This extension of liability has occurred without much intervention by Congress, making CERCLA as much judicially created law as it is statutory law.\(^3\) Because of the heavy influence of judicial interpretation and the apparent low probability that Congress will clarify the law on its own, individual decisions can immediately reshape the contours of CERCLA law.\(^3\)

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29. See id. at 10,338 (noting that some experts estimate more than 500,000 sites nationwide show evidence of at least some hazardous waste contamination, with a total potential cleanup price of as high as $650 billion).
30. See id. at 10,339.
31. See Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991) ("[T]he remedial nature of CERCLA's scheme requires the courts to interpret its provisions broadly to avoid frustrating the legislative purposes."). Examples of the broad judicial interpretation of CERCLA are that the phrase "owner and operator" really means "owner or operator," and that simple movement of previously contaminated soil is a new "disposal" that triggers a new round of CERCLA responsibility. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 (11th Cir. 1990); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988).
32. Congress has substantively modified CERCLA to temper some of its perceived harsh effects on only a few occasions. In 1986, Congress passed the Superfund Amendments and Reauthorization Act (the "SARA Amendments") that specified the right of contribution among PRPs and clarified the innocent purchaser defense. See Pub. L. No. 99-499, 100 Stat. 1613 (1986). In 1996, Congress clarified the application of CERCLA to the activities of lenders, effectively overruling Fleet Factors. See Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, H.R. 3610, 104th Cong. § 2502. See also S. REP. No. 103-349, at 39-40 (1994) (accepting implicitly that the judicial interpretations of CERCLA, like its retroactivity, are settled legal issues).
33. See, e.g., supra note 17 (discussing how the Fleet Factors ruling shocked the
B. Relevant CERCLA Provisions

CERCLA applies joint and several, strict, and retroactive liability to all parties responsible for a discharge of hazardous waste at a facility. Since all PRPs at the facility are considered joint tortfeasors, the joint and several liability part of CERCLA is consistent with the common law of torts, which holds that, in the absence of divisibility of the harm caused by joint tortfeasors, joint and several liability applies. Strict liability under CERCLA arises from the language in the statute that, to give effect to the remedial purpose, defines liability as based only on the status of parties and their relationship to the contaminated facility without reference to relative fault. Finally, retroactive liability is injected into CERCLA in part because of its remedial purpose and in part due to language in the statute in the past tense, which suggests that past events are relevant. Because it is the only implied liability under CERCLA and because it can reach back well beyond the relevant statute of limitations for events, retroactive liability is the most controversial of the liability theories applying to responsible parties under CERCLA.
On the key issue of who is a PRP, CERCLA defines four categories of responsible parties in § 9607(a):

(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release. . . .

The four categories of CERCLA liability apply to any "person," where "person" is defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." Combining the broad definition of person with the four types of responsibility, a wide range of individuals or entities may be directly responsible under CERCLA.

In practice, applying the four statutory types of responsibility is not straightforward since it requires interpretation of sometimes ambiguous language. The most frequently encountered interpretation issue occurs in § 9607(a)(1), which only applies to present "owners and operators." This language has always troubled courts because, interpreted literally, it means that current owners who do not operate a business at the site and operators who do not own the site at which they are operating would be freed from CERCLA responsibility. Because of this perceived problem, from the earli-

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40. § 9601(21).
41. See infra note 140 (presenting the Redwing I court's statutory interpretation of § 9607(a)(1)).
42. See Redwing I, 875 F.Supp. at 1555 (discussing the interpretational gymnastics courts have employed to find that "and" should be read as "or").
est interpretations of CERCLA this language has uniformly been interpreted as meaning "owner or operator." 43 Another key interpretation issue in applying the statute is that §§ 9607(a)(2), (3), and (4) each apply to persons at the time of a disposal event. 44 Thus, the interpretation of "disposal" can be critical to whether a person is covered by the statute. 45 Other such interpretation questions abound in applying CERCLA. 46 Further, the liability structure of CERCLA cases (that once you are a PRP, you are strictly, jointly, severally, and retroactively liable for the entire cost of the cleanup) makes even small interpretation issues of major importance.

In applying the responsibility tests of § 9607(a), there are a few statutory defenses. Section 9607(b) exempts from responsibility persons who

[c]an establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such

43. See id.
44. See §§ 9607(a)(2)-(4).
45. Compare Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988) (holding that CERCLA responsibility applies to persons who dig or move already contaminated soil because this is a new disposal event) with infra note 141 (discussing the Redwing I creation of a voluntary/involuntary distinction for what it termed "second-hand" disposals); infra notes 200-01 and accompanying text (discussing the Redwing II court's rejection of the Redwing I rule and creation of its own test that does not consider digging a disposal if the soil is put back in the same location).
46. See, e.g., infra notes 83-101 and accompanying text (discussing the wide variation in standards for deciding when a person should be held as an operator).
third party and the consequences that could foreseeably result from such acts or omissions or any combination of the foregoing paragraphs.\textsuperscript{47}

In practice, defenses (1) and (2) are “rarely invoked,” so the only viable defense is the “third-party” defense of § 9607(b)(3).\textsuperscript{48} While this defense is designed to absolve persons who did not cause any contamination and whose ties to the site occurred after the contamination had already occurred, it can be hard to establish.\textsuperscript{49} The first difficulty is that if a contractual arrangement exists either directly or indirectly between the person claiming the defense and any person responsible under CERCLA, the defense will probably fail.\textsuperscript{50} For example, a current owner who bought from a responsible person has a contractual relationship through the contract of sale and will lose the third party defense unless they can establish the innocent purchaser defense. The second difficulty with the third party defense is that it requires proof that due care was used with respect to the hazardous substance already existing on

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\textsuperscript{47} § 9607(b).
\textsuperscript{48} Redwing II, 94 F.3d at 1507.
\textsuperscript{49} See ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE, § 5.5.A. (1992) (“Though defendants often assert the third-party defense, we are aware of only a few reported cases in which a court has actually held that a CERCLA defendant was not liable on this or a related basis.”).
\textsuperscript{50} See § 9601 (35)(A) (“The term ‘contractual relationship,’ for the purpose of section 9607(b)(3) of this title includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession . . . ”). The only exception to finding a “contractual relationship” is the so-called “innocent purchaser defense” that excepts from coverage:

[R]eal property on which the facility concerned is located [that] was acquired by the defendant after the disposal or placement of the hazardous substances on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility.

(ii) The defendant is a governmental entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to the foregoing, the defendant must establish that he has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title.

\textit{Id.}
the property and precautions were taken against the foreseeable consequences of existing contamination.\textsuperscript{51} Since there is wide latitude for interpretation as to the level of due care and precautions required for the third party defense, courts have considerable flexibility as to deciding who qualifies.\textsuperscript{52} Thus, while the third party defense exists ostensibly to temper the harsh effects of CERCLA, as implemented under the remedial purpose canon the third party defense may not relieve many PRPs from CERCLA responsibility.

If a person is found responsible and not excused by the third party defense, ultimate liability at the site will be determined by an allocation of responsibility among PRPs. Section 9613(f) states that:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.\textsuperscript{53}

In application, the key words of § 9613(f) are “may allocate” and “using such equitable factors as the court determines are appropriate.” This language shows that courts are not required to award contribution to a PRP who has paid for the costs of a cleanup. Even if the court does award contribution, there is no defined set of equitable factors to apply.\textsuperscript{54} The end result of these vague implementation standards for contribution actions is that PRPs cannot easily settle their share of liability with other PRPs because they cannot predict how a court will ultimately allocate responsibility.\textsuperscript{55}

\textsuperscript{51} See Topol & Snow, supra note 49, at § 5.5.C. (arguing that a narrow interpretation of the “sole-cause” requirement leads courts to reject the third party defense for parties who in any way contributed to the contamination and that courts require the defendant to offer evidence of due care or precautions against release).

\textsuperscript{52} See id. (arguing that courts have so narrowly construed the third party defense that plaintiffs now take the position that “any act or omission of a party—however slight or innocent—that contributes to the situation at the site bars a third-party from being the ‘sole cause’ of the problem and therefore bars assertion of the defense”).


\textsuperscript{54} See Redwing I at 1568-69 (“[A] court may consider any factors appropriate to balance the equities in the totality of the circumstances. . . . In any given case, a court may consider several factors, a few factors, or only one determining factor . . . depending on the totality of circumstances presented to the court.”) (quoting Environmental Transportation Systems Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992)).

\textsuperscript{55} See S. Rep. No. 103-349, at 40 (1994) (noting that the lack of a provision for
There is one final caveat that must be added to the discussion of how persons acquire their CERCLA responsibility. Because different tests are applied to each and the terminology used by courts tends to be confusing, care should be taken to distinguish direct from indirect responsibility. Thus, for the present analysis, the terminology will be defined as follows: "Direct responsibility" occurs when a person is found responsible as an owner, operator, arranger, or transporter under the four sub-sections of § 9607(a); and "indirect responsibility" occurs when a person incurs CERCLA responsibility derivatively through a directly responsible person, either through an indemnity agreement or when two separate persons are so interrelated that they are considered one person for application of liability. Using these definitions, there is a clear difference between direct and indirect responsibility. Direct responsibility is established by a straightforward application of the statute while indirect responsibility is established only by finding sufficient links to a person who is already directly responsible.

The distinction between direct and indirect CERCLA liability is frequently glossed over in applying the statute and this leads to much of the confusion surrounding the implementation of the law. This confusion is evidenced by frequent references to CERCLA "owner" responsibility incurred when a corporate stockholder loses its liability protection and is thus considered one and the same as the corporation. Technically, this is not "owner" responsibility under CERCLA at all, but is instead a blending of legally separate persons into one, whereupon the second person

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56. Cf. United States v. Cordova Chemical Co., 59 F.3d 584, 589 (6th Cir. 1995) (holding that the operative test for liability of a corporate stockholder is the same for both direct responsibility as an operator and indirect responsibility through piercing the stockholder's corporate liability shield).

57. See Brown, supra note 20, at 823 (applying a similar distinction between direct and indirect responsibility).

58. See, e.g., Cordova, 59 F.3d at 590 (jumping together the consideration of indirect CERCLA responsibility as an owner with direct responsibility as an operator to reach the result that both should be treated under the same standard).

59. See Gail A. Flesher & Dale S. Bryk, How to Incur Liability Without Really Trying: The Perils of Parenthood Under CERCLA, J. ENVTL. L. & PRAC. 4, 5 (1996) (describing how indirect responsibility tests involving "piercing the corporate veil" between a parent corporation and its wholly owned subsidiary are generally known as "owner" responsibility tests); see also infra notes 71-82 and accompanying text (discussing corporate veil piercing under CERCLA in greater detail).
becomes responsible for actions of the first person. In such a situation, the stockholder is responsible for the corporation’s CERCLA responsibilities, regardless of whether the corporation itself is considered an owner, operator, arranger, or transporter under § 9607(a). For stockholders then, indirect responsibility for the corporation’s direct CERCLA responsibility could be based on any of the four grounds in § 9607(a).

There is similar confusion when courts consider whether a stockholder is an operator under CERCLA based on acts taken in controlling a responsible corporation. If a court finds the stockholder responsible as an operator, under the terminology here, this is a direct application of the statute, even though the stockholder is being held for indirect actions of control (the stockholder controlled the corporation which in turn violated the statute). While this is essentially derivative responsibility, as in the "owner" example, the "operator" test considers a direct application of the statute to acts that caused (albeit indirectly) contamination. Therefore, it differs from the "owner" test that looks at law outside CERCLA to decide if the stockholder’s liability veil should be pierced. Overall, this distinction between direct and indirect liability is helpful to the present analysis because it provides a theoretical framework for separating the application of CERCLA to persons directly via the statute and indirectly through legal processes like piercing the corporate veil or successor liability.

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60. See Flesher & Bryk, supra note 59, at 4, 5. While this indirect responsibility of the corporation may be derived from its status as an "owner," once the veil is pierced and the corporations are treated as one, the CERCLA responsibility should not be limited to § 9607(a)(1) owner responsibility.

61. An example might help clarify the differences between direct and indirect responsibility. Consider a corporation that arranged with an unrelated facility to process the corporation's waste oil. If the facility became a CERCLA site, the corporation could directly be held liable for only arranger or transporter responsibility, depending on the facts. So a corporate stockholder who lost its liability shield and was considered one and the same as the corporation would be indirectly responsible under §§ 9607(a)(3) or (4), but not for owner liability under § 9607(a)(1). Thus, notwithstanding the current practice of calling this "owner" responsibility, a better terminology is that the stockholder whose liability shield is pierced is "indirectly" responsible for the corporation's CERCLA responsibility.

62. See Cordova, 59 F.3d at 593-94 (Ryan, J., dissenting) (arguing that the statutory separation between owner and operator means that a person can incur direct operator responsibility regardless of interest in the facility because the operator test applies directly to the person's actions).

63. See generally id.
C. CERCLA Liability Applied to Business Entities

1. General Issues

When applying the CERCLA responsibility tests to a business entity, like a corporation or a partnership, complications arise because the business entity has a legal existence of its own, apart from its owners/investors. As mentioned above, when there are separate CERCLA “persons” (e.g., a corporation and its stockholders or managers), CERCLA can apply directly to each party, depending on its own actions. First, each person is tested independently of all others for direct responsibility. Then, whenever there are related parties, like an investor and the entity he owns, indirect responsibility could apply depending on whether one party is charged with liability for the acts of the other. Therefore, in analyzing how CERCLA applies to business entities and related persons (owners, management or agents), two threshold questions are (1) whether any of the persons can be found directly responsible for their own acts, and (2) whether any of the persons are indirectly responsible for another person who is directly responsible.

2. CERCLA as Applied to Corporations

Almost all of the cases that have applied CERCLA to business entities have involved a subsidiary corporation that is wholly-owned by a parent corporation. The issues are usually similar; namely, whether the parent corporation can be held, either directly or indirectly for the CERCLA responsibility of their wholly-owned subsidiary. Although the opinions are sometimes muddled, the

64. See generally Flesher & Bryk, supra note 59, at 4-5. As they note:

Parent companies are generally not responsible for the liabilities of their subsidiaries. In the environmental arena, however, where the statutory provisions are broadly drafted and often vague, and where public policy favors imposing liability on those who benefit from an activity rather than leaving the liability with taxpayers, the general rule against holding a parent responsible for the sins of its child has been altered, sometimes radically, by court decisions.

Id. at 4.

65. See Cordova, 59 F.3d at 593-94 (Ryan, J., dissenting) (applying a separate analysis to subsidiary corporation and to the parent corporation).

66. See infra notes 71-82 and accompanying text (discussing how a stockholder can be indirectly responsible for the acts of a corporation through a “piercing” of the corporate veil).

67. See, e.g., Cordova, 59 F.3d at 587-88 (where two of the defendants are parent
first question usually asked relates to whether the parent corporation can be held indirectly responsible because the corporate veil should be pierced under the appropriate test. From there, the analysis usually proceeds to a consideration of whether the parent corporation can be held directly responsible as an owner, operator, arranger, or transporter under § 9607(a).

In cases considering the responsibility of a parent corporation for its subsidiary, important underlying issues are (1) the extent to which state entity law should guide the analysis, (2) whether to develop or apply a federal common law, and (3) how the remedial purpose of CERCLA should be incorporated into the selected legal standards. This flexibility to combine state law with new or existing federal common law, particularly when flavored by the remedial goals of CERCLA, results in varied applications of the statute to parent and subsidiary corporations. This variation is important for the present analysis because it demonstrates how courts can reach diametrically opposed results depending on judicial views of federalism and the implications of the remedial purpose of CERCLA. Further, the variation in court opinions provides a useful background for understanding the choices the Redwing I and II courts made and the alternatives they rejected.

corporations who are allegedly responsible under CERCLA for the actions of their respective wholly owned subsidiary corporations).

68. See generally Flesher & Bryk, supra note 59, at 5-7 (discussing the difficulties in determining the appropriate legal standards to apply).
69. See id.
70. The majority in Cordova noted:

[The parent corporation] indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of the agreement with the MDNR and the use of subsidiaries. To scuttle such sensible and legitimate precautions . . . would actually contravene the public interest by discouraging businesses from becoming involved in such projects.

59 F.3d at 590. The Cordova dissent disagreed, stating: "[The parent corporation] admits that Cordova . . . was established solely as a facade, to avoid any legal obligation to pay for further environmental cleanup at the site. Under Michigan law, their admission is sufficient to justify piercing the corporate veil." 59 F.3d at 598 (Ryan, J., dissenting).

The federalism issue arises because there is a tension between state law, which generally governs the operation of corporations, and the federal common law that has developed surrounding CERCLA. See infra notes 156-66 and accompanying text (discussing the Supreme Court's guidelines on when state law is adequate and when federal common law should be developed).
a. Indirect Responsibility of Corporate Stockholder

In considering the issue of whether a parent is indirectly responsible for the acts of its subsidiary corporation, courts apply a test known as "piercing the corporate veil." This common law test effectively decides when equity or justice requires that the corporate form be ignored and the stockholder be considered indistinguishable from the corporation. It is important to note that veil piercing is a limited exception to the general rule of corporate law that the stockholder is an independent legal entity who does not own the assets that the corporation owns and whose only financial risk in the corporation is the consideration paid for stock.

Even though it is clear that a parent corporation's indirect responsibility is measured by the appropriate veil-piercing test, in practice, the application of this test is muddled. Some courts apply the applicable state law test while others have developed a federal common law test. Further, all variations of the test are multi-faceted; as applied they have produced little guidance as to what is covered. The net effect of this variability and the use of multi-factor tests is that there is uncertainty about when the corporate veil will be pierced in a particular factual setting where some factors are met and others are not. This uncertainty, in the context

71. As discussed above, courts and commentators generally refer to veil piercing as a test of "owner" responsibility, even though a more accurate description would be that it tests indirect responsibility for the corporation's responsibility, however derived. See supra notes 59-63 and accompanying text.
72. See Brown, supra note 20, at 823-24. Brown notes:

[A] corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of the legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

Id. (quoting United States v. Milwaukee Refrigerator Transit Co., 142 F. 247 (E.D. Wis. 1905)).
73. See, e.g., Brown, supra note 20, at 832.
74. See Flesher & Bryk, supra note 59, at 5. As they write:

What circumstances warrant piercing a corporation's veil is generally a question of state law. CERCLA is a federal statute, however, and in the absence of clear congressional intent that state law should be applied, a number of courts have determined that the application of various inconsistent state laws would significantly threaten the overarching need for uniformity in the nation's environmental protection standards.

Id: see infra notes 156-66 and accompanying text (discussing the rules for determining when to defer to state law and when to create federal common law).
of the remedial nature of CERCLA, gives courts tremendous flexi-
bility.

As for the choice of federal or state veil-piercing law, while it
has been noted that the federal veil-piercing standard generally
"gives less respect to the corporate form [than state law]," there
are states where the common law veil-piercing test is similar to the
federal common law standard. Under the most commonly cited
federal standard, a court is likely to pierce the veil:

"[I]n the interest of public convenience, fairness and equi-
ty," if there was, in descending order of importance: "(1)
inadequate capitalization in light of the purposes for which the
 corporation was organized, (2) extensive or pervasive
control by shareholder or shareholders, (3) intermingling of
the corporation's properties or accounts with those of its
owner, (4) failure to observe corporate formalities and separateness, (5) siphoning of funds from the corporation,
(6) absence of corporate records, and (7) nonfunctioning
officers or directors."

However, as an example of the uncertainty surrounding the
process of veil piercing, when the Acushnet River court applied
these factors, they found that even though several factors pointed
toward piercing the veil, enough factors pointed toward respecting
the veil. The only true rule that can be distilled from the case is

75. Flesher & Bryk, supra note 59, at 5 (quoting United States v. Kayser-Roth Corp.,
724 F.Supp. 15, 23 (D.R.I. 1989)).

76. See, e.g., Cordova, 59 F.3d at 597 (Ryan, J., dissenting). As Justice Ryan stated in
dissent:

Indeed, this court has observed, in dicta to be sure, that Michigan law permits
veil piercing upon a showing of any of the following: (a) a corporation and
shareholders have complete identity of interests; (b) the corporation is a mere
instrumentality of the shareholders; (c) the corporation is a devise to avoid a
legal obligation; or (d) the corporation is used to defeat public convenience,
justify a wrong, protect or defend a crime.

Id.

77. Flesher & Bryk, supra note 59, at 6 (quoting In re Acushnet River, 675 F. Supp.

78. See Acushnet River, 675 F.Supp. at 33-35. The factors supporting upholding the
corporate veil under this test were: (i) the subsidiary's net worth increased substantially
during the parent's ownership; (ii) the parent never paid itself a dividend; (iii) the sub-
sidiary negotiated its own contracts, loans, budgets, marketing, sales, and developed its
own customers; (iv) the subsidiary controlled the hiring and firing of employees; (v) the
subsidiary maintained its own financial records; and (vi) the subsidiary conducted regular
that if exactly the same facts were presented the court should uphold the veil. But there is little guidance as to what would be required to pierce the veil. A court intent on piercing (e.g., to uphold CERCLA's remedial purpose) would have plenty of flexibility to decide that enough had been shown.

Although there are many more subtleties to corporate veil piercing depending on the jurisdiction and the type of test, the important point is that the indirect responsibility of a stockholder is measured by a multi-factor analysis to decide if the appropriate standard is met.79 This standard, as well as the list of factors, in turn depends on whether state or federal veil piercing law is used.80 Finally, once the liability veil is successfully pierced, the stockholder is no longer treated as a separate entity from the corporation.81 Therefore, in a CERCLA analysis, the effect of piercing the corporate veil is that the CERCLA responsibility of the corporation is applied to the stockholder.82

b. Direct Responsibility of Corporate Stockholder

Regardless of whether the stockholder is responsible under the veil-piercing test, courts have held stockholders directly responsible under § 9607(a)(1) as a present operator, or under § 9607(a)(2) as

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79. See generally Brown, supra note 20, at 832-34 (discussing in detail corporate veil piercing and giving composite lists of factors that have been applied in state and federal veil-piercing tests).

80. Veil-piercing analyses by state courts often follow the same approach as the federal court in Acushnet River, but often require more to pierce the corporate veil. See, e.g., Flesher & Bryk, supra note 59, at 5 (noting that “[p]ersuading a Delaware court to disregard a corporate entity is a difficult task,” and while “[u]nder Delaware law, the alter ego theory of liability does not require a showing of fraud . . . [i]t does . . . require an “overall element of injustice or unfairness”). Id.

81. See, e.g., supra note 72.

82. See Flesher & Bryk, supra note 59, at 5 (describing shareholder responsibility under CERCLA).
an “operator,” if the stockholder exerts sufficient control over the corporation.\textsuperscript{83} Again, the cases generally consider the parent/subsidiary relationship (where the stockholder is the corporate parent). The issue is whether there is a theory of liability by which the parent can be held responsible under CERCLA.\textsuperscript{84} The principle difference between this attempt to pin direct responsibility on the parent corporation as an operator and indirect corporate veil piercing is that the operator responsibility question is generally applied independently as a backup theory in case veil piercing fails.\textsuperscript{85}

The rationale for treating a corporate parent as an “operator” under CERCLA is that when corporations are closely linked, many decisions of the subsidiary, especially those related to hazardous materials, are made by the parent.\textsuperscript{86} Thus, the critical determination in finding operator liability is the degree of the stockholder’s involvement in running or controlling the corporation.\textsuperscript{87} All tests of operator responsibility endorsed by federal appellate courts reflect this concern with acts of control,\textsuperscript{88} however, there is a wide divergence in the appropriate standard to apply since some courts look at actual acts of control, while other courts focus on the mere authority to control.

The majority rule for operator liability is the “actual control” standard, where a stockholder will only be held liable for the corporation’s environmental violations when there is evidence of

\textsuperscript{83} See, e.g., Redwing II, 94 F.3d at 1503. The appellate court noted:

In the corporate context, courts have reasoned that an officer or a shareholder in a corporation may be directly liable under CERCLA if the officer or shareholder in fact operated the facility at issue. This is so despite the traditional corporate law principle that officers, shareholders, and employees are not liable for the acts of the corporation.

\textit{Id.} (citations omitted).

\textsuperscript{84} See, e.g., Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993) (discussing the level of control necessary to trigger operator liability).

\textsuperscript{85} See Brown, supra note 20, at 837-38 (arguing that courts should recognize that there is a difference between indirect corporate veil piercing and direct application of operator responsibility).

\textsuperscript{86} See generally Flesher \& Bryk, supra note 59, at 8 (articulating the rationale for parent operator liability).

\textsuperscript{87} See id. (“Most courts will evaluate the level of actual control the parent has over the management of the subsidiary, giving particular attention to environmental operations and decision-making.”).

\textsuperscript{88} See id. (discussing how most of the circuits have addressed this issue and all but one of these adopted control tests as the test of operator responsibility).
“substantial control” by the stockholder over the corporation.\footnote{89} Under this standard, mere ownership as an investor or having general authority or ability to control the corporation is not enough.\footnote{90} Instead, actual involvement in day-to-day operations and in the decision making process of the corporation are usually required.\footnote{91} A leading case applying the “actual control” test to the parent/subsidiary relationship described the test as follows:

Under the actual control standard, while the longstanding rule of limited liability in the corporate context remains the background norm, a corporation cannot hide behind the corporate form to escape liability in those instances where it played an active role in the management of a corporation responsible for environmental wrongdoing.\footnote{92}

Applying the test to the facts before them, the \textit{Lansford-Coaldale} court noted significant separations between the corporations in question. The court remanded the case, however, for a factual determination on this issue because it was troubled by the fact that there were common officers in the corporations, that one of the officers signed an environmental consent order, and that the internal organization chart described the two corporations as operating as one entity.\footnote{93} These facts were sufficient to raise the question of whether the stockholder participated in enough decisions related to business, and in particular to hazardous waste, to be directly held under CERCLA as an operator.

In contrast to the “actual control” standard, a much broader test of operator liability is known as the “ability to control” standard.\footnote{94} In effect, this test applies operator liability to a stockholder who had the capability to control the corporation, even if this

\footnotesize{\textit{89.} See, e.g., \textit{Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.}, 4 F.3d 1209, 1221 (3d. Cir. 1993).
\footnotesize{\textit{90.}} See id.
\footnotesize{\textit{91.}} See \textit{Jacksonville Elec. Auth. v. Bernuth Corp.}, 996 F.2d at 1110 (11th Cir. 1993) (holding that the test for operator responsibility required that a parent corporation “exercise[] actual and pervasive control of the subsidiary to the extent of actually involving itself in daily operations of the subsidiary”).
\footnotesize{\textit{92.}} \textit{Lansford-Coaldale}, 4 F.3d at 1221.
\footnotesize{\textit{93.}} See Flesher & Bryk, \textit{supra} note 59, at 9-10 (describing the \textit{Lansford-Coaldale} holding).
\footnotesize{\textit{94.}} See \textit{Nurad, Inc. v. William E. Hooper & Sons Co.}, 966 F.2d 837 (4th Cir. 1992) (adopting the ability to control standard under CERCLA).}
capability was never exercised. The Fourth Circuit Court of Appeals adopted this test because it applies CERCLA responsibility to "a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority by undertaking efforts at a cleanup." While this decision is only a minority rule, several courts have commented on the validity of this test, apparently emphasizing its consideration of the critical issue of who had influence over the handling of hazardous substances.

To further complicate things, there are yet other interpretations of the standard for applying operator responsibility. For example, the Eighth Circuit has rejected the Nurad test in favor of a test that requires the stockholder to have had authority for hazardous waste decisions and to have actually exercised that authority. This test is apparently stricter than the general actual control test (or ability to control test) because it requires actual control over only one particular issue, hazardous waste handling. Also, the Fifth Circuit has decided that a stockholder cannot be considered an

95. See id.
96. Id. at 842.
97. See, e.g., Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1341-42 (9th Cir. 1992) (suggesting the ability to control test applies); Flesher & Bryk, supra note 59, at 10 (discussing the Tenth Circuit's express refusal to choose between the actual control test and the ability to control test in FMC Corp. v. Aero Industries, 998 F.2d 842 (10th Cir. 1993) and quoting the Eighth Circuit in United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986) ("It is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme."). But see, e.g, Lansford-Coaldale, 4 F.3d at 1221. In rejecting the "authority to control" test, the Lansford-Coaldale court held:

[A] rule which imposes liability on a corporation which never exercised its general authority over its subsidiary or sister corporation may unduly penalize the corporation for a decision by that corporation to benefit from one of the well-recognized and salutary purposes of the corporate form: specialization of management.

Id. (citing Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. Chi. L. Rev. 89, 90-94 (1985)).

98. See United States v. Gurley, 43 F.3d 1188, 1193 (8th Cir. 1994), cert. denied, 116 S. Ct. 73 (1995). The Gurley court held:

[A]n individual may not be held liable as an "operator" under § 9607(a)(2) unless he or she (1) had authority to determine whether hazardous wastes would be disposed of and to determine the method of disposal and (2) actually exercised that authority, either by personally performing the tasks necessary to dispose of the hazardous wastes or by directing others to perform those tasks.

Id.
"operator" unless the corporate veil is pierced. The rationale for this ruling was that Congress could have included language within CERCLA to reach persons who controlled an entity, and without such language, the basic tenets of corporate law should control. In summary, there is wide variation in the standard used to apply operator responsibility to a corporate stockholder. Moreover, even when the applicable test is certain, the application of that test is conducted through a factual determination of whether there are enough acts of control. Thus, courts still have plenty of flexibility to interpret facts in accordance with their personal views of CERCLA.

II. REDWING DECISIONS

A. Factual Background and Legal Issues Presented

Redwing I and Redwing II concern property in Saraland, Alabama where an apartment complex was built on the site of a trucking terminal. From 1961 to 1972, Redwing Carriers, Inc. ("Redwing") owned and operated a trucking terminal at the site and was in the business of hauling materials used in construction and other industries. Trucks at the terminal carried asphalt, tail oil, and molten sulphur; after carrying their loads the trucks were cleaned out at the terminal and the waste water was drained onto the property. Excess asphalt was also dumped directly into pits dug in the ground. The combined result of this contamination was that a "black, tar-like toxic substance" was formed, apparently just beneath the surface of the land.

Redwing sold the trucking terminal site to Harrington, Inc. in 1971, who then sold it to Apartments, Inc. later that year.

100. See Flesher & Bryk, supra note 59, at 10 (interpreting the holding of Joslyn Manufacturing).
101. See, e.g., United States v. Cordova Chemical Co., 59 F.3d 584, 590, 597 (6th Cir. 1995) (deciding to adopt the strict Fifth Circuit veil-piercing operator rule, while the dissent would have applied the more prevalent actual control test).
102. See Redwing II, 94 F.3d at 1494.
103. See id.
104. See id.
105. See id.
106. Id.
107. Redwing II, 94 F.3d at 1494-95.
1973, Apartments, Inc. sold the property to a partnership, Saraland Apartments, Ltd., ("Saraland I"), who hired Meador Contracting Company ("Meador") to build an apartment complex on the site, which was completed in 1974. In 1980, Saraland I hired Marcrum Management Company ("Marcrum") as its management agent for the property. Finally, in the last transaction of interest, a group of investors bought out the original partners in Saraland I in October 1984, creating a new limited partnership with the same name ("Saraland II"). In this transaction, Robert Coit and Roar Company ("Roar") purchased a one percent general partnership interest in Saraland I, and Hutton Advanced Properties, Ltd. and H/R Special Limited Partnership ("Hutton") purchased the remaining ninety-nine percent of Saraland I as limited partners.

After Redwing sold the land to the succession of owners in 1971, and during the construction of the apartments that were completed by 1974, the preexisting contamination of the site was

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108. See id. The partners in the original Saraland partnership were Ralph C. Harrington, A.B. Meador, E.L. MacDonald, and W.D. Bolton. See id. Saraland partner A.B. Meador was also the president of the Meador Contracting Company. See id.

109. See id.

110. See id. at 1495. Under partnership law, Saraland I is considered a separate legal entity and all partners are general partners who do not directly own the assets the partnership owns, but are ultimately jointly and severally liable for the liabilities of the partnership. See UNIF. PARTNERSHIP ACT § 26 (1914) ("UPA") ("A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."); id. § 15 ("All partners are liable (a) jointly and severally for everything chargeable to the partnership under sections 13 and 14. (b) Jointly and severally for all other debts and obligations of the partnership. . .").

111. See Redwing II, 94 F.3d at 1495. In the transaction that converted Saraland I, the ordinary partnership, into Saraland II, the limited partnership, there presumably was a sale of the partnership interests of the Saraland I partners to the incoming partners. Under established partnership law, whenever a partner ceases to be associated with the partnership it effects a dissolution of this partnership. See UNIF. PARTNERSHIP ACT § 29 (1914) ("The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on . . . of the business."). Thus, the effect of the sale of partnership interests was that the Saraland I partnership dissolved and a new partnership, Saraland II, was formed as a limited partnership by Hutton and Roar, the purchasers of interests in the partnership. See generally REVISED UNIF. LTD. PARTNER- ship ACT §§ 101, 303, 403 (1976) ("RULPA") (defining a limited partnership as a partnership where there is at least one general partner, who has the liabilities of a partner in a partnership without limited partners, and at least one limited partner, who is not liable for the obligations of the limited partnership unless he or she takes certain acts in controlling the business). Note that while RULPA was substantially amended in 1985, Alabama adopted it in 1984 and follows the 1976 version. See infra notes 125, 127, 159 and accompanying text.
apparently not noticed by the new owners. However, Saraland I did become aware of tar seeping to the surface in 1977, and Department of Housing and Urban Development inspections in 1983 and 1984 cited tar in various places in the complex. Other events related to the contamination were the repaving of the parking lot in 1986, and maintenance work on an underground gas line in 1991, where soil was dug out and eventually replaced.

After the property was converted from industrial use to residential apartments, the EPA started monitoring contamination at the property. Since Redwing was clearly responsible for some, if not all, of the contamination, the EPA focused its efforts on Redwing, although it appears that other parties, like Saraland II, were also named as PRPs. In 1985, Redwing entered into an administrative consent order with the EPA agreeing to monitor the former trucking terminal. Redwing then bound themselves to clean up the site in a second consent order with the EPA in 1990.

After paying $1.9 million in CERCLA costs, Redwing brought a contribution action against other PRPs that ultimately led to Redwing I and Redwing II. In this lawsuit, the defendants were Saraland II, Roar, Hutton, Marcrum, and Meador. The theories

112. See Redwing II, 94 F.3d at 1494-95.
113. See id. (noting that by the time of the sale to the new partners in 1984, residents of the development had been complaining about tar problems for several years).
114. See id. at 1510. The repaving and pipeline work create a critical issue as to whether some parties can be held as responsible parties. If those works are considered a new act of disposal, a new round of CERCLA responsibility attaches to those parties deemed to be owners and operators at the time the events occurred. See infra note 141 (discussing the creation of a "second-hand" disposal rule in Redwing I; infra notes 200-01 and accompanying text (discussing the Redwing II theory that, without proof that the soil was not replaced where it originated, there is no new disposal event).
115. See Redwing II, 94 F.3d at 1495.
116. See Redwing Carrier Source Soil Removal Near, 10 SUPERFUND WEEK 38, Sept. 30, 1996, available in WL 11485982 (reporting that both Redwing and Saraland II are parties to EPA orders with respect to the cleanup at the facility, the next phase of which is estimated to cost $3 million).
117. See Redwing II, 94 F.3d at 1495.
118. See id.
119. See id.
120. See id. The notable part of this list of defendants is not who it includes, but who it omits, namely, Saraland I, and its partners. The absence of Saraland I is understandable since it was apparently dissolved upon the transfer of the partnership interests. But the partners in Saraland I were presumably liable for the responsibilities of Saraland I from 1973 to 1984 under partnership law, and so would be indirectly responsible for any CERCLA responsibility incurred during that time. And since CERCLA responsibility can-
of responsibility alleged were: (1) that Saraland II, Roar, Hutton, and Marcrum are responsible under § 9607(a)(1) as present owners or operators; (2) that Saraland II, Roar, Hutton, and Marcrum are responsible under § 9607(a)(2) as persons who were owners or operators at the time of disposal of hazardous substances that occurred in the 1986 repaving and the 1991 pipeline maintenance; and (3) that all the defendants are responsible as persons who arranged for the disposal of hazardous substances under § 9607(a)(3). Each of the defendant’s counterclaimed against all the others for contribution, and all parties filed for summary judgment.

B. District Court Opinion

In Redwing I, Senior District Court Judge William Brevard Hand combined solid analysis of how CERCLA should apply to limited partnerships with newly created interpretations of CERCLA. A simple summary of his ruling is that Redwing is not entitled to contribution from any of the defendants, even though they may have owned, operated, or developed the property, because each is either not responsible under CERCLA or is equitably excused from paying contribution. While holding the major

not be discharged once it attaches, these partners are PRPs not named in the lawsuit. See Dolan, supra note 8, at 187-88, 194 (discussing how indemnification agreements may shift but not relieve CERCLA liability). Other unnamed PRPs are Harrington, Inc. and Apartments, Inc., who each briefly owned the property in 1971 and who therefore could be responsible if any disposal occurred during their tenure.

121. See Redwing I, 875 F.Supp. at 1554-55.
122. See id. Since all parties have moved for summary judgment, the procedural posture of Redwing I and Redwing II is that the appellate court may review the district court’s decision de novo to decide if there are genuine issues of any material fact or if judgment may be granted as a matter of law. See Redwing II, 94 F.3d at 1495.
124. See Redwing I, 875 F.Supp. at 1569. Judge Hand writes:

After extensive review of the documents submitted, the court finds that a reasonable jury could conclude only that, among the parties before the court, the disposal of hazardous substances at the site results entirely from Redwing’s actions, and that among these parties, justice requires Redwing bear all, and the defendants bear none, of the response costs.

Id. Somewhat paradoxically however, Redwing would not even be a party to the litigation under Judge Hand’s recent ruling that CERCLA should not apply retroactively; Judge Hand’s argument about justice requiring Redwing to bear all could not occur under Olin.
The polluter entirely responsible is completely consistent with the remedial purpose of CERCLA, the following analysis demonstrates that Judge Hand flaunts established CERCLA law on several points to reach this result. Thus, Redwing I is interesting for its lessons on how a noncorporate entity should be treated under CERCLA, as well as for its new rulings by a jurist gaining renown for controversial CERCLA interpretations.

On the application of CERCLA to a noncorporate entity, Judge Hand first considered the issues of whether the limited partners, Hutton, could be held responsible as an owner of Saraland II under either § 9607(a)(1) or § 9607(a)(2). Finding that state limited partnership law controlled the determination of what kind of interest the limited partners held, Judge Hand ruled that the Hutton limited partners were not liable as owners. This determination was compelled by the fact that under Alabama limited partnership law, limited partners own only an interest in the partnership, but do not own what the partnership owns. In other words, the limited partners own only personal property (an intangible interest in the profits and losses of the partnership), and cannot therefore be considered owners directly under CERCLA.

Once it is established that state law limiting the limited partners' liability is to be respected, the next question is whether the limited partners can be found indirectly responsible through a piercing of their liability veil. On this point, Judge Hand ruled that the indirect responsibility of limited partners was governed by state limited partnership law.

See generally Tucker, supra note 16, at C1.

125. See Redwing I, 875 F.Supp at 1557. This is the general rule for limited partnerships—that the limited partner is not responsible for any of the limited partnership's obligations. For example, RULPA provides:

[A] limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

REVISED UNIF. LTD. PARTNERSHIP ACT § 303(a) (1976). Note that Alabama adopted RULPA in 1984, and apparently does not follow amendments to the rules regarding limited partners' participation in control adopted in 1985. See infra notes 127, 159 and accompanying text.

126. This result is also consistent with the general corporate rule that the stockholder does not own what the corporation owns. See, e.g., supra note 64 and accompanying text.
Whether the limited partners would be liable for any obligations of the limited partnership is a different issue, one which depends on limited-partnership law, not on CERCLA. A limited partner may be liable to a third party for the obligations of the limited partnership only if he participates in the control of the business. "However, if his participation is not substantially the same as a general partner's exercise of powers, the limited partner is liable only to persons who, with actual knowledge of his participation in control and in reasonable reliance thereon, transact business with the partnership."127

In this decision on veil-piercing rules, there are actually two components: first, that state law applies instead of federal common law;128 and, second, that the statutory limits on a limited partner's actions in controlling the partnership are the relevant standard to guide veil piercing.129 Both are important because, jointly, they

127. *Redwing I*, 875 F.Supp. at 1557 (citing and quoting *AL. CODE § 10-9A-42(a)(1994)*). Note that the quoted Alabama rule is substantially the same as pre-1985 RULPA §303(a). *See Redwing II*, 94 F.3d at 1495; *see also infra* note 159 and accompanying text.

128. Judge Hand apparently did not consider creating a federal common law to govern the responsibilities of limited partners. *See infra* notes 156-66 and accompanying text (discussing the *Redwing II* court's detailed analysis of when a federal common law should replace state law).

129. *See Redwing I*, 875 F.Supp. at 1557 (ruling that a limited partner is not indirectly responsible for the limited partnership unless the limited partner takes actions of control that cause him to lose his limited liability protection under state limited partnership law).

Under Alabama Law:

A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following: (1) Being a contractor for or an agent, attorney-at-law, or employee of the limited partnership or of a general partner, or an officer, director, or shareholder of a general partner; (2) Consulting with and advising a general partner with respect to the business of the limited partnership or examining into the state and progress of the partnership business; (3) Acting as surety or guarantor for any liabilities for the limited partnership; (4) Approving or disapproving an amendment to the partnership agreement; or (5) Voting on one or more of the following matters:

(i) The dissolution and winding up of the limited partnership; (ii) The sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business; (iii) The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business; (iv) A change in the nature of the business; or (v) The removal of a
fit the implementation of CERCLA within existing limited partnership law. This result is noteworthy because CERCLA responsibility is then guided by well-established limited partnership law, instead of by newly-created standards ostensibly intended to better meet the statute’s remedial goal.

After concluding that limited partnership law governed veil piercing, Judge Hand did not actually decide if Hutton’s liability protection was pierced because other rulings made Hutton’s indirect responsibility moot. However, Judge Hand did consider the direct responsibility of Hutton as an operator. Here, Judge Hand analogized to the control test applied to corporations in Jacksonville Electric, which holds stockholders of a corporation liable as operators only when there has been “actual control.” After deciding the Jacksonville Electric “actual control” test was the relevant standard for the limited partners, Judge Hand suggested that the control exercised by the limited partners was not actual control. Finally, Judge Hand ruled that there was no way that Hutton could be liable under § 9607(a)(3) as arrangers of a disposal because the 1986 repaving and 1991 pipeline work were not disposal events, and no other disposal events were alleged during Hutton’s involvement at the site.

Overall, Judge Hand’s application of CERCLA to limited partners is important because it shows respect for well-developed state

130. See infra note 140 (discussing Judge Hand’s holding that § 9607(a)(1) requires finding a person both “owner and operator”).
131. See Redwing I, 875 F.Supp. at 1558 (citing Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993)).
132. See id. The alleged acts of control were that Hutton:
   (1) recommended rent increases and capital improvements at the Saraland Apartments, (2) recommended that Saraland Limited meet with Macrumb to discuss the management of complex, (3) requested and received bids for the capital improvements, (4) recommended assisting an interim apartment-complex manager, (5) recommended cash-flow improvements for Saraland Limited after the 1986 tax-reform act phased out passive-loss deductions, and (6) were expected to pay Saraland Limited’s legal bills.

Id.
133. See id. at 1559; see also infra note 141 (discussing Judge Hand’s voluntary test for “second hand disposals,” under which Hutton was excused from arranger liability because this requires voluntarily arranging a disposal and “[e]ven if there were a disposal, there is no contention or sufficient evidence to persuade a reasonable jury that the Hutton defendants intended to dispose of hazardous substances . . . “).
limited partnership law and extends an existing operator standard instead of creating a new one especially for partnerships.\footnote{But see infra notes 184-87 and accompanying text (arguing that a better result would be obtained by tying the limited partnership operator responsibility test to state limited partnership law because, if other circuits also extend their corporate operator tests to noncorporate entities, the current wide variation in corporate operator tests will just be perpetuated).} For both reasons, Redwing I substantially decreases the uncertainty as to how CERCLA will apply to limited partnerships. In the context of other CERCLA decisions, where courts stretch the law to meet the statute’s remedial purpose, a ruling that respects state law and rejects creating new federal common law is noteworthy on this ground alone.

Turning to the general partners, Roar, Judge Hand’s rulings were similar to those for the limited partners. First, the general partners were not deemed to be owners under § 9607(a)(1) because, under state partnership law, the general partners own only an interest in the partnership; they do not own what the partnership owns.\footnote{See Redwing I, 875 F.Supp. at 1566.} Second, the status of the general partners as operators under § 9607(a)(1) was also measured by the Jacksonville Electric "actual control" test, and acts of control by Roar were found to be less than those excused in Jacksonville Electric.\footnote{See id.} Thus, the general partners were not owners under § 9607(a)(1) and were not operators under § 9607(a)(2).\footnote{The analysis of the general partner’s involvement is sparse in Redwing I, presumably because under Judge Hand’s ruling that § 9607(a)(1) requires both “owner and operator” status, the issue of operator status is moot once owner status is rejected. See infra note 140 (discussing Judge Hand’s ruling that § 9607(a)(1) requires both owner and operator status). The Presumably, Judge Hand never considered the indirect responsibility of the general partner Roar for Saraland II because this was a moot question after he ruled that Saraland II was not equitably responsible for any of the CERCLA costs. See infra note 142 (discussing Judge Hand’s ruling that Redwing was entirely responsible for the contamination, so even though Saraland II admitted they were a responsible party under CERCLA, Redwing was not entitled to any contribution from Saraland II).} While the rules for the general partner in Redwing I are consistent with those developed for limited partners, the indirect responsibility of the general partners was not considered.\footnote{Presumably, Judge Hand never considered the indirect responsibility of the general partner Roar for Saraland II because this was a moot question after he ruled that Saraland II was not equitably responsible for any of the CERCLA costs. See infra note 142 (discussing Judge Hand’s ruling that Redwing was entirely responsible for the contamination, so even though Saraland II admitted they were a responsible party under CERCLA, Redwing was not entitled to any contribution from Saraland II).} If this issue was addressed, there is little question that the general partner would be found indirectly responsible for the limited partnership (without even resorting to a veil-piercing
test) under a straightforward application of limited partnership law.\textsuperscript{139}

In summary, Judge Hand's District Court opinion presented a well-reasoned legal analysis of how CERCLA should apply to limited partnerships. Judge Hand also continued the development of his controversial method of CERCLA interpretation in \textit{Redwing I}, however, by holding that: (1) "owner and operator" means what it says,\textsuperscript{140} (2) inadvertent movements of soil are not disposals,\textsuperscript{141}

\textsuperscript{139} See \textit{Redwing II}, 94 F.3d at 1509 n.27 (suggesting that the general partner may be protected from this indirect responsibility to the extent it represented a preexisting responsibility of the partnership when the new general partner entered). See also infra notes 215-34 and accompanying text (discussing how the treatment of succession issues surrounding the transfer of interests from Saraland I to Saraland II are important unresolved issues).

\textsuperscript{140} Judge Hand's first controversial ruling in \textit{Redwing I} was that the language in § 9607(a)(1), which provides that a person must be the present "owner and operator," actually means what it says: "owner and operator." See \textit{Redwing I}, 875 F.Supp. at 1555-56. Since he was attempting to overrule apparently binding precedent from the Eleventh Circuit, see United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990) (holding that "[a]lthough the 'owner and operator' language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts"), Judge Hand was careful to support his controversial decision.

First, he argued that § 9607(a)(1) is clear on its face and a court should presume that Congress intends what a statute clearly says. See \textit{Redwing I}, 875 F.Supp. at 1555-56. The clarity of the statute is shown by the disjunctive "owner or operator" language in § 9607(a)(2) because the inconsistent use in neighboring sentences suggests there is a purpose for the different word choice. See id. at 1556. Second, Judge Hand argued that there is no contradiction in the phrase interpreted conjunctively, since it is possible to be a present owner and operator. See id. (arguing that the holding in \textit{Maryland Bank}, that the class of persons who are both owners and operators would have no members, is flawed) (citing United States v. Maryland Bank & Trust Co., 632 F.Supp. 573, 578 (D.Md. 1986)). Third, he argued the "and" cannot be converted to "or" under the doctrine of scrivener's error, because "the \textit{sine qua non} of any 'scrivener's error' doctrine . . . is that the meaning genuinely intended but inadequately expressed must be absolutely clear; otherwise we might be rewriting the statute rather than correcting a technical mistake," and it is not absolutely clear that Congress did not mean the use the conjunctive. Id. (quoting United States v. X-Citement Video, Inc., 115 S. Ct. 464, 474 (1994) (Scalia, J., dissenting)). For all these reasons, Judge Hand rejected the traditional interpretation of § 9607(a)(1) to reach the almost heretical conclusion that the statute means what it says.

\textsuperscript{141} Judge Hand's second controversial ruling was that the phrase "disposal" in §§ 9607(a)(2) and (3) contemplates a stricter standard than the broader "release" in § 9607(a)(1). Judge Hand argued there is a difference between "disposal" and "release" in the sense that "disposal" is defined as a "discharge, deposit, injection, dumping, spilling, leaking, or placing" and "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." \textit{Redwing I}, 875 F.Supp. at 1560-61 (quoting 42 U.S.C. §§ 9601(29), 6903(3), 9601(22)). Comparing the lists, some things that are releases—pumping, pouring, emitting, emptying, escaping and leaching—are not on the list for disposals. Therefore, Judge Hand argued, Congressional intent is clear; a release is more broadly defined than
and (3) common law principles of divisibility of harm apply to CERCLA contribution actions.\textsuperscript{142} Since all three new interpretations were overruled in \textit{Redwing II}, they have not been considered in detail here, although it should be noted that one effect of Judge Hand's rulings may be to increase uncertainty as to how CERCLA disposal. \textit{See id.} ("Congress must have intended there be a difference between 'disposal' and 'release,' otherwise it would not have used two different terms, much less defined them differently."). Because of this difference in definitions, Judge Hand concluded that the language of §§ 9607(a)(2) and (3), referring to disposals but not releases, means that responsibility under these sections does not cover pumping, pouring, emitting, emptying, escaping, and leaching. \textit{See id.}

Applying this rule to what he called the "alleged second-hand disposals" of the 1986 repaving and the 1991 pipeline maintenance, Judge Hand found that these involuntary movements of pre-contaminated soil were not disposal events. \textit{See id.} at 1562-63. Under his theory, the inadvertent moving of soil for another purpose, like pipeline maintenance, may be a release under CERCLA, but should not be considered a disposal.

The effect of this ruling was to make many of the CERCLA responsibility issues moot because there were then no disposal events during the period that three of the defendants (Roar, Hutton, or Marcum) were at the site. \textit{See id.} (holding that Marcum is not an operator under § 9607(a)(2) nor an arranger under § 9607(a)(3) because there were no disposal events); \textit{id.} at 1566 (holding that no disposal events occurred during the time Roar was a general partner). Similarly, the original developer of the site was excused from liability because movement of the soil in building the apartments was considered an involuntary second-hand disposal. \textit{See id.} at 1564 (holding that a reasonable jury could not find that Redwing had not already contaminated the tract of the facility on which the apartments were built, so the movement of dirt in the construction did not move contaminated soil to a new area and there was no disposal event).

\textit{142.} After arriving at the first two interpretations, Judge Hand was able to grant summary judgment on most of the claims. However, the defendant Saraland II could not be easily relieved from liability because it had admitted responsible party status under CERCLA. \textit{See id.} at 1566-67 (noting that the court was prevented by Saraland II's admission from granting summary judgment in its favor on § 9607(a)(1) responsibility); \textit{infra} note 143.

To resolve the issue of how to equitably divide the CERCLA costs between the only two parties left, Redwing and Saraland II, Judge Hand relied on the equitable nature of § 9613(f) and the common law of joint tortfeasors to find that the harm caused by Redwing was divisible and that equitable factors would deny them any contribution. \textit{See id.} at 1568-69 (analogizing to the Restatement (Second) of Torts § 433A, which discusses the application of joint and several liability to divisible harms, to find that Redwing's acts of contamination were divisible from any of Saraland II, so that no contribution was due to Redwing from Saraland II). Therefore, even though Saraland II was liable under § 9607(a)(1), Judge Hand held that since no reasonable jury could find that any contribution should be allowed under § 9613(f), summary judgment was appropriate. \textit{See id.}

Although not discussed in the present analysis, Redwing also brought an action for unjust enrichment against the defendants, alleging that the property was made more valuable because of Redwing's actions. \textit{Id.} at 1569-70. This state common law claim was dismissed by Judge Hand because unjust enrichment is an equitable theory. (And since Redwing was responsible for the damage, there was nothing unjust about Redwing alone paying to clean up the site.) \textit{Id.}
will be implemented. Judge Hand's unconventional rulings may
provide new grounds to raise at trial, and perhaps may even sug-
gest that parties should not assume that anything is ever completely
settled under CERCLA. 143

C. Eleventh Circuit Opinion

A three judge panel of the Eleventh Circuit affirmed Judge
Hand's rulings as they related to partnership issues, and partially
affirmed some of the other results on different grounds. 144 As for
Judge Hand's new interpretations of CERCLA, all were overruled
except the holdings that partnership issues under CERCLA were
decided by state law, and that the Jacksonville Electric test for
operator liability applied in a partnership context. 145 The net re-
result of Redwing II is therefore that limited partners in the Eleventh
Circuit have fairly solid protection from liability under CERCLA,
but other parties caught in CERCLA's broad scope are not protect-
ed by Judge Hand's new interpretations.

Since Redwing II represents the first time a federal appellate
court considered CERCLA as applied to limited partnerships, the
partnership rulings are the most important part of the decision. 146
The first key ruling is that the partnership interests owned by both
limited and general partners are considered personal property. 147
As the Redwing I court ruled, the partners do not own what the

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143. For example, if the partners of Saraland II knew that Judge Hand would be cre-
ating new CERCLA interpretations that had the effect of excusing most of the defendants,
they undoubtedly would not have admitted to § 9607(a) responsibility, since they believed
they were owners but not operators. See id. at 1568 n.85 (surmising that Saraland II
admitted to responsibility because they accepted the Fleet Factors determination that
"owner and operator" is interpreted as "owner or operator"). Or at the least Saraland II
would have asserted the § 9607(b) third party defense. See id. at 1567 (suggesting, in
dicta, that the third party defense would be easy to satisfy).

144. See generally Redwing II, 94 F.3d at 1489.

145. See infra notes 170-71 and accompanying text (discussing the Redwing II ruling
that the Redwing I court was bound by an Eleventh Circuit ruling that "owner and opera-
tor" is interpreted as "owner or operator"); infra notes 200-01 and accompanying text
(discussing the Redwing II replacement of Judge Hand's "voluntary second-hand disposal"
analysis with their own new interpretation); infra notes 208-11 and accompanying text
(discussing the Redwing II ruling that common law principles of divisibility of harm do
not apply to a contribution action under § 9613(f)).

146. See Redwing II, 94 F.3d at 1499 n.12 ("The parties have cited, and our research
has uncovered, only one reported decision from a federal court addressing a limited
partner's liability under CERCLA.") (citing, as the only case, Soo Line R. Co. v. B.J.
Carney & Co., 797 F.Supp. 1472 (D.Minn. 1992)).

147. See Redwing II, 94 F.3d at 1498.
partnership owns, so neither limited nor general partners are considered owners for the purposes of § 9607(a)(1) or § 9607(a)(2). This ruling is consistent with certain well-established partnership tenets that treat the partnership as an entity separate from its partners. Nonetheless, it is an important ruling because it is not obvious from the history of CERCLA implementation that a court would respect limited partnership law. In fact, on this point Redwing II is directly contrary to the only federal court case considering the issue, which did not separate the liability of the partnership from the general or limited partners. In rejecting the Soo Line ruling, the Eleventh Circuit held that "nothing in CERCLA suggests we should disregard traditional concepts of limited liability in the corporate or partnership contexts in assessing owner liability under the Act." 

Once a court decides that none of the partners are owners, the next question is whether either the limited partners or general partners can be held indirectly responsible through corporate veil piercing. With respect to general partners, the Redwing II court never reached the issue of whether a veil-piercing test is required because they are already indirectly liable for the obligations of the limited partnership as a matter of limited partnership law.

148. See id.
149. See Flesher & Bryk, supra note 59, at 4 (concluding that present standards are too inconsistent to provide clear guidance for parent companies that want to avoid responsibility for their subsidiaries' environmental liability). The argument here is that the limited partners own ninety-nine percent of Saraland II and receive the beneficial interest from use of the facility, so, under the remedial purpose canon of CERCLA, it is not obvious ex ante that the limited partners will be shielded from Saraland II's CERCLA responsibility.
150. See Soo Line, 797 F.Supp. at 1485-86 (holding that since both individuals and partnerships are listed as "persons" under CERCLA, and since all "persons" are jointly and severally liable, the distinction between individual partners and the partnership will not matter unless the harm of the parties can be shown to be divisible).
151. Redwing II, 59 F.3d at 1499-1500 n.12. The Redwing II court distinguished Soo Line by stating:

[T]o the extent the Soo Line court rested this particular holding on the premise that CERCLA imposes liability directly on a limited partner merely because the partnership itself is liable, then we must respectfully disagree with this conclusion. Such reasoning ignores the limited liability nature of these partnerships under state law.

Id.
152. See id. at 1508-09 (declining to reach a decision on this point since other rulings made the point moot and since the record was not well-developed enough to decide if the general partners of Saraland II assumed the preexisting CERCLA responsibility when they
However, the *Redwing II* court also suggested that there could be an exception to this rule because, as a matter of partnership law, incoming general partners are insulated from existing partnership responsibilities. While the issue is not decided because there are not enough facts, *Redwing II* suggests a workable rule: general partners are indirectly responsible for the partnership’s CERCLA responsibility without a veil-piercing analysis unless those general partners have explicitly not assumed this responsibility, in which case a veil-piercing analysis will be required to measure indirect responsibility.

Turning to the question of the limited partner’s liability shield, the *Redwing II* court found there was a “dearth of authority” on how CERCLA interacted with state partnership law; therefore, it was not immediately clear if state partnership law or federal common law should govern the question of when to pierce the limited partner’s limited liability. To resolve this question, the court turned to the applicable rule from the Supreme Court decision in *Kimbell Foods*: “Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy dependent upon a variety of considerations always relevant to the nature of specific governmental interests and to the effects upon them of applying purchased their interest in 1984).

153. See id.; see also UNIF. PARTNERSHIP ACT § 17 (1914) (“A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.”); REVISED UNIF. LTD. PARTNERSHIP ACT § 403(b) (1976) (“Except as provided in this Act, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners.”); infra notes 233-34 and accompanying text (analyzing the implications of the *Redwing II* court’s suggestion that incoming general partners could be insulated from CERCLA responsibility and discussing how the third party defense extended to Roar depends heavily on how the succession between the partners in Saraland I and the partners in Saraland II is treated).

154. There is an unresolved issue as to what veil-piercing test should apply to a general partner who has limited liability with respect to a preexisting obligation. See notes 245-48 and accompanying text (discussing the implications of *Redwing II* for LLCs, and noting an important unresolved issue for LLCs—deciding what test should apply to pierce the LLC veil to apply indirect responsibility to its members).

155. *Redwing II*, 94 F.3d at 1498-1500 (reviewing de novo whether to apply state law or federal common law regarding limited partnerships under CERCLA).
state law."  

Under *Kimbell Foods*, courts must consider three factors:

1. whether there is a need for a nationally uniform body of law to apply in situations like the one before the court; 2. whether application of the state law rule would frustrate important federal policy; and 3. the impact a federal common law rule might have on existing relationships under state law.  

Applying *Kimbell Foods* to the question of limited partnership law, the *Redwing II* court found that the first factor points in favor of state law since "[t]here is significant agreement among the 50 states and the District of Columbia on the broad outlines of a rule governing the liability of limited partners . . . because nearly every jurisdiction in this country has adopted a version of the Revised Uniform Limited Partnership Act of 1976 (RULPA)."  

In essence, they found that, since RULPA already functions as a national standard, there is no need to create a federal common law.

As for the second factor, the *Redwing II* court found that state laws were not inconsistent with the goals of CERCLA. In support of this ruling, the court analogized to a Sixth Circuit decision holding that state law on corporate dissolutions and mergers should

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157. See id. at 1501 (quoting *Kimbell Foods*, 440 U.S. at 728-29).
158. See id. at 1501 n.14.
159. There are actually two different standards for limited partner liability under state implementations of RULPA. As amended in 1985, § 303 of RULPA holds that a limited partner who has "participated in the control of the business" is liable to:

> [P]ersons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.

**REVISED UNIF. LTD. PARTNERSHIP ACT** § 303 (1985). In the 1976 implementation of RULPA, a limited partner is liable if:

> in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

See **REVISED UNIF. LTD. PARTNERSHIP ACT** § 303(a) (1976). As noted above, Alabama's Code reflects the 1976 version. See supra notes 111, 125, 127.

160. See *Redwing II*, 94 F.3d at 1500.
be the federal decision rule under CERCLA. Under the rationale of the Sixth Circuit's decision, state law based on the state's substantial, independent interest in protecting its citizens and resources is presumed to be complementary to the United States interest in implementing CERCLA. The Redwing II court adopted a similar approach, holding that state limited partnership law, with its substantial uniformity and potential for applying liability to limited partners who take too many control actions, is adequate to meet CERCLA's goal of making the polluter pay.

On the last factor of the Kimbell Foods test, the Redwing II court decided that a federal common law would negatively impact existing state limited partnership laws. The problem with creating a federal common law, the court argued, is that it is the very concept of limited liability that attracts investors to limited partnerships, and these investors' expectations are upset if a federal common law applies instead of the defining state statute. Thus, the court ruled that, under all the factors of the Kimbell Foods test, state limited partnership law should govern the question of how CERCLA should apply to limited partners in a limited partnership.

Once the Redwing II court determined that state limited partnership law applied to the question of whether to pierce the limited partner's liability protection, it compared the actions of Hutton to the list of accepted actions for limited partners provided in the Alabama Code. Since Hutton only possessed rights to control important decisions, but never actually exercised any of these rights, the court found that it did not lose its limited partner status

161. See id. at 1501 (referring favorably to the rationale of Anspec v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991)).
162. See id.
163. See id. at 1501-02.
164. See id.
165. See Redwing II, 94 F.3d at 1502 ("Given the popularity of the limited partnership structure as a means of organizing businesses and attracting investment in this country, we hesitate to upset the expectations investors have under current state law rules by adopting a federal common law rule."). This ruling, that courts should hesitate to upset the expectations of investors, highlights the clash between the remedial paradigm of CERCLA and a newer paradigm, legitimate expectations of investors. See Oakes, supra note 25, at 10,308-10,311 (discussing the interaction of CERCLA with the emerging "expectations of investors" paradigm).
166. See Redwing II, 94 F.3d at 1502.
167. See supra note 129 (presenting the relevant Alabama Code sections).
under Alabama limited partnership law. Therefore Hutton could not be held indirectly responsible for Saraland II's responsibility.168

After considering the indirect responsibility of Roar and Hutton, the next issue to be addressed is the all-important question of direct responsibility as an operator. In a precursor to its analysis of operator status, however, the Redwing II court first addressed Judge Hand's ruling that § 9607(a)(1) liability requires owner and operator liability because, under Judge Hand's standard, the question of operator liability under § 9607(a)(1) is moot if the person is not an owner.169 The Redwing II court dealt with this controversial ruling by simply noting that the district court is bound by the Eleventh Circuit opinion in Fleet Factors that "owner and operator" should be interpreted as "owner or operator."170 Thus, regardless of Judge Hand's argument that the Fleet Factors interpretation is not supported by the statutory text and is due for reconsideration, the Redwing II court declined such reconsideration; holding that it is settled law within the Eleventh Circuit that "a person is a responsible party under subsection 107(a)(1) if they are the current owner or operator of a facility."171

Once established that a person could be an owner or operator under § 9607(a)(1), the court must frame the test for operator liability under CERCLA for limited partners in a limited partnership. To decide this issue, the Redwing II court followed the analysis of Redwing I and analogized to the application of operator liability in the corporate context. The court decided that the "actual control" test of Jacksonville Electric applied to limited liability partnerships as well as corporations.172 Under this test, the fact that the percentage interest in the partnership is large or that a partner has authority to control is not sufficient to trigger operator

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168. See Redwing II, 94 F.3d at 1503. ("Merely having the authority to control certain aspects of a partnership’s business without actually using that authority does not amount to "taking part in the control of the [partnership’s] business.") (quoting ALA. CODE § 10-9A-42(a) (1994)).

169. See supra note 140 (discussing Judge Hand's interpretation of § 9607(a)(1)).

170. Redwing II, 94 F.3d at 1497-98. Therefore, "[t]he district court was not free to disregard Fleet Factor's reasoning, and neither are we. Absent a supervening Supreme Court decision or a change in statutory law, we are bound by a prior panel's decision." Id. at 1498. This statement appears technically incorrect because presumably the Eleventh Circuit, acting en banc, would have the authority to overrule a prior panel's decision.

171. Id.

172. See id. at 1503-04.
liability.¹⁷³ Instead, it must be demonstrated that the partner either "(1) actually participated in operating the Site or the activities resulting in the disposal of hazardous substances, or (2) 'actually exercised control over, or [was] otherwise intimately involved in the operations of' the Partnership."¹⁷⁴ By restricting operator liability to those who themselves participated in the wrongful conduct prohibited, the actual control test is designed to meet the policy of CERCLA that operator liability be based only on a person's actions.¹⁷⁵

Since the tests for holding a corporate stockholder or officer responsible as an operator under §§ 9607(a)(1) or (2) differ greatly across the circuits, the rationale of the Redwing II court in deciding which standard to apply is worth exploring further.¹⁷⁶ Before agreeing with Judge Hand and applying the corporate operator standard, the Redwing II court considered the alternative theories that are applied in other circuits; the first being the theory that operator liability should be imposed only when the corporate veil is pierced.¹⁷⁷ While the Redwing II court implicitly rejected a rule where operator liability would be governed by the same standards as veil piercing, they gave no rationale for this ruling, so it is not clear why the court rejected this approach.¹⁷⁸ Next, the Redwing II court considered the "authority to control" test, which looks at whether the alleged operator had the authority to control hazardous waste decisions.¹⁷⁹ This test was rejected since it "is simply incompatible with [the] reasoning in Jacksonville Elec."¹⁸⁰ Finally, the court considered the Eighth Circuit's test, perhaps best described as the "actual control of hazardous waste" test, which

¹⁷³. See id. at 1505.
¹⁷⁴. Redwing II, 94 F.3d at 1505 (quoting Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993)).
¹⁷⁵. See id. at 1504.
¹⁷⁶. See supra notes 83-101 and accompanying text (discussing the wide variation in tests to determine operator status in the corporate context).
¹⁷⁷. See Redwing II, 94 F.3d at 1504 n.17; see also supra notes 99-100 and accompanying text (discussing the Fifth Circuit rule that operator status applies only when the corporate veil can be pierced).
¹⁷⁸. See Redwing II, 94 F.3d at 1504.
¹⁷⁹. See id. at 1504 (considering the "authority to control" test approved by the Fourth Circuit in Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837 (4th Cir. 1992) and by the Ninth Circuit in Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992)). See also supra notes 94-97 and accompanying text (discussing the "authority to control" test under its alternative name, "ability to control").
¹⁸⁰. Redwing II, 94 F.3d at 1505.
considers all parties who have authority over the disposal of hazardous wastes, and who actually exercise that authority, to be operators.\footnote{181} Since this test would in practice find fewer persons responsible as operators than \textit{Jacksonville Electric}, it was rejected because "the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability."\footnote{182} Since none of the tests other than the "actual control" test were therefore acceptable, the \textit{Redwing II} court concluded that the \textit{Jacksonville Electric} operator test should apply to limited partners in a limited partnership.\footnote{183}

Under the \textit{Jacksonville Electric} "actual control" test, an operator under §§ 9607(a)(1) or (2) need not have actually controlled the disposal of hazardous substances, but must have participated in substantial control of the partnership.\footnote{184} In choosing the operator responsibility rule that would apply to limited partnerships, the \textit{Redwing II} court apparently did not consider the issue \textit{de novo}, as they did with choosing the veil-piercing test for limited partners. This is unfortunate, since the rule of \textit{Redwing II} can be fairly stated as requiring that the operator responsibility test from the corporate context be applied to all alleged operators. There are two problems with this type of rule. First, it ignores the possibility that state entity law could provide a more predictable "control" test. Second, implementation of this rule in other jurisdictions will spread the existing variation in operator responsibility from the corporate context to all other entities. On the other hand, if the \textit{Redwing II} court had considered the possibility of using the detailed control test already existing in limited partnership law, a better general rule would have been established.\footnote{185} In the court's

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\footnote{181. See id. at 1505 n.19. See also supra note 98 and accompanying text (discussing the Eighth Circuit's unique operator rule).} \footnote{182. \textit{Redwing II}, 94 F.3d at 1505 n.19.} \footnote{183. See id at 1505.} \footnote{184. The \textit{Jacksonville Electric} "actual control" test essentially follows the majority rule for operator responsibility tests. \textit{See supra} notes 89-93 and accompanying text (discussing the actual control test adopted in the majority of jurisdictions).} \footnote{185. The alternative rule proposed here is that RULPA, as implemented by state limited partnership law, with its limits on the acts of control that the limited partners can take before losing their limited liability, could also be applied to the operator responsibility test that looks at similar types of control activities. \textit{Compare supra} notes 125, 129 (discussing the acts of control for which limited partners can lose their limited liability) \textit{with supra} notes 89-93 and accompanying text (discussing the implementation of the "actual control" operator test).}
favor, however, the *Jacksonville Electric* standard probably is less likely to find a limited partner to be an operator than the application of the control test in limited partnership law. So it is only in considering how *Redwing II* will be applied in other circuits that the court's failure to consider, *de novo*, all the options for applying the operator test will become important. Once the standard for partners in a partnership was decided to be the *Jacksonville Electric* standard, application to Hutton was simple because the *Redwing II* court also found that the limited partners exercised less actual control than the corporate stockholder in *Jacksonville Electric*, who was not considered to be an operator.

As for the other defendants, the *Redwing II* court impliedly ruled that the *Jacksonville Electric* operator test applied to all the classes of defendants when it applied the same test in all of its considerations of direct operator responsibility under CERCLA. Thus, the *Redwing II* court considered the present operator responsibility of the management agent, Marcrum, using the *Jacksonville Electric* actual control test. As applied to the facts, the court then found enough acts of control by the management agent to raise a material question of fact such that summary judgment was inappropriate. The significance of finding that Marcrum is po-

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186. Both courts easily determined that the *Jacksonville Electric* control test was not met as applied to the limited partners, so there really was no serious issue of how to measure the acts of Saraland II. *See Redwing I*, 875 F.Supp. at 1559 (“[N]o reasonable jury could conclude that the alleged “control” has exceeded the control which the alleged operator exercised in *Jacksonville Electric* . . . .”); *Redwing II*, 94 F.3d at 1505 (“[T]he record lacks any significantly probative evidence that the Hutton partners controlled the Saraland Site itself or had any connection with the alleged disposals occurring after they bought their interest in 1984.”). In fact, it seems likely that a limited partner would usually trigger the RULPA control test before the *Jacksonville Electric* operator test.

187. *See Redwing II*, 94 F.3d at 1505; *see also supra* notes 132, 186 (discussing the District Court’s findings on this issue).

188. *See id.* at 1510.

189. *See id.* at 1509-10. The record included the following acts by Marcrum in its role as managing agent:

1. prepared annual budgets for the complex and required the resident manager to regularly report expenses to Marcrum and seek approval from Marcrum of any expenses exceeding the budget;
2. regularly inspected the complex, and required the resident manager to perform quarterly inspections and report on these inspections to Marcrum;
3. ordered the resident manager to implement major improvement and repair programs for the complex as a whole;
4. ordered the resident manager to make specific repairs to particular units by certain deadlines;
tentially responsible as a present operator is that management companies running apartment complexes may now face CERCLA responsibility. Although the Redwing II court does not comment much on this result, this possibility could significantly increase the exposure of management agents to CERCLA, particularly in jurisdictions where the broad “authority to control” operator test applies.\textsuperscript{190} Thus, the Redwing II ruling that the management agent’s acts of control were to be independently analyzed under the operator control test could represent a notable expansion of CERCLA responsibility. While the actual impact of this ruling is presently unclear, management agents of apartment buildings should be concerned about the implications.\textsuperscript{191}

Next, the Redwing II court considered the question of whether the general partners, Roar, could be held responsible as present operators. The court did not reach the point of deciding the appropriate standard (presumably Jacksonville Electric would have been chosen) because it ruled that, regardless of § 9607(a)(1) responsibility, the general partners satisfied the third party defense of § 9607(b)(3).\textsuperscript{192} In this third party defense ruling, the court found that there was no contractual relationship between the current general partners, Roar, and the only PRPs, Redwing and Meador.\textsuperscript{193} Further, since Roar exercised due care toward the existing contamination and took precautions against foreseeable acts of contamin-

5. received complaints from tenants, and forwarded these complaints to the resident manager with instructions as to how and by when to respond to the complaints; and
6. prepared proposed rent increases for approval by the Partnership and HUD.

\textit{Id.} “In addition, the record suggests Marcnm has, in the past, been partly responsible for remedying tar seeps as they appeared on the property.” \textit{Id.} at 1510.

190. To the extent other courts follow Redwing II and apply its corporate operator responsibility test to management agents, the application of the broad “authority to control” test is likely to ensnare many management agents. See supra notes 94-97 and accompanying text (discussing the broadly defined test known as “ability to control” or “authority to control”).

191. Since the court detailed exactly how a management agent could be judged responsible as a present operator under CERCLA, there is now a well-developed theory that could be easily argued in other cases.

192. See Redwing II, 94 F.3d at 1506, n.25, see also supra note 137.

193. See id. at 1508. But see infra notes 233-34 and accompanying text (suggesting that the Redwing II court improperly ignored the clear contractual connection between Roar and the partners in Saraland I, who presumably were responsible for Saraland I’s CERCLA responsibility).
tion, the third party defense was satisfied. Thus, the general partners were excused from liability as present operators because they asserted a successful third party defense.

While this decision on the third party defense appears unremarkable as described in Redwing II, it is actually quite remarkable. First, the third party defense is rarely successful because of the flexibility of courts to find indirect contractual relationships or lack of due care with respect to existing contamination. Here, however, the court's decision was apparently predicated only on an examination of the parties before the court. An analysis of Roar's contractual links with persons, such as the original partners who sold their interests to Roar (who could easily be themselves responsible for CERCLA responsibility), is completely missing. Therefore, by narrowing the list of persons who could supply the necessary contractual link to defendants in the litigation, the Redwing II court is increasing the chances that a person will be able to establish the third party defense.

After considering the present operator status, the Redwing II court examined the § 9607(a)(2) responsibility covering owners or operators during past disposals and the § 9607(a)(3) responsibility for arrangers of past waste disposals. The Redwing II court

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194. See Redwing II, 94 F.3d at 1508.
195. See supra notes 49-52 and accompanying text (discussing the difficulties in establishing the third party defense).
196. See Redwing II, 94 F.3d at 1508 (where the court mentions only the defendants Redwing and Meador when searching for a contractual link between Roar and a CERCLA responsible person).
197. See infra notes 206-07 and accompanying text (describing how the original partners in Saraland I were presumably responsible parties since Meador was a PRP for arranging disposals at the time when Saraland I owned the site; see also infra notes 233-34 and accompanying text (discussing how the issues of succession in partnerships provide ample precedent for the Redwing II court to have denied the third party defense because of an indirect contractual relationship)).
198. The clear implication of this ruling is that the availability of the third party defense depends on the subset of PRPs who remain as viable parties at the time of litigation, since these are the only parties examined for a contractual link. While this is probably not what the Redwing II court intended, the alternative of extending the search for contractual links to missing parties is not particularly satisfying either, because that would require a determination of the CERCLA responsibility of defunct parties.
199. Since both categories depend on the definition of disposal, the Redwing II court had to deal with Judge Hand's ruling that an involuntary second-hand disposal was not a disposal under §§ 9607(a)(2) or (3). See supra note 141 (discussing Judge Hand's new interpretation of disposal under § 9607(a)(2) and (a)(3)). While the Redwing II court agreed with Judge Hand that neither the 1986 repaving nor the 1991 pipeline maintenance was a "disposal" under CERCLA, the Redwing II court rejected Judge Hand's new rule in
ruled that while “CERCLA’s definition of ‘disposal’ should be read broadly to include the subsequent movement and dispersal of hazardous substances within a facility,” it must be affirmatively proven that the movement of previously contaminated soil was permanent.\textsuperscript{200} Therefore, even though the 1986 and 1991 events might be disposals, there is no evidence in the record that either event resulted in the permanent movement of contaminated soil. Consequently, “the only reasonable inference is that any soil dug up during the process was returned from whence it came [and] . . . [n]o matter how broadly the term is defined, this conduct did not amount to disposal.”\textsuperscript{201} Therefore, even in the process of rejecting Judge Hand’s new rule, the Eleventh Circuit created an apparently new rule that limits the scope of finding disposal events in every movement of previously contaminated soil to those events that can be proven to be permanent.

Once established that no disposal events occurred during their tenure at the site, Marcrum could not be found to be an owner or operator during the time of a disposal under § 9607(a)(2), or an arranger of a disposal under § 9607(a)(3).\textsuperscript{202} Similar arguments would presumably apply to the defendants Roar and Hutton, if the \textit{Redwing II} court had not decided these issues on other grounds.\textsuperscript{203} As for Meador, the developer of the apartments, the \textit{Redwing II} court ruled that no past operator responsibility could be found because this claim was not pleaded or argued in the district court.\textsuperscript{204} This left no viable claims for operator responsibility under § 9607(a)(2), and the only viable arranger claim left under § 9607(a)(3) was against Meador for hiring subcontractors to develop the site back in 1980.\textsuperscript{205} The fact that contaminated material was found on the site in a place where Redwing Carriers never operated served as proof that previously contaminated soil was moved favor of their own new rule. \textit{See Redwing II}, 94 F.3d at 1510.

\textsuperscript{200} \textit{Redwing II}, 94 F.3d at 1510 (citing Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342 (9th Cir. 1992)).

\textsuperscript{201} \textit{Id.} at 1510-11.

\textsuperscript{202} \textit{See id.}

\textsuperscript{203} \textit{See id.} at 1506 (holding that Hutton was not involved enough in the control of the partnership to be considered an arranger); \textit{id.} at 1508-09 (discussing the liability of the general partners, Roar, but not considering past operator liability presumably because the general partners already could be indirectly responsible).

\textsuperscript{204} \textit{See Redwing II}, 94 F.3d at 1511 n.30.

\textsuperscript{205} \textit{See id.} at 1512.
during the initial development of the apartment buildings. Since there was credible evidence that a permanent movement of soil had taken place, summary judgment was not appropriate on the claim that Meador arranged for the disposal of hazardous materials during the construction of the building.

The final issue considered by the Redwing II court was divisibility of the harm. After stating that they were not ruling on Judge Hand's equitable determination that Redwing was entirely responsible, the Eleventh Circuit panel rejected Judge Hand's intertwining of the divisibility of harm defense with a contribution action under § 9613(f). The panel held instead that the divisibility defense does not apply to § 9613(f) actions. Judge Hand's decision to excuse Saraland from a factual determination of its responsibility was therefore incorrect. However, it should be noted that even though Judge Hand's divisibility analysis was overruled, it is not obvious that RedWing will be awarded anything upon remand. This is because a § 9613(f) contribution action is

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206. See id. Since Meador was potentially responsible as an arranger, they would also have been potentially responsible under the Jacksonville Electric control test, if this claim had been pleaded.

207. See id. at 1511-12. The ruling against Meador is based on the Eleventh Circuit's concurrence with the rule of the Fifth and Ninth Circuits that "a 'disposal' may occur when a party disperses contaminated soil during the course of grading and filling a construction site." Id. at 1512 (citing Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342 (9th Cir. 1992); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988)). Further, the Redwing II rule that, to be held liable for arranger liability, "a CERCLA plaintiff ... need not demonstrate a party acted with the specific intent to dispose of hazardous substances or made certain 'crucial decisions' regarding the disposal of those substances in order to establish a defendant has 'arranged for' a disposal," Redwing II, 94 F.3d at 1512, was also important to this determination.

Once Meador is considered a PRP as an arranger, the immediate implication is that the contractor who actually did the work could also be considered a PRP as an operator. There is therefore at least one more PRP at the site who was not part of the Redwing litigation.

208. Judge Hand had ruled that Redwing's responsibility for the harm was divisible from the other defendants, so that no contribution was due regardless of whether the defendants were responsible parties under CERCLA. See supra note 142 (discussing Judge Hand's application of the common law of divisibility of harm to a CERCLA contribution action).

209. See Redwing II, 94 F.3d at 1513 (arguing that since there is no joint and several liability among defendants in a contribution action, the common law notion of divisibility has no relevance to a § 9613(f) contribution action).

210. See id. at 1514.
guided by equitable principles and Judge Hand appears convinced that Redwing should bear the full responsibility.211

Overall, the Redwing II opinion is notable for several reasons. First, the panel affirmed the district court on the determination that state limited partnership law governed the application of CERCLA to both limited and general partners for ownership responsibility and for indirect responsibility. These decisions are important since the choice of well-developed state law decreases the uncertainty about how CERCLA will apply.212 Further, it gives limited partners a clear answer as to how they can avoid CERCLA responsibility: do not exercise control over the limited partnership beyond what is allowable under state law. However, in their second notable ruling, that the Jacksonville Electric standard applied to the determination of direct operator responsibility for all parties, the Redwing II court may have undone their strong defense of the limited partnership form by introducing a text grounded in the corporate context to the acts of limited partners. While it would have been preferable if the Redwing II court had considered using the limits in state partnership law as a control test, the choice of the actual control standard is not likely to cause too much mischief, since it tends to be stricter in application than the limited partner control limits. In other circuits with more relaxed operator tests, however, the Redwing II rule that the corporate operator standard applies may actually lead to an undermining of the strong protection given by the indirect responsibility test.

Redwing II is also noteworthy for creating several novel rules. First, the panel found that an apartment management company could be held as a current operator for their extensive acts in controlling property that was contaminated. This is likely to be a real "eye-opener" in some circles. Next, the Redwing II court applied a sensible limit to the Tanglewood rule that moving contaminated soil was a new disposal event. By requiring proof of a permanent

211. Thus, the Eleventh Circuit's ruling that divisibility of harm has no place in an equitable § 9613(f) action is more a theoretical ruling than one of practical significance. See id. at 1513 (holding that the ability of the court, with the assistance of the parties, to distinguish among separate harms caused by different parties is an appropriate factor for a court to consider in making a fair division of liability).

212. While established federal law generally provides uniformity, the predictability regarding the extent of investor liability offered by state partnership law is critical in this context. See supra notes 156-66 and accompanying text (discussing the Redwing II court's decision to follow state law).
movement of soil, ordinary events like pipeline maintenance (digging a hole, then refilling it with the same soil) cannot even be alleged to be disposal events unless there is some proof that the contamination was spread. Finally, the Redwing II court applied a nontraditional interpretation of the third party defense by limiting the search for a direct or indirect contractual link to the defendants actually before the court. While it is not clear if the court intended this result, or was merely confused as to the succession between Saraland I and Saraland II, the court’s application of the third party defense only to the parties present in the litigation could be a significant new limitation if followed elsewhere.

III. IMPLICATIONS OF THE REDWING DECISIONS

There are two implications of Redwing II worthy of further consideration. The first is one of the puzzling subtexts to the cases; how the partnership succession between Saraland I and Saraland II should be treated.\textsuperscript{213} This issue underlies both the analysis of whether the current general partner is indirectly responsible for Saraland II or is insulated from this responsibility because he is an incoming partner, and the analysis of whether the current general partner had a contractual relationship with a responsible party. The second implication worth exploring is what Redwing I and Redwing II will mean for the other major noncorporate entity offering limited liability, the LLC. Given the paucity of case law interpreting this relatively new entity, the cases discussed here are likely to be influential in deciding how CERCLA responsibility will affect an LLC and its members.\textsuperscript{214}

A. Partnership Succession and CERCLA

Because they were presented with one of the first opportunities to apply CERCLA to limited partnerships, the Redwing I and Redwing II courts can be fairly criticized for not expressly considering the buried issue of how to treat the conversion between the original Saraland partnership and the limited partnership created in 1984.\textsuperscript{215} Several key decisions turned on the fact that the partners

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\item[\textsuperscript{213}] See supra notes 110-11 and accompanying text (discussing the technical dissolution of Saraland I that occurred when the partners sold their interests to Hutton and Roar, and the formation of a new partnership, Saraland II, organized as a limited partnership).
\item[\textsuperscript{214}] See infra note 246 and accompanying text (describing the lack of judicial decisions as to what veil-piercing test should apply to LLCs).
\item[\textsuperscript{215}] Both the Redwing I and Redwing II courts measured the involvement of Roar and
in Saraland II, both general and limited, were only on the site after 1984. However, this ignores the salient fact that the predecessor partnership, Saraland I, and its partners probably incurred CERCLA responsibility before 1984. Thus, there is a real issue concerning whether and how the responsibility of Saraland I and its partners transferred to Saraland II and its partners.

This buried issue arises in Redwing II when the court briefly mentions that the general partners in Saraland II may not be responsible for the CERCLA responsibility of Saraland II. This is so because they are incoming partners who are insulated from liability for any preexisting partnership responsibility as a matter of partnership law. Although it is true that incoming general partners are insulated from preexisting liabilities, there are two problems with the Redwing II suggestion. First, the sale of interests by the partners in Saraland I to Hutton and Roar to create Saraland II does not appear to be a succession in partnerships since, under partnership law, there is technically a dissolution of Saraland I and creation of a new partnership. This means there is no continuing partnership, so that the rule insulating the incoming general partner from preexisting responsibilities should not apply. The second problem is that, even if Roar is insulated from any preexisting CERCLA responsibility of Saraland II, Roar bought its partnership interests from persons who could have been responsible persons

Hutton at the site only subsequent to their purchase in 1984. See supra notes 141, 202-03 and accompanying text. As for considering the Saraland II partnership as a successor to the Saraland I partnership, the Redwing II court argued that “[s]Although the current Saraland Limited [II] partnership could perhaps be considered a ‘successor’ to the partnership formed in 1973 given an amended partnership agreement was executed in 1984, the current partners themselves are not ‘successors’ to any partnership. Rather, they own an interest in the potential ‘successor’ partnership.” Redwing II, 94 F.3d at 1503 n.16.

216. The potential of CERCLA responsibility for Saraland I and its partners can be inferred from the Redwing II analysis of the developer Meador. See generally supra notes 206-07 and accompanying text. Since Meador was found potentially responsible as an arranger for moving contaminated dirt around the site when the apartments were built, Saraland I, who owned the site at that time, would also be presumably responsible. See id. Once Saraland I is responsible, all the partners are then indirectly responsible. See supra notes 152-53 and accompanying text (discussing the Redwing II suggestion that partners who are liable for the partnership’s debts and obligations are automatically considered indirectly responsible for the partnership’s CERCLA responsibility).

217. See Redwing II, 94 F.3d at 1508 n.27.

218. See supra notes 110-11 and accompanying text (discussing how the succession between Saraland I and Saraland II is characterized under partnership law principles).

219. See id; see also supra note 153 (reciting the UPA rule for incoming partner liability that implicitly assumes there is a continuing partnership).
themselves. Thus a lingering question is whether CERCLA responsibility attaches to the partnership interest itself. This question of how to treat the succession of a partnership interests (along with the broader question of how to treat the succession of partnerships themselves) is an important but unresolved issue in Redwing I and Redwing II.

In addition to the issue of an incoming partner's insulation from responsibility, there are unresolved succession questions concerning the third party defense; namely, the possibility in Redwing I that the court would have favorably considered the third party defense for Saraland II, and the Redwing II court's determination that Roar satisfies the third party defense. Again, the Redwing I and Redwing II courts fail to consider the subtleties of how partnership succession underlies their analyses. Taking the Redwing I court ruling first, it is not clear from the brief excerpt in the case ("For purposes of summary judgment, [Saraland II] declines to assert the defenses of §9607(b)") that the court would have favorably considered this defense. For discussion purposes, however, to hold that Saraland II satisfied the third party defense it must be shown that either Saraland I was not a responsible party or that there was no contractual link (either direct or indirect) between Saraland I and Saraland II. Since Saraland I was presumably a responsible party under CERCLA, characterization of the transition between Saraland I and Saraland II is required.

The general rule of succession applicable in the corporate context is that a successor corporation (the surviving corporation after a merger) retains the CERCLA responsibility of the subsumed corporation. But under partnership law, one partnership termi-

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220. Since partnership law holds that the partnership interest is personal property of the partner and represents only his share of profits and surplus, the general rule is that liabilities do not transfer with partnership interests. See UNIF. PARTNERSHIP ACT § 26 (1914); REVISED UNIF. LTD. PARTNERSHIP ACT § 101(10) (1976). However, to give effect to the remedial purpose of CERCLA, it is possible, although unlikely, that CERCLA responsibility could attach to a partnership interest (given that the incoming partners can still be reached under other theories of liability).

221. See supra notes 138, 193 and accompanying text.

222. Redwing I, 875 F.Supp. at 1567.

223. See supra notes 48-52 (discussing the third party defense of § 9607(b)).

224. See supra note 207 (discussing how the analysis of Meador's responsibility strongly suggests that Saraland I could also be potentially responsible).

225. See Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1246 (6th Cir. 1991). As the court noted:
nates and another begins when all the original partners sell their interests to new partners forming a limited partnership. Therefore the corporate rule cannot directly apply to partnerships.

But this raises another question. Does the CERCLA responsibility of the dissolving partnership survive if the newly formed partnership begins operations by essentially replacing the old partnership? Since CERCLA responsibility is not easy to discharge, and since the remedial purpose is not met by allowing a responsible party to escape responsibility by dissolving, the dissolving partnership's responsibility must be borne by someone. One answer is that the partners in the terminating partnership retain the responsibility. The rationale for this answer is that the selling partners were indirectly responsible for Saraland's CERCLA responsibility before the sale, and received valuable consideration for their partnership interests. Thus, it is equitable that they retain this responsibility. An alternative answer is that the new partnership is constructively considered as a successor if they purchase the assets and continue the operations of the terminating partnership. While this requires ignoring the technical distinctions in

In general, when two corporations merge pursuant to statutory provisions, liabilities become the responsibility of the surviving company. "In the case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former, at least to the extent of the property and assets received, and this liability is often expressly imposed by statute."

Id. (quoting 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7121, at 185 (rev. perm. ed. 1983)).

226. See supra notes 217-18 and accompanying text.

227. See, e.g., supra note 111 and accompanying text (discussing how Saraland II apparently took over for Saraland I in every way, with the exception that Saraland II was organized as a limited partnership).

228. See Dolan, supra note 8, at 182-83 (describing how parties can arrange for indemnification from CERCLA responsibility but cannot discharge it by contract).

229. See supra note 152 and accompanying text (arguing that the original partners in Saraland I are indirectly responsible for Saraland's CERCLA responsibility).

230. Actually, the economically rational result here would depend on whether the price paid for the partnership interests included an assessment of the CERCLA responsibility. If this were the case, then, equitably, the original partners should not pay again. But in the present case, neither selling partner nor buying partner appeared to know of the impending CERCLA problem, so the price probably did not reflect CERCLA costs.

231. The argument here is that when one partnership takes over for another, the dissolution is only an artifact of partnership law; the reality is that this is a succession. Thus, the rules of corporate succession, that the surviving entity be charged with the debts of the former entity, could constructively be applied. See Anspec, 922 F.2d at 1246 ("[W]e
partnership law that make adopting a succession theory difficult, under the remedial purpose of CERCLA a court could easily find (at least constructively) that there is a continuing entity.

Under these interpretations of CERCLA, the only way Saraland II might qualify for the third party defense is if the CERCLA responsibility of Saraland I falls exclusively on the selling partners. In that case, Saraland II would not assume CERCLA responsibility as a successor and would only face potential CERCLA responsibility as the current owner (where the third party defense could theoretically apply).\footnote{If Saraland II was considered the successor to Saraland I, it could not qualify for the third party defense because this succession would be at least an indirect contractual link. However, even if the lack of technical succession had been upheld, there are presumably still direct contractual links between Saraland II and Saraland I arising from the transfer of title to the property. Further, there are definitely indirect links since Saraland II took over operations for Saraland I under the same name. Therefore, it is not clear how the third party defense could ever be satisfied here.}

Similarly, the hidden succession issues in the \textit{Redwing II} ruling that the general partners in Saraland II satisfy the third party defense are crucial. To reach this result (upholding the defense), the \textit{Redwing II} court implicitly rejects attaching CERCLA responsibility to the partnership interests. If the court had done otherwise, the panel would have had to find a direct contractual link between Roar and a responsible party under CERCLA and the defense would have failed.\footnote{See supra notes 192-98 and accompanying text (discussing the \textit{Redwing II} ruling that Roar qualified for the third party defense because, in part, there were no contractual links with responsible parties).} Instead, it appears from the panel’s comment suggesting that the incoming partner might be insulated from preexisting responsibility that they believed that Saraland II was a continuation of Saraland I; consequently there could be an “incoming” partner.\footnote{See supra notes 152-53 and accompanying text (suggesting by implication that there was at least constructively a continuing partnership so that there was an issue about whether the incoming general partners were insulated from preexisting liabilities).} Unfortunately, the \textit{Redwing II} court did not expressly state this conclusion, leaving unresolved exactly how this succession is supposed to work.

All in all, the unresolved succession questions are important because, as the analysis here shows, when the hidden issues are revealed it appears that the \textit{Redwing I} and \textit{Redwing II} courts have

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\item are merely saying that the drafters of CERCLA were not blind to the universal rule that ‘corporation' includes a successor corporation resulting from a merger and that the drafters intended ‘corporation' to be given its usual meaning.”).
\end{itemize}
opposing views as to how the succession between Saraland I and Saraland II should be treated. Judge Hand appears to have found no succession when he implied that Saraland II might qualify for the third party defense, while the Redwing II court implicitly found at least constructive succession. Since qualifying for a defense is a critical element in analyzing CERCLA responsibility, these unresolved issues should be more clearly analyzed in future applications of CERCLA to limited partnerships, both for the sake of clarity and to avoid incorrect applications of the third party defense.

**B. Lessons of Redwing II For Applying CERCLA to LLCs**

The rulings of Redwing II on how to apply CERCLA to limited partnerships partially resolve the question of how CERCLA will apply to the increasingly popular business entity, the LLC, and its owners (called "members").\(^{235}\) While not all the issues raised can be answered, the rulings and their rationales suggest how LLCs will be treated under CERCLA, at least in the Eleventh Circuit. To the extent this decision is influential in other circuits, these lessons will decrease the uncertainty as to how LLCs that own and develop environmentally questionable property like brownfields will be treated.

The LLC is essentially a hybrid between the corporate and partnership form. While it offers all of its members corporate-like liability protection for the acts of the LLC, it is treated as a partnership for tax purposes.\(^{236}\) In form, the LLC is similar to the limited partnership since both are governed by detailed statutory law, both operate pursuant to an operating agreement that spells out the duties of each member or partner, and both are covered exclusively by partnership tax law.\(^{237}\) The biggest difference be-

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236. See id. at 266-67. According to Horwood:

As a hybrid form, the LLC combines the liability protection of a corporation with the structuring and management ease of a partnership. Although LLCs have existed in certain states since the late 1970s, they were not generally considered viable entities until 1988 when the IRS ruled that LLCs may be taxed as partnerships rather than corporations. Thus, all items of income, gain, loss, credit, and deduction "flow through" to the owners, called "members," of the LLC.

Id.

237. See id. at 267-68.
tween LLCs and limited partnerships is how they provide limited liability. In the limited partnership, there must be a general partner who is responsible for the liabilities of the partnership. By contrast, all members of the LLC are protected by limited liability, regardless of their involvement in operations.238

Applying the rules of *Redwing II* to LLCs, the first issue is whether state LLC law should govern the issue of owner responsibility under CERCLA, or whether a federal standard should be created. Here, an application of *Kimbell Foods* test would probably reach the result that state law should be respected for the same reason as in *Redwing II*.239 While there is less history surrounding LLCs than limited partnerships, there is substantial uniformity in implementation across states, so state law will probably be respected.240 This would suggest that LLC members will be considered to own only a personal property interest, and not to own what the LLC owns. Consequently, members should not be considered owners under § 9607(a)(1).241

Another issue with a clear answer is that LLC members’ direct responsibility as operators will be tested under the *Jacksonville Electric* actual control test, since the *Redwing II* court applied this test in all of their considerations of operator responsibility.242 As discussed above, it is a bit problematic that the corporate operator test applies to other entities, since the factors considered are derived from the corporate context.243 But since LLCs provide limited liability protection similar to corporations, the corporate operator test is less objectionable when applied to LLCs than limited partnerships because there is no ready statutory alternative for a

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238. See id. at 272.
239. See supra notes 156-66 and accompanying text (discussing the *Kimbell Foods* test for deciding when to follow state law and when to develop federal common law).
240. See SARGENT & SCHWIDETZKY, supra note 10, at §§ 3.08, 3.08[2][d] (noting that all states have adopted LLC legislation in some form and that a Uniform Limited Liability Company Act has been drafted and submitted for approval by the American Bar Association).
241. This is the logical extension of the strong statements in *Redwing I* and *Redwing II* that, under state partnership law, the partner does not own what the partnership owns. See supra notes 125, 148 and accompanying text.
242. See supra note 192 and accompanying text (discussing *Redwing II*’s implication that *Jacksonville Electric* applies to all questions of operator responsibility).
243. See supra notes 184-87 and accompanying text (discussing how the control test from limited partnership law is preferable to the *Jacksonville Electric* standard in the limited partner-as-operator context).
control test in that case (unlike with limited partnerships).\footnote{See Horwood, supra note 235, at 267 (discussing how LLCs offer limited liability to all members regardless of the degree to which they participate in management).} Thus, given the similarities between the blanket liability protection offered by corporations and LLCs, the corporate operator test is likely to carry over to LLCs, regardless of the persuasive force of the Redwing II ruling that applies the corporate test to all entities.

Finally, Redwing II does not provide much guidance regarding the indirect responsibility of LLC members since there is no statutory scheme that a court could adopt as a veil-piercing test.\footnote{See id.} The Redwing II ruling that state law governs veil piercing, will not help since there is no statutorily defined veil-piercing test under LLC law.\footnote{See Sargent & Schwedetzky, supra note 10, at § 3.08[2][d] ("[W]e do not generally know when the veil of an LLC might be pierced and its members held liable for its obligations.").} This uncertainty is quite similar to the issue that the Redwing II court sidestepped when it declined to consider what veil-piercing test would apply to general partners in a limited partnership who were insulated from preexisting liabilities.\footnote{The similarity is that there is no statutory control test for when a general partner loses his liability protection because this partner is ordinarily liable for all debts and obligations of the partnership. Consequently, a test must be created here as it must be for LLCs. See supra note 110 and accompanying text (discussing the liability of a general partner).} The most likely resolution of this uncertainty is that the veil-piercing test from the corporate context will be applied to LLCs because of the similarity between the entities in offering blanket liability protection.\footnote{See generally supra note 244 and accompanying text.} But to the extent that LLC veil-piercing tests are later developed under state law, the principles derived in Redwing II suggest that these rules should then apply to indirect CERCLA responsibility.

Overall, the fact that Redwing II can be readily applied to unresolved CERCLA issues in the LLC context is a notable strength of the case. There is now persuasive authority for respecting state LLC law in applying CERCLA. Also, the Redwing II rule that the corporate operator test applies to all considerations of operator responsibility answers the question of how the all-important operator responsibility test will apply to LLCs in the Eleventh Circuit. These two decisions are good news for members of LLCs who are essentially just investors, because in the Eleventh Circuit
they would not be considered owners or operators. The final question, which liability veil-piercing test will apply to LLCs, remains an unresolved issue. A resolution of this issue is critical to the application of CERCLA to LLCs.

CONCLUSION

Both the Redwing I and Redwing II cases are noteworthy for their rulings on the application of CERCLA to limited partnerships. The most important aspect of the cases is probably the respect given to state limited partnership law. This is an encouraging development in the evolution of CERCLA because recognition of well-developed state law adds a measure of predictability that is too often absent in the application of CERCLA. The Redwing courts' recognition of the need for predictability suggests that the legitimate expectations of investors may begin to enter into CERCLA analysis as a countervailing consideration to the remedial purpose paradigm.249

The Redwing cases are not all good news for limited partnerships or other business entities, however. The fact that the actual control test from the corporate context was applied to limited partners, instead of a test based on the RULPA control factors, suggests that the present divergence in operator tests will spread from the corporate context to noncorporate entities. Furthermore, the choice of the corporate veil-piercing standard may lead, in jurisdictions with broad operator responsibility tests, to an undermining of the liability protection otherwise given to limited partners. If the all-important operator responsibility from the corporate context applies to all business entities, courts will still have considerable flexibility in finding responsible parties. This means that predicting CERCLA liability will still be a risky proposition for real estate investors operating in noncorporate forms.

It is also important to remember that Redwing I and Redwing II were decided in a setting where the major, if not only, polluter

249. See, e.g., supra note 165 and accompanying text (presenting the Redwing II court's recognition of investment backed expectations). Further, Judge Hand made clear that investors' attempts to limit their liability will not be considered as a negative factor in determining ultimate CERCLA responsibility. See Redwing I, 875 F.Supp. at 1558 ("It is hubris for Redwing to assert in effect that the Hutton defendants' efforts at dealing with, and protecting themselves legally from, the mess Redwing created make the Hutton defendants liable to Redwing. This court will not turn such absurdity into law.").
was already a responsible person who was able to pay for the cleanup. Since there was a "deep pocket" polluter already on the hook, the courts had the luxury of applying traditional legal analysis instead of stretching their interpretations to bring in persons who were financially viable. If Redwing was no longer a viable corporation, the courts would have presumably been less likely to excuse parties on grounds like the third party defense. Thus, the rules of Redwing I and Redwing II may prove less influential in cases where the only viable party is otherwise protected from responsibility.

Notwithstanding this caveat, the Redwing cases provide helpful guidance as to how CERCLA will apply to new entities like LLCs. Because the cases also demonstrate the fundamental uncertainties still surrounding critically important interpretations of CERCLA (e.g., retroactivity, how defenses to liability should work), however, it is difficult to draw any conclusions about the influence of the Redwing decisions beyond this measured contribution to predictability for noncorporate entities.

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