

Environmental Law

Shareholder, Officer and Director Liability Under the NJ Spill Act

By Craig Huber

With the costs of environmental cleanups rising, parties facing cleanups are looking further to find liable parties able to pay for the costs of remediation. One potential source of monies are the individual shareholders, officers and/or directors who may have controlled a corporation.

Plaintiffs seeking to recover the cleanup costs in New Jersey courts typically plead the New Jersey Spill Act, N.J.S.A. 58:10-23.11 et seq., due to the low threshold of proofs required to demonstrate liability and the limited number of defenses available.

While the traditional method of holding individual officers, directors and shareholders of a corporation liable — by piercing the corporate veil — exists, the proofs are often difficult to assemble and prove. A court will only pierce the corporate veil for fraud, injustice or the like. *Lyon v. Barret*, 89 N.J. 294 (1982).

The Spill Act, with its broad scope of liability, may offer another avenue to hold individual corporate shareholders, directors and officers liable for cleanups. The liability section of the Spill Act states:

Any person who has discharged

Huber is a partner and a member of the environmental practice group of Archer & Greiner in Haddonfield.

a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable... for all cleanup and removal costs

The first part of this section is straightforward — anyone who has discharged a hazardous substance is liable under the Spill Act. The terms “hazardous substance” and “discharge” are defined broadly and include discharges that occur by omission and commission.

The second part of the section is open to interpretation due to the lack of a definition for the phrase “in any way responsible for the discharge of hazardous substance,” however, the court in *State Dept. of Env. Prot. v. Ventron*, 94 N.J. 473 (1983), stated the section must be “liberally construed to effect its purposes.” In *Ventron*, the court found that although the parent, Velsicol, could not be held liable under the traditional veil piercing test, it could be responsible for its subsidiary’s contamination under the Spill Act. Noting that Velsicol was the sole shareholder of the subsidiary, members of the subsidiary’s board of directors were Velsicol employees and that Velsicol personnel were involved in the daily operation of the subsidiary, the court found Velsicol “responsible” under the Spill Act.

Case law has also provided insight into what activities do not fall within the “in any way responsible” clause. *Tennsco*

Corp. v. Estey Metal Products, 200 Bankr. Rpt. 542 (D.N.J. 1996) (bankruptcy trustee not liable for contamination at a property sold by trustee); *Lentz v. Mason*, 961 F. Supp. 709 (D.N.J. 1997) (real estate agency and agent not liable for contamination caused by tenant the company had procured).

Despite the expansive language of the *Ventron* decision, the next case to discuss shareholder liability found that two individuals who were sole shareholders and directors were not liable under the Spill Act despite some outrageous activities including the dumping of drums of poisonous chemicals into pits. *Dept. of Environ. Protection v. Arky’s Auto Sales*, 224 N.J. Super. 200 (App. Div. 1988).

In the *Arky’s* case, brothers formed a corporation whose sole asset was a property leased out to a junkyard operation. The junkyard operator allowed another party to bring drums of hazardous wastes to the premises which were dumped onto the premises.

A fire broke out at the site, causing the drums to explode and cause contamination. The township advised the brothers about the need to clean up contaminated soil and issued summons to compel a cleanup. Later, the township engineer observed the tenant pushing drums of chemicals into a pit, spilling their contents into the pit.

No action was taken for years until the NJDEP employees found the drums and a whole suite of hazardous substances

contaminating the site. The NJDEP brought suit and the judge, reacting to the failure to take any action to abate the dumping, found the brothers individually liable. Noting that the brothers had owned the site through their corporation from 1971 through 1977, had transferred the property to themselves from 1977 to 1981, and then had transferred it back to the corporation in 1981 (when the NJDEP appeared), the judge stated the corporation was a shell for the brothers and served no legitimate corporate purpose.

Although the Appellate Division found the corporation liable, it reversed the trial court as to the individuals, taking a narrow view of Spill Act liability. The court stated that when the discharges occurred, the site was owned by the corporation, and "the Arky brothers were only acting for the corporation, not for themselves individually." The court found no basis to pierce the corporate veil and, incredibly, observed there was no evidence to show that the drums had leaked any substances during the period when the brothers had owned the site as individuals.

Relying upon Arky's, the judge in *Analytical Measurements Inc. v. Keuffel & Esser Company*, 816 F. Supp. 291 (D.N.J. 1993), granted judgment to an individual who had been sued under the Spill Act for pollution caused by a corporation he had served as a shareholder and officer. The *Analytical* matter did not involve the burial of drums of chemicals in an open pit, but arose from the routine manufacturing operations of a paper company. The contamination was caused by a waste-handling system which was constructed in an effort to treat the wastes.

The individual was a high-ranking corporate officer, owned stock in the corporation and was involved in the decision to construct the treatment system. The court made short work of the Spill Act claim, noting that under the Arky's decision a

corporate shareholder/officer could only be held liable if the corporate veil were pierced.

In *Fishbein Family Partnership v. PPG Industries Inc.*, 947 F. Supp. 790 (D.N.J. 1996), the court ruled that a corporation that was the largest shareholder, (but did not control a majority of the stock) and had common fiduciaries and employees with a subsidiary was not liable under the Spill Act.

Dismissing the Spill Act claim, the *Fishbein* court held that the plaintiff would have to demonstrate facts which mirrored those in the *Ventron* case in order to hold the parent corporation liable, absent piercing the corporate veil. As the facts did not match those in the *Ventron* case, the Spill Act claim was dismissed.

In *Stearns & Foster Bedding Company v. Franklin Holding Corporation*, the court dealt with Spill Act claims against corporations and an individual officer. The court in *Stearns* equated Spill Act liability to CERCLA liability for an "operator," and ruled that if a party was not liable as a CERCLA operator, then it had no Spill Act liability. However, if there was potential liability as a CERCLA operator, then there was potential liability under the Spill Act.

Two corporations were granted judgment, as they were only minority shareholders, shared no officers and had not dominated the board of the contaminating corporation. Another corporation was denied judgment, as it had shared a corporate officer with the subsidiary, had a majority interest in the stock and had some control over the board.

Turning to the liability of the individual who had served as an officer for both the parent and subsidiary, the court granted him judgment on the Spill Act claim, noting that, in the absence of veil piercing, an individual officer could not be held liable under the Spill Act.

In the case of *W.R. Grace & Company*

v. Weja Inc., Sup. Ct. of N.J., App. Div., Docket No. A-5527-03T1, owners and operators of a service station faced liability for cleanup costs under the Spill Act. One of the parties was an individual who owned the corporation which was alleged to have caused the contamination.

The trial judge pierced the corporate veil and found the owner personally liable for certain debts of the corporation, but ruled he was not liable under the Spill Act as he had no direct involvement with the spill.

Reversing the trial court, the Appellate Division noted that the Spill Act is to be broadly interpreted and said the *Ventron* decision:

stands for the proposition that the control or ability to control a property at the time of a discharge will suffice to hold a person responsible for the discharge of a hazardous substance under the Spill Act.

Utilizing the *Ventron* decision, the appeals court found the individual was liable due to his control of the corporation. The court in *Weja* did not make clear whether it was holding the individual liable as the sole owner/shareholder and controlled the site, or because the corporate veil had been pierced.

If the *Weja* ruling hinged on the fact that the trial judge pierced the corporate veil, then the strict test for individual liability set out by Arky's remains intact. On the other hand, if the court relied upon the fact that the individual was the corporation's sole owner/operator and controlled the corporation, then the decision may represent a slight expansion of the liability of individual executives/shareholders even in the absence of traditional veil piercing. ■