

ROBBING THE CORPORATE GRAVE: CERCLA LIABILITY, RULE 17(b), AND POST-DISSOLUTION CAPACITY TO BE SUED

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I. INTRODUCTION

A federal judge must decide a case in which a corporation has violated federal pollution laws while making millions of dollars in profit. Thousands of tons of toxic chemicals have been dumped with no regard for potential injuries to the public. After realizing how much the cleanup may cost, the corporation sells its assets, dissolves under state law, and distributes the profits from the sale to its shareholders. When the federal government seeks to recover response costs for the cleanup of the site a few years later, attorneys for the corporation claim that it is no longer liable because it is legally dissolved, and its capacity to be sued has expired.

In light of the recent public and legislative concern over hazardous waste exposure, at first glance the judge's decision might seem clear: impose liability on the dissolved corporation for flagrant violation of the law. Although public policy underlying hazardous waste legislation would support this result, the current state of the law may not.

The question of whether liability attaches to a dissolved corporation for hazardous waste cleanup under federal law has been raised in recent cases, but has not been decided uniformly. The dispute involves the clash between a federal statute and a federal rule of civil procedure, with underlying preemption conflicts between federal substantive law and state corporate law as well.

* Solicitations Editor, 1989-90, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

The federal statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund),¹ was passed by Congress in 1980 to address the problem of the then-estimated 30,000 to 50,000 hazardous waste sites across the country.² The need for federal legislation grew out of increasing public concern over hazardous waste. This concern escalated with dramatic cases such as Love Canal and Valley of the Drums,³ and Congress accordingly enacted a liability scheme designed to cast a wide net over corporate defendants.

The rule that clashes with this liability scheme is Federal Rule of Civil Procedure 17(b),⁴ adopted in 1938. Rule 17(b) directs federal courts to defer to state corporate law to determine the capacity of a corporation to sue or be sued.⁵ Corporate capacity under state dissolution laws varies widely, from a two-year post-dissolution period in which claims may be brought to unending corporate liability. The question, therefore, is whether Rule 17(b) can permit state corporate law to trump CERCLA liability, and thereby cut a large hole in CERCLA's liability net.

In Section II, this Comment explores the basic liability provisions of CERCLA and the courts' treatment of procedural and equitable defenses to CERCLA liability. Section III looks at the history of Rule 17(b) and federal courts' treatment of conflicts between state dissolution laws and federal statutes. Section IV examines conflicts between federal rules and federal statutes generally. Section V discusses CERCLA preemption of state corporate law on the question of dissolution, and reviews state dissolution laws and the Revised Model Business Act to examine the substantive areas of conflict with CERCLA. Section VI examines CERCLA cases that have addressed the problem of the liability of dissolved corporations to date, and the potential implications for hazardous waste cleanup. Because CERCLA's language and legislative history do not support reading the statute's liability provisions to reach dissolved corporations, in Section VII this Comment suggests that Congress review this issue and explicitly make dissolved corporations liable under CERCLA.

¹ CERCLA §§ 101-308, 42 U.S.C. §§ 9601-9657 (1982) (amended by Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. §§ 9601-9675 (Supp. IV 1986)).

² H.R. REP. NO. 1016, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120.

³ *Id.*, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6121.

⁴ 28 U.S.C. app. § 17(b) (1982).

⁵ The Rule makes no distinction between a federal court sitting in diversity and a court hearing a federal question. *Id.*

II. THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

A. *The Statute and Its Legislative History*

Congress enacted CERCLA in 1980 to address the problem of thousands of improperly managed hazardous waste sites in the United States.⁶ Hazardous waste disposal at ongoing facilities was already covered by the Resource Conservation and Recovery Act (RCRA),⁷ but RCRA did not specifically address past actions at abandoned waste sites.⁸ The purpose of CERCLA was twofold: (1) to establish a trust fund to provide monies needed to address immediate threats to public health posed by these sites;⁹ and (2) to make those responsible for hazardous waste sites pay for the costs of their cleanup.¹⁰

To achieve these two goals, Congress created a broad liability scheme designed to cast a wide net over individual and corporate defendants. Section 107(a) of CERCLA¹¹ provides that, subject to three limited defenses laid out in section 107(b),¹² liability should be imposed on owners, operators, transporters, and generators of hazardous waste posing a threat to public health "[n]otwithstanding any other provision or rule of law."¹³

⁶ H.R. REP. NO. 1016, 96th Cong., 2d Sess. 18, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119, 6120. For an overview of CERCLA's legislative history on liability, see Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982). See also *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-08 (S.D. Ohio 1983); *United States v. Reilly Tar and Chem. Corp.*, 546 F. Supp. 1100, 1111-12 (D. Minn. 1982).

⁷ Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. § 6901-6991i (1982 & Supp. V 1987)).

⁸ See *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1252 (S.D. Ill. 1984) (citing *United States v. Price*, 577 F. Supp. 1103, 1109 (D.N.J. 1983)).

⁹ Monies from the fund are generated through general revenues and through a tax on petrochemicals. Hazardous Substances Response Act, Pub. L. No. 96-510, 94 Stat. 2797 (codified as amended at 26 U.S.C. §§ 4611-4672 (1982 & Supp. IV 1986)).

¹⁰ H.R. REP. NO. 1016, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6119.

¹¹ 42 U.S.C. § 9607(a) (Supp. IV 1986).

¹² *Id.* § 9607(b) (1982). The defenses are (1) an act of God; (2) an act of war; and (3) a limited third-party defense. See Comment, *The Practical Significance of the Third Party Defense Under CERCLA*, 16 B.C. ENVTL. AFF. L. REV. 383 (1988).

¹³ Section 9607(a) of CERCLA provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

(1) the owner and operator of a vessel or a facility,

Although this "notwithstanding" provision appears to create a net through which no defendant could escape, an examination of CERCLA's legislative history indicates that Congress did not intend to create an absolute liability standard. As finally passed, CERCLA represented a compromise between House and Senate bills.¹⁴ The liability standard was one of the areas of strong disagreement among members of Congress,¹⁵ and language mandating joint and several liability contained in the Senate bill was removed from the final bill in order to secure the votes necessary for passage.¹⁶

The floor statements of CERCLA's chief sponsors comprise the Act's only real legislative history.¹⁷ Senator Randolph stated that he envisioned liability standards under CERCLA to be the same as

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility 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 which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title

42 U.S.C. § 9607(a) (Supp. IV 1986).

¹⁴ H.R. 7020, 96th Cong., 2d Sess. (1980); S. 1480, 96th Cong., 1st Sess. (1980).

¹⁵ See 126 CONG. REC. S15,004 (daily ed. Nov. 24, 1980) (statement of Sen. Helms, who led the opposition in the Senate).

¹⁶ Some Senators, including Senator Stafford, a chief sponsor of the compromise, acknowledged that "major concessions [would have to be made] in the final effort to achieve a Superfund bill this year." 126 CONG. REC. S14,967 (daily ed. Nov. 24, 1980) (statement of Sen. Stafford). Removal of strict liability language was a major concession. See *id.*; 126 CONG. REC. S14,980 (daily ed. Nov. 24, 1980) (statement of Senator Cohen, who did not favor the compromise but supported it in order to ensure that some legislation was passed before the end of the session). For further discussion on this change of language, see Moore & Kowalski, *When is One Generator Liable for Another's Waste?*, 33 CLEV. ST. L. REV. 93, 94-96 (1984-85).

¹⁷ House and Senate reports were prepared for CERCLA's predecessors, H.R. 7020 and S. 1480, but no committee reports were prepared for the final bill, which never went through review at the committee level.

those under the Federal Water Pollution Control Act,¹⁸ which he understood to be strict.¹⁹ Unresolved issues of liability, he continued, should be "governed by traditional and evolving principles of common law."²⁰ Similarly, Representative Florio, the chief sponsor of the original House bill, stated that: "The terms joint and several have been deleted with the intent that . . . liability . . . be determined under common or previous statutory law"²¹ Thus, Congress expressed a policy of imposing liability without fault but left the determination of other liability issues to the courts.

Some members of Congress also expressed a strong concern during debate that liability be applied uniformly throughout the country to keep hazardous waste companies from moving their operations to states with more lenient laws. As Representative Florio stated during the House debate of the bill: "To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in states with more lenient laws, the bill will encourage the further development of a Federal common law in this area."²² Nothing in CERCLA's legislative history, however, indicates any explicit consideration of potential conflicts with procedural or equitable defenses or with the particular issue of liability of a dissolved corporation.

B. CERCLA Liability in the Federal Courts

Under Congress's direction to let "traditional and evolving principles of common law" govern unresolved liability issues, the courts have had to fill significant gaps regarding CERCLA liability. In this effort, courts have held that CERCLA, as a remedial statute, should be construed broadly to effect its purposes.²³ Not surprisingly, CERCLA liability is imposed on a wide range of defendants.²⁴ In addition, the courts have held uniformly that CERCLA's purpose and struc-

¹⁸ FWPCA § 311, 33 U.S.C.A. § 1321 (West 1986 & Supp. 1988).

¹⁹ 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph).

²⁰ *Id.*

²¹ 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio).

²² *Id.*

²³ *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 192-96 (W.D. Mo. 1985) (holding that CERCLA, as a statute enacted for the protection of public health, is to be given "an extremely liberal construction") (quoting 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 71.02, at 313); *United States v. Reilly Tar and Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

²⁴ See *Developments in Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1511-17, 1535-39 (1987) (discussing CERCLA liability for owners, operators, generators, corporate officers, and third parties).

ture support the development of interstitial federal common law, rather than the adoption of state common law, to promote nationwide uniform liability standards.²⁵ For example, in *United States v. Chem-Dyne Corp.*,²⁶ the United States District Court for the Southern District of Ohio noted the federal government's financial interest in protecting CERCLA's trust fund²⁷ and held that a liability standard that varied from state to state would undermine CERCLA's policies by encouraging illegal dumping in states with lax liability laws.²⁸

Courts also have held consistently that the language of the statute and the strong public interest in cleaning up abandoned sites support retroactive application of the statute.²⁹ Furthermore, courts have ruled that congressional removal of joint and several liability from CERCLA does not preclude the imposition of joint and several liability on a case-by-case basis.³⁰

1. Procedural Defenses Under CERCLA

Despite the strong policy objectives in CERCLA, the "notwithstanding" language, and the limited statutory defenses in section 107(b), courts have not held that CERCLA's liability scheme excuses plaintiffs from meeting the requirements of the Federal Rules of Civil Procedure. As originally enacted, CERCLA had no provision authorizing nationwide service of process, and plaintiffs were thus bound by Rule 4(e).³¹ In cases where insufficient process has been raised as a defense, courts have not read the "notwithstanding" language to supersede Rule 4(e), but rather have held that CERCLA did not contain the language necessary to authorize nationwide ser-

²⁵ See, e.g., *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1255-56 (S.D. Ill. 1984); *United States v. Wade*, 577 F. Supp. 1326, 1338-39 (E.D. Pa. 1983); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-10 (S.D. Ohio 1983).

²⁶ 572 F. Supp. 802 (S.D. Ohio 1983).

²⁷ *Id.* at 808. CERCLA's trust fund, established through the collection of a tax on petrochemicals, is designed to fund emergency cleanups and cleanups at sites where the responsible party does not clean up, cannot be found, or does not have sufficient resources to pay for the cleanup. S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980), reprinted in 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), at 320 (1983); see also *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

²⁸ *Chem-Dyne*, 572 F. Supp. at 809.

²⁹ See, e.g., *United States v. Northeastern Pharm. and Chem. Co.*, 810 F.2d 726, 732 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); *United States v. South Carolina Recycling and Disposal, Inc.*, 20 Env't Rep. Cas. (BNA) 1753, 1760 (D.S.C. 1984).

³⁰ See, e.g., *Chem-Dyne*, 572 F. Supp. at 808; *United States v. Wade*, 577 F. Supp. 1326, 1337-38 (E.D. Pa. 1983).

³¹ 28 U.S.C. app. 4(e) (1982).

vice.³² Thus, defendants who might otherwise have been liable were not amenable to suit because of limitations imposed by a rule of civil procedure.

Congress subsequently recognized that the original CERCLA legislation needed clarification on this point. In 1986, Congress amended section 113 of CERCLA to explicitly authorize nationwide service of process.³³ House,³⁴ Senate,³⁵ and Conference reports³⁶ for the Superfund Amendments and Reauthorization Act (SARA) all contain language indicating that this amendment was designed to clarify and confirm congressional intent in CERCLA, but the language of the amendment itself contains no such indication.³⁷

This lack of "confirm and clarify" language in SARA, as well as the lack of clarity in CERCLA's legislative history, has been held to prevent a court from applying section 113 retroactively. In *In re Acushnet River & New Bedford Harbor Proceedings*,³⁸ the United States District Court in Massachusetts refused to rejoin a corporate defendant who had been dismissed from a CERCLA action in part for lack of personal jurisdiction based on insufficient service of process.³⁹ This case exemplifies how, even after further congressional clarification, at least one federal rule of civil procedure has shielded a defendant from liability under CERCLA because the plaintiff was unable to bring, or keep, the defendant in court.

³² *In re Acushnet River and New Bedford Harbor*, 675 F. Supp. 22, 30 (D. Mass. 1987); see *Violet v. Picillo*, 613 F. Supp. 1563, 1573 (D.R.I. 1985). In a subsequent opinion, *O'Neil v. Picillo*, 682 F. Supp. 706 (D.R.I. 1988), the district court reexamined the court's jurisdiction over the defendant in light of recent federal court decisions regarding minimum contacts. *Id.* at 726-27. But see *United States v. Bliss*, 108 F.R.D. 127, 137 (1985).

In *Bliss*, the court found implicit nationwide service of process in CERCLA for abatement actions but not for cost-recovery actions. The court stated: "[S]ection [113b] does not alter traditional restraints upon the exercise of jurisdiction over the person. Thus, in cost-recovery actions, the district court must have personal jurisdiction and proper service of process in accordance with Fed. R. Civ. P. 4." *Bliss*, 108 F.R.D. at 137. The *Acushnet* court flatly rejected the *Bliss* holding that found implicit nationwide service of process for abatement actions. *Acushnet*, 675 F. Supp. at 29.

³³ SARA § 113(e), 42 U.S.C. § 9613(e) (Supp. IV 1986).

³⁴ H.R. REP. NO. 253, 99th Cong., 1st Sess. 79, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2861.

³⁵ S. REP. NO. 11, 99th Cong., 1st Sess. 59.

³⁶ H.R. CONF. REP. NO. 962, 99th Cong., 1st Sess. 221, 222, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3314-15.

³⁷ Section 113(e) provides that "[i]n any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process." SARA § 113(e), 42 U.S.C. § 9613(e) (Supp. IV 1986).

³⁸ 675 F. Supp. 22 (D. Mass. 1987).

³⁹ *Id.* at 35-37.

2. Equitable Defenses to CERCLA Liability

Some courts have held that defendants can assert equitable defenses under CERCLA despite the "notwithstanding" and limited defense language.⁴⁰ These courts have used a variety of reasons to support this conclusion. For example, in *United States v. Conservation Chemical Corp.*,⁴¹ the District Court for the Western District of Missouri found that section 106(a) of CERCLA explicitly incorporates traditional equitable defenses.⁴² Because the standard of liability and associated defenses are the same under section 107 as under section 106, the court held that equitable defenses are available to defendants under section 107 as well.⁴³

Similarly, in *Mardan Corp. v. C.G.C. Music, Ltd.*,⁴⁴ the United States District Court in Arizona held that the defendant's equitable defenses could prevent a private plaintiff from recovering response costs under section 107(a).⁴⁵ The plaintiffs argued that section 107(b)'s enumerated defenses⁴⁶ were exclusive. The court held that Section 107(b) defenses were not exclusive, noting that the plaintiff's

⁴⁰ See, e.g., *O'Neil v. Picillo*, 682 F. Supp. 706, 726-27 (D.R.I. 1988) (court denied equitable defense of "unclean hands" because at most government merely was negligent); *United States v. Moore*, 703 F. Supp. 460, 462 (E.D. Va. 1988) (court refused to rule that equitable defenses such as unclean hands, estoppel, and illegality cannot be raised in CERCLA actions); *United States v. Mottolo*, 695 F. Supp. 615, 626 (D.N.H. 1988) (elimination of equitable defenses under CERCLA is contrary to equitable principles and unwarranted by CERCLA's statutory language); *United States v. Dickerson*, 640 F. Supp. 448, 450-51 (D. Md. 1986) (court dismissed defense of exercise of due care under section 107(b) but not defenses of equitable estoppel, laches, and failure to join indispensable third parties); *Violet v. Picillo*, 613 F. Supp. 1563, 1573 (D.R.I. 1986) (court refused to dismiss defendant's equitable defense of "unclean hands"); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 204 (D. Mo. 1985); *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1057-59 (D. Ariz. 1984); see also *Versatile Metals v. Union Corp.*, 693 F. Supp. 1563, 1572 (E.D. Pa. 1988) (court assumed that equitable defense of unclean hands is available but defendant failed to meet requirements).

⁴¹ 619 F. Supp. 162 (D. Mo. 1985).

⁴² *Id.* at 204. Section 106(a) of CERCLA, which authorizes the federal government to take action necessary to abate immediate risks to public health, states that a court may "grant such relief as the public interest and the equities of the case may require." CERCLA § 106(a), 42 U.S.C. § 9606(a) (1982).

⁴³ 619 F. Supp. at 205. The court also relied on *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), in which the Supreme Court held that courts retained equitable power when determining whether injunctive relief must follow a statutory violation of the FWPCA.

The *Conservation Chemical* court characterized the *Romero-Barcelo* holding as allowing traditional equitable defenses to injunctive relief under section 311 of the FWPCA. Like CERCLA section 107, section 311 also provides for liability subject to a limited number of defenses. 33 U.S.C. § 1321 (1982). CERCLA's legislative history explicitly establishes section 311 of the FWPCA as the basis for CERCLA's liability provisions. See *supra* note 18 and accompanying text.

⁴⁴ 600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1985).

⁴⁵ *Id.* at 1058.

⁴⁶ See *supra* note 12 and accompanying text.

interpretation "would result in defendants being held liable even if they had already paid [plaintiff's] Section 107(a) claim in a prior lawsuit since *res judicata*, payment, and accord and satisfaction are not listed as defenses in subsection (b)." ⁴⁷ Other courts have held that because relief under section 107 is essentially restitution, an equitable remedy, equitable defenses should be assertable. ⁴⁸

Not all courts agree that traditional equitable defenses are available in CERCLA liability actions. ⁴⁹ For example, the District Court for the Western District of Michigan, in *Kelley v. Thomas Solvent Co.*, ⁵⁰ held that equitable defenses are unavailable to defendants when the plaintiff is a sovereign asserting public rights. ⁵¹ Some courts also have held that equitable defenses are limited by CERCLA's "notwithstanding" language. ⁵² In addition to a sovereign rights analysis, the *Kelley* court held that CERCLA's "notwithstanding" language expressed "unequivocal" intent that liability was to be imposed subject only to the defenses set out in section 107(b). ⁵³ Similarly, in *United States v. Marisol, Inc.*, ⁵⁴ the District Court for the Middle District of Pennsylvania held that CERCLA's "notwithstanding" language means that there are no statutory or procedural prerequisites to a cost-recovery action under section 107(a) as a matter of law. ⁵⁵

⁴⁷ 600 F. Supp. at 1056 n.9. The court granted the defendant's motion for summary judgment on both the existence of a purchase agreement in which plaintiffs assumed liability, as well as the equitable doctrine of "unclean hands." The court limited the application of the "unclean hands" defense, however, to situations in which private plaintiffs, as opposed to a federal or state government, seek cost recovery. *Id.* at 1058.

⁴⁸ See, e.g., *United States v. Mottolo*, 695 F. Supp. 615, 626-27 (D.N.H. 1988); see also *In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 893 (D. Mass. 1989). In *Acushnet*, the court indicated that equitable defenses barred against a sovereign's natural resources claims, because they are legal in nature. 722 F. Supp. at 899. The court left open the question of the viability of equitable defenses to the government's clean-up claims but expressed serious doubt about this viability. *Id.* at 899 n.15.

⁴⁹ See, e.g., *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1378-79 (8th Cir. 1989) (CERCLA provides only a limited number of statutorily prescribed defenses); *United States v. Marisol, Inc.*, 725 F. Supp. 833, 841 (M.D. Pa. 1989); *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1445-46 n.3 (W.D. Mich. 1989); *United States v. Stringfellow*, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987); see also *In re Acushnet River & New Bedford Harbor*, 722 F. Supp. 893, 899 n.15 (D. Mass. 1989).

⁵⁰ 714 F. Supp. 1439 (W.D. Mich. 1989).

⁵¹ *Id.* at 1445-46 n.3; see also *United States v. Stringfellow*, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (holding that equitable defenses to liability under CERCLA cannot be asserted against the government when it acts to protect public rights).

⁵² *Aceto*, 872 F.2d at 1378-79; *Marisol*, 725 F. Supp. at 841; *Kelley*, 714 F. Supp. at 1445-46 n.3.

⁵³ *Kelley*, 714 F. Supp. at 1445.

⁵⁴ 725 F. Supp. 833 (M.D. Pa. 1989).

⁵⁵ *Id.* at 841. The court stated: "Any defenses offered by the instant defendants which argues [sic] that liability for response costs may be excused because of the government's

A close reading, however, indicates that even these courts have not determined that CERCLA's "notwithstanding" language precludes all defenses other than those laid out in section 107(b). The *Kelley* holding, although broad on its face, should be read in the context of the defendant's proffered defense. The *Kelley* defendant had attempted to raise the statutory third-party defense,⁵⁶ but the court found that the defendant had not met the statutory requirements.⁵⁷ *Kelley* thus stands for the proposition that the courts will not create new judicial variations of the statutory defense. Similarly, the *Marisol* court interpreted the "notwithstanding" language in light of the defendant's argument that the government had failed to comply with the notice requirements of CERCLA section 104⁵⁸ and had failed to enter into a contract or cooperative agreement pursuant to section 104(c)(3).⁵⁹ The *Marisol* court's broad pronouncement can thus be limited to statutory or procedural prerequisites found in other sections of CERCLA. Because the *Kelley* and *Marisol* courts were not presented with a defense based on a rule of civil procedure or a fundamental aspect of state corporate law, these decisions cannot be read to preclude these defenses as well.

Courts thus far have recognized that procedural and equitable defenses under CERCLA fall within traditional lines, consistent with the expectation of Congress. CERCLA's language and legislative history clearly indicate that Congress intended for corporate defendants who caused hazardous waste problems in the past to pay for their cleanup. The legislative history also suggests, however, that section 107 was primarily intended to create a strict liability standard rather than an absolute liability standard.⁶⁰ Section 107, therefore, should not be read to eliminate all procedural or equitable defenses.

One of those procedural requirements, established by Rule 17(b), is that a corporate defendant have the capacity to be sued. An

failure to take certain statutory or procedural steps before bringing this action are insufficient as a matter of law." *Id.*

⁵⁶ Section 107(b)(3) provides that parties shall not be liable for damages caused solely by an act or omission of a third party if the defendant establishes by a preponderance of the evidence that he (a) exercised due care and (b) took precautions against foreseeable acts or omissions of any such third party. *Id.* § 9607(b)(3).

⁵⁷ As one of many defenses, the defendant claimed that the releases were due "in whole or in part" to third parties, ignoring the statute's requirement that releases be caused solely by third parties. *Kelley*, 714 F. Supp. at 1446. Furthermore, the defendant failed to allege that it had exercised due care or had taken precautions against foreseeable acts and omissions of a third party. *Id.*

⁵⁸ 42 U.S.C. § 9604.

⁵⁹ *Id.* § 9604(c)(3).

⁶⁰ *Developments*, *supra* note 24, at 1550.

examination of the history of Rule 17(b), its effects in federal court, and courts' attempts to resolve other conflicts between federal rules and federal statutes may provide a useful analogy in evaluating the application of Rule 17(b) to CERCLA cases.

III. RULE 17(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

A. History

Rule 17(b) governs the capacity of a party to sue or be sued. The rule states, in part, that "[t]he capacity [of a corporation] to sue or be sued shall be determined by the law under which it was organized."⁶¹ Courts have held that Rule 17(b) applies to both existing and dissolved corporations.⁶²

The term "capacity" consistently has been interpreted to mean the ability of a party to have legal existence sufficient to use the federal courts, regardless of the particular cause of action or defense at issue.⁶³ The rule does not distinguish a corporation's capacity to sue or be sued in a diversity action from a federal question action, as it does with the capacity of an unincorporated association.⁶⁴ Thus, a corporation's capacity to use the federal courts usually is determined by state incorporation law, not by the type of action at issue.⁶⁵

The Federal Rules of Civil Procedure were adopted in 1938.⁶⁶ The rules were drafted by an advisory committee appointed by the Supreme Court, pursuant to authority granted to the Court by Congress under the Rules Enabling Act of 1934.⁶⁷ In the Act, Congress authorized the Supreme Court to develop a uniform set of procedures to govern actions in federal district courts. Congress intended the

⁶¹ 28 U.S.C. app. 17(b) (1982).

⁶² 6 CYCLOPEDIA OF FEDERAL PROCEDURE § 21.40 (3d ed. 1981); see also C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1563, at 738 (1971).

⁶³ "Generally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and typically is determined without regard to the particular claim or defense being asserted." C. WRIGHT & A. MILLER, *supra* note 62, § 1559, at 727-28; see also *Johnson v. Helicopter & Airplane Serv. Corp.*, 404 F. Supp. 726, 729 (D. Md. 1975); *De Franco v. United States*, 18 F.R.D. 156, 159 (S.D. Cal. 1955); *United States v. Association of Am. R.R.s*, 4 F.R.D. 510, 517 (D. Neb. 1945).

⁶⁴ Rule 17(b) states that "a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." FED. R. CIV. P. 17(b), 28 U.S.C. app. 17(b) (1982).

⁶⁵ See *infra* notes 84-87 and accompanying text.

⁶⁶ D. LOUISELL, G. HAZARD & C. TAIT, PLEADING AND PROCEDURE 28 (1982).

⁶⁷ Rules Enabling Act (codified as amended at 28 U.S.C. § 2072 (1982)).

rules to eliminate the difficulties presented to litigants, lawyers, and judges by the complicated variations of common-law pleadings that existed in federal district courts.⁶⁸

The Advisory Committee's Notes regarding corporate capacity are meager, indicating only that the Committee relied on a law review article authored by the Committee's Reporter, and a single Supreme Court case.⁶⁹ The Rule's legislative history indicates that the Committee drafted Rule 17(b) to codify existing law on the subject of a corporation's capacity to bring suit in federal courts.⁷⁰

Members of the House Judiciary Committee, which held hearings on the rules in 1938, expressed some concern over the extent of power granted to states of incorporation under this rule.⁷¹ Of primary concern to the members was a state's apparent ability, under the rule, to create a corporation that could be insulated from suit by statutory limitations on its capacity while continuing to conduct business in other states.⁷²

Dean William Clark, Reporter for the Advisory Committee, testified before the House Judiciary Committee that he believed that the rule ensured that a foreign corporation could sue in federal courts in states in which it was doing business.⁷³ In other words, the forum state could not insulate its citizens from suit by restricting a foreign corporation's ability to sue in its courts and the federal courts within its borders.

When asked whether the incorporating state could limit its corporations' capacity to *be sued* in either its own courts or a forum state's courts, Clark indicated that he thought such a law would be invalid on constitutional grounds.⁷⁴ Clark also indicated that the rule as drafted would allow a corporation to be sued in any state in which

⁶⁸ D. LOUISELL, G. HAZARD & C. TAIT, *supra* note 66, at 28–29.

⁶⁹ The Advisory Committee Notes indicate that committee members relied generally upon Clark & Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 YALE L.J. 1291 (1935) and a previous Supreme Court decision, *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912), regarding the capacity of a corporation. Surprisingly, the Advisory Committee made no mention of two other Supreme Court cases in which the Court firmly established that corporate capacity to be sued was within the exclusive province of state law. See *infra* notes 76–80 and accompanying text.

⁷⁰ *Hearings on the Rules of Civil Procedure for District Courts Before the House Comm. on Judiciary*, 75th Cong., 1st Sess. 9–10 (1938) (statement of Dean Charles Clark, Reporter, Advisory Committee on Rules of Civil Procedure).

⁷¹ *Id.* at 9–10.

⁷² *Id.* at 9–13, 40–43.

⁷³ *Id.* at 10.

⁷⁴ *Id.* at 11.

it did business as long as the corporation retained capacity to sue and be sued under its state law.⁷⁵

The legislative history of Rule 17(b) does not include any consideration of the potential clash between a federal statute and a corporation's capacity to be sued. The drafters simply attempted to resolve whether forum states could insulate their citizens from suit, or whether incorporating states could insulate their corporations while the corporation continued to do business elsewhere. The legislative history, therefore, is of little value in determining whether CERCLA justifies an override of Rule 17(b). An examination of how corporate dissolution, both before and after the adoption of Rule 17(b), has been treated by federal courts may provide more help in resolving the clash.

B. Dissolved Corporations in the Federal Courts

In 1927, before the adoption of the Federal Rules of Civil Procedure, the Supreme Court established in *Oklahoma Natural Gas Co. v. Oklahoma*⁷⁶ that only state statutory authority could extend the capacity of a dissolved corporation to sue or be sued.⁷⁷ The Court developed this doctrine more fully in *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp.*⁷⁸ In *Chicago Title*, the Court held that the plaintiff, a dissolved corporation under Illinois law, could not initiate a proceeding in federal bankruptcy court. Justice Sutherland, writing for the majority, held that the existence, and hence the capacity, of a state-created corporation was a matter "exclusively of state power . . . to be decided by the state Legislature."⁷⁹ The majority added that the "federal government is powerless to resurrect a corporation which the state has put out of its existence for all purposes,"⁸⁰ and that the federal government could not add to or take away from the terms of a state-created corporation's existence.⁸¹

⁷⁵ *Id.* at 12.

⁷⁶ *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 259 (1927).

⁷⁷ The Court held that "[t]he matter really is not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the State which brought the corporation into being." *Id.* at 259-60.

⁷⁸ 302 U.S. 120 (1937).

⁷⁹ *Id.* at 127-28; cf. *Cort v. Ash*, 422 U.S. 66, 84 (1975) ("Corporations are creatures of state law.").

⁸⁰ *Id.* at 128.

⁸¹ *Id.* Justices Stone, Black, and Cardozo dissented. Writing for the dissent, Justice Cardozo viewed capacity as more than the ability to meet the legal requirements of state incorporations law. *Id.* at 130 (Cardozo, J., dissenting). Rather, he reasoned that because the dissolved

The *Oklahoma Natural Gas* and *Chicago Title* view of capacity as the exclusive province of state law generally has prevailed. Federal courts have looked to state dissolution law, sometimes without explicit reference to Rule 17(b), to determine whether a corporation retains legal capacity to sue or be sued.⁸² When state law has clearly continued the existence of a corporation, suits based on both diversity⁸³ and federal causes of action have

corporation had the capacity to defend claims pending against it in state court under state law, it also retained capacity to initiate federal bankruptcy proceedings. *Id.* Justice Cardozo saw the question as one of federal preemption, arguing that a state could not continue the life of a corporation for its own purposes while destroying its life to withdraw the supremacy of federal law. *Id.* at 131. (Cardozo, J., dissenting).

Chicago Title may also be limited to its facts. The shareholders of a corporation that had been dissolved for failure to comply with state law sought to use the federal courts to revive the corporation in order to file for reorganization. *Id.* at 121–23. The majority expressly set aside the question of whether creditors could bring suit against a dissolved corporation in bankruptcy court. *Id.* at 124. The Court stated: “The question presented here differs substantially from the question presented [by creditors seeking to sue a dissolved corporation] The sole question now for determination is whether . . . a [dissolved] corporation . . . may, nevertheless, itself invoke the powers of a court of bankruptcy” *Id.* On these facts, the Court saw no conflict between state law and the federal bankruptcy laws. *Id.* at 126. Rather, the Court saw that allowing a corporation dissolved by the state for unlawful activity to revive itself with the aid of a federal statute would impermissibly thwart the operation of state law. *Id.* at 129. The holding in *Chicago Title*, therefore, may be applied in cases where an involuntarily dissolved corporation seeks to sue in federal court.

Oklahoma Natural Gas may also be limited to its facts. In that case, the Court was faced with a conflict based on a common-law claim, not a governmental plaintiff suing a dissolved corporation for violation of a federal statute. 273 U.S. 257 (1927). The Court, therefore, did not consider whether a competing federal interest could ever abrogate the rule established in the case. Nevertheless, federal courts have consistently relied on the broad holdings of these two cases to allow dissolved corporations to escape liability under state law. *See infra* note 82 and accompanying text.

⁸² *See, e.g.*, *United States v. 2.61 Acres of Land*, 791 F.2d 666 (9th Cir. 1985); *Chrysler Credit Corp. v. Superior Dodge Inc.*, 538 F.2d 616, 617–18 (4th Cir.), *cert. denied*, 429 U.S. 1042 (1976); *Johnson v. Helicopter and Airplane Serv. Corp.*, 404 F. Supp. 726, 729–30 (D. Md. 1975); *Textile Banking Co. v. Colonial Chem. Corp.*, 285 F. Supp. 824, 826 (N.D. Ga. 1967); *Sevits v. McKiernan-Terry Corp.*, 264 F. Supp. 810, 811 (D.N.Y. 1966).

⁸³ In limited circumstances, some federal courts have held that Rule 17(b), directing the courts to look to the law of the state of incorporation, does not apply in diversity actions. These courts instead have allowed laws of the forum state, known as door-closing statutes, rather than the state of incorporation to determine a corporation's capacity to be sued. This approach was first established in *Woods v. Interstate Realty Corp.*, 337 U.S. 535 (1949).

In *Woods*, the Supreme Court determined that under the *Erie* doctrine, 304 U.S. 64, 78 (1938) (holding held that in diversity actions, the federal court must look to the forum state's substantive law for the applicable law), a corporation that has not met the forum state's requirements for doing business within the state is barred from using the state, and hence the federal, courts of the forum state. *Woods*, 337 U.S. at 538 (1949) (Court reversed judgment for corporate plaintiff who had won in federal court although he would have been barred from bringing suit in state court for failing to comply with forum state requirements for doing business).

The *Woods* Court deemed the rule announced in *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912), which held that the federal courts were open to a

survived.⁸⁴ In some cases, federal courts, including the Supreme Court, have had to construe state law broadly to allow suits against dissolved corporations for criminal violations.⁸⁵ In none of these

corporation despite the fact that the state courts were closed, and on which Rule 17(b) in part is based, FED. R. CIV. P. 17(b) Advisory Committee Notes, to be "obsolete" in light of *Erie*. *Woods*, 337 U.S. at 537 (quoting *Angel v. Bullington*, 330 U.S. 183 (1947), in which the Court upheld dismissal of suit in federal court to obtain deficiency judgment where such judgment was unavailable under forum state law).

Lower courts are divided over the continuing vitality of the *Woods* holding. A few courts have continued to apply the *Woods* holding and have abrogated Rule 17(b). *See, e.g.*, *Weinstock v. Sinatra*, 379 F. Supp. 274, 276-77 (C.D. Cal. 1974); *Power City Communications, Inc. v. Calaveras Tel. Co.*, 280 F. Supp. 808, 812 (E.D. Cal. 1968); *Textile Banking Co. v. Colonial Chem. Corp.*, 285 F. Supp. 824, 826 (D. Ga. 1967).

The *Weinstock* court, however, acknowledged that the *Woods* holding was unfair to plaintiffs when it allowed a corporation to escape liability because it lacked the capacity to be sued based on its failure to comply with a forum state's laws. 379 F. Supp. at 276-77. In this case, the defendant, a hotel corporation incorporated in Delaware, was being sued in tort. The defendant had failed to pay state taxes and was barred by California law from using the state (and federal courts under *Erie*) courts. *Id.* Therefore, the court held that the defendant retained the capacity to be sued under Delaware law based on Rule 17(b), but it had forfeited the capacity to defend itself based on California law. The court allowed a default judgment to stand unless the defendant revived itself by complying with the forum state's corporate tax requirements. *Id.* at 277.

Other courts have rejected the *Woods* holding in light of *Hanna v. Plumer*, 380 U.S. 460 (1965), which determined that the Federal Rules of Civil Procedure are presumptively valid. *See Farris v. Sambo's Restaurants, Inc.*, 498 F. Supp. 143, 145 (N.D. Tex. 1980); *Emusol Corp. v. Rubenstein & Son Produce, Inc.*, 111 F. Supp. 410 (N.D. Tex. 1953) (expressly rejecting *Woods* holding).

For a detailed discussion of the *Woods* holding and its effect on Rule 17(b) in diversity actions, see Little, *Out of Woods and into the Rules: The Relationship Between State Foreign Corporation Door-Closing Statutes and Federal Rule of Civil Procedure 17(b)*, 72 VA. L. REV. 767 (1986). Little concludes that Rule 17(b) is both constitutional and within the scope of the Rules Enabling Act, and therefore, under *Hanna*, courts should reject the Supreme Court's holding in *Woods*. *Id.* at 769.

⁸⁴ *See, e.g.*, *United States v. Mobile Materials, Inc.*, 776 F.2d 1476, 1479-80 (10th Cir. 1985); *Moore v. Occupational Safety and Health Rev. Comm'n (OSHRC)*, 591 F.2d 991, 995 (4th Cir. 1979) (OSHRC must follow Virginia law to determine liability of corporate officers); *United States v. Polizzi*, 500 F.2d 856, 908 (9th Cir. 1974) (Duniway, J., concurring), *cert. denied*, 419 U.S. 1120 (1975); *United States v. Indian Hill Farms, Inc.*, 255 F.2d 282, 284 (2d Cir. 1958); *United States v. Maryland & Virginia Milk Producers, Inc.*, 145 F. Supp. 374, 376 (D.D.C. 1956); *Newmark v. Abeel*, 102 F. Supp. 993, 993 n.1 (S.D.N.Y. 1952); *Signal Gasoline Corp. v. United States*, 46 F. Supp. 276, 280 (S.D. Cal. 1942).

Even when state law provided only a "murky answer" to the question of capacity, a court construed state law to allow the plaintiff's claims against dissolved corporations. *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965).

⁸⁵ *See, e.g.*, *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959). The Supreme Court held that it was not bound by state court interpretation of state law and read the term "proceeding" to include criminal prosecutions. *See also United States v. P.F. Collier & Son Corp.*, 208 F.2d 936, 940 (7th Cir. 1953) (expansive reading of "proceeding" under Delaware dissolution law); *United States v. Arcos Corp.*, 234 F. Supp. 355, 358 (N.D. Ohio 1964) (expansive reading of terms "remedy" and "liability" under Pennsylvania survival statute); *United States v. San Diego Grocers Ass'n*, 177 F. Supp. 352 (S.D. Cal. 1959) (expansive reading of term "existence" under California survival statute).

cases, however, have the courts interpreted the federal substantive statute to override Rule 17(b) or to preempt state law.

Conversely, where corporate dissolution has been completed to the satisfaction of state law, suits against dissolved corporations in federal courts based both on diversity⁸⁶ and federal question jurisdiction⁸⁷ have been barred. For example, suits by the federal government for criminal violations, primarily based on antitrust statutes, have occasionally been barred by the defendant's dissolution.⁸⁸ In these cases, the courts have not relied on Rule 17(b) to determine corporate capacity. Rather, they look to state law because the Sherman Act defines persons to include corporations existing under the laws of any state.⁸⁹ Nevertheless, these courts, like courts following Rule 17(b), have allowed state dissolution law to prevent federal claims.⁹⁰ Both the Sherman Act and Rule 17(b) cases reflect federal courts' general understanding that the determination of corporate capacity to be sued is within the exclusive province of state law.

IV. CONFLICTS BETWEEN FEDERAL STATUTES AND THE RULES OF CIVIL PROCEDURE

A. *The Gustin-Bacon Test*

Federal courts have developed a test to apply when faced with a conflict between a federal rule of civil procedure and a federal statute. First announced by the Tenth Circuit Court of Appeals in 1970

⁸⁶ Many of these diversity-based cases involved product liability claims brought by citizens who purchased products before dissolution but did not bring a claim until after the defendant corporation had dissolved. *See, e.g.,* *Gonzales v. Progressive Tool & Die Co.*, 463 F. Supp. 117, 119-20 (E.D.N.Y. 1979) (trust fund theory not available to plaintiff whose products liability claim had not accrued at time of dissolution); *Stone v. Gibson Refrig. Sales Corp.*, 366 F. Supp. 733, 734 (E.D. Pa. 1973) (court barred products liability cause of action that arose four months after corporation dissolved).

⁸⁷ *See* *Community Elec. Serv., Inc. v. National Elec. Contractors*, 869 F.2d 1235 (9th Cir. 1989) (dissolved corporation lacked capacity to sue for federal antitrust violations); *Canadian Ace Brewing Co. v. Anheuser-Busch Inc.*, 448 F. Supp. 769, 773 (N.D. Ill. 1978) (dissolved corporation not entitled to bring action under Clayton Act after Illinois survival period had expired), *aff'd without opinion*, 601 F.2d 593 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979); *Walder v. Paramount Publix Corp.*, 132 F. Supp. 912, 917 (S.D.N.Y. 1955) (dissolved corporation unable to sue for antitrust violations); *United States v. Leche*, 44 F. Supp. 765, 767 (E.D. La. 1942) (dissolution prevented federal criminal prosecution).

⁸⁸ *See* *United States v. Line Material Co.*, 202 F.2d 929, 932 (6th Cir. 1953); *United States v. Safeway Stores, Inc.*, 140 F.2d 834, 840 (10th Cir. 1944).

⁸⁹ 15 U.S.C. § 7 (1982).

⁹⁰ *See supra* note 88. The Sherman Act's express adoption of state corporate law avoids the preemption question. *See infra* notes 111-14 and accompanying text.

in *United States v. Gustin-Bacon Division, Certain-teed Products Corp.*,⁹¹ the test requires that, unless congressional intent to supersede a rule "clearly appears, subsequently enacted statutes ought to be construed to harmonize with the Rules."⁹²

Unfortunately, this test is not easily applied. In *Gustin-Bacon*, the court determined that the requirement of the Civil Rights Act of 1964, that complaints allege facts pertaining to the pattern or practice of discrimination, did not supersede Federal Rule of Civil Procedure 8(a). Rule 8(a) requires that complaints contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁹³ The court's brief analysis first focused on the history and purpose of Rule 8(a).⁹⁴ The court then determined that, despite the language of the Civil Rights Act, which on its face requires more than is required under the rule, the legislative history of the Act expressed no intent, clear or otherwise, to supersede Rule 8(a).⁹⁵

Thus, under the *Gustin-Bacon* test, a statutory requirement that conflicts on its face with a rule alone is not enough to supersede a federal rule.⁹⁶ Because the *Gustin-Bacon* court failed to find the requisite clear intent in the legislative history, what qualifies as clear intent was left unanswered. This lack of example compounds the problem of subjectivity posed by a test that relies on "express intent, clear or otherwise."⁹⁷

Two cases relying on *Gustin-Bacon* to resolve a conflict between a federal statute and a federal rule provide only limited guidance in resolving a conflict between CERCLA and Rule 17(b). In *Untermeyer v. Fidelity Daily Income Trust*,⁹⁸ the United States District Court in Massachusetts also emphasized the need for clear intent to supersede in the statute's legislative history. The *Untermeyer* court failed to find the clear intent required by the test. First, the court noted that the statute itself was silent on the rule. The court then stated that "[t]o assume that Congress has spoken *sub silentio* would require strong indicia of legislative intent."⁹⁹

⁹¹ 426 F.2d 539 (10th Cir.), *cert. denied*, 400 U.S. 832 (1970).

⁹² *Id.* at 542. The Court of Appeals for the Tenth Circuit cited 7 MOORE, FEDERAL PRACTICE, ¶ 86.04 [4], at 4966. The court cited no other authority for this proposition.

⁹³ 28 U.S.C. app. 8(a) (1982).

⁹⁴ *Gustin-Bacon*, 426 F.2d at 542.

⁹⁵ *Id.* at 542-43.

⁹⁶ *Id.*

⁹⁷ *Id.* at 543.

⁹⁸ 79 F.R.D. 36 (D. Mass.), *vacated on other grounds*, 580 F.2d 22 (1st Cir. 1978).

⁹⁹ *Id.* Because the court found the legislative history inconclusive, it held that the statute did not supersede the rule. *See id.*

Of further assistance is the Seventh Circuit Court of Appeals' decision in *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*¹⁰⁰ The court found that a federal statute implicitly superseded Rule 62(d).¹⁰¹ The conflicting statute, the Multiemployer Pension Plan Amendments to the Employee Retirement Income Security Act, did not explicitly state that it superseded Rule 62(d).¹⁰² Nonetheless, the court found that the Act's entire scheme of liability, which provides for immediate payment of benefits upon judgment, was wholly inconsistent with Rule 62(d), which allows for an immediate stay if the defendant posts a bond,¹⁰³ and therefore the statute superseded the rule.

Gustin-Bacon and these subsequent cases establish that a federal statute may supersede a federal rule of civil procedure only when the statute, by its entire scheme or by its legislative history, expresses clear congressional intent. Under limited circumstances involving the capacity of an individual to be sued, however, courts have used a more general balancing approach to resolve conflicts between a statute and Rule 17(b).¹⁰⁴ These cases involve prisoners' right to sue for infringement of their civil rights protected by section 1983 of Title 42 of the United States Code.¹⁰⁵

While Rule 17(b) directs the court to look at state law when determining an individual's capacity to sue, as well as a corporation's, some state statutes eliminate a prisoner's capacity to sue.¹⁰⁶ Section 1983, however, creates a cause of action for "any citizen of the United States,"¹⁰⁷ a grant of capacity that does not expressly supersede Rule 17(b). Nevertheless, in *Almond v. Kent*,¹⁰⁸ the Fourth Circuit Court of Appeals relied on the underlying policies of both the statute and the rule to find an override of Rule 17(b). The court reasoned that the preservation of constitutional rights, when balanced against the state's interest in preventing a prisoner from suing, supported an override of 17(b). This balancing approach to resolving conflicts

¹⁰⁰ 800 F.2d 641 (7th Cir. 1986).

¹⁰¹ 28 U.S.C. app. 62(d) (1982).

¹⁰² *Robbins*, 800 F.2d at 643.

¹⁰³ *Id.*

¹⁰⁴ *Almond v. Kent*, 459 F.2d 200, 203 (4th Cir. 1972); *Weller v. Dickson*, 314 F.2d 598, 601 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963); *McCollum v. Mayfield*, 130 F. Supp. 112, 116 (N.D. Cal. 1955). *But see Lombardi v. Peace*, 259 F. Supp. 222, 226 (S.D.N.Y. 1966).

¹⁰⁵ 42 U.S.C. § 1983 (1982).

¹⁰⁶ *See, e.g., Almond*, 459 F.2d at 203; *McCollum*, 130 F. Supp. at 116.

¹⁰⁷ 42 U.S.C. § 1983 (1982).

¹⁰⁸ 459 F.2d 200 (4th Cir. 1972).

between federal statutes and Rule 17(b) is also of some assistance in CERCLA conflicts.¹⁰⁹

Rule 17(b) differs from other federal rules, however, because rather than prescribing a federal rule of law regarding capacity, it directs a federal court to defer to state law. Significant problems, therefore, stemming from the courts' long history of recognizing exclusive state control over state-created corporations, still exist with imposing liability under federal statutes on a corporation that claims that it has met its state's dissolution requirements. A discussion of the conflict between CERCLA and Rule 17(b) also requires consideration of federal preemption doctrine to determine whether CERCLA preempts state dissolution law.¹¹⁰

V. CERCLA AND THE PREEMPTION OF STATE LAW

A. Federal Preemption of State Law

The Supreme Court has outlined three ways in which federal law may be found to preempt state law.¹¹¹ Congress may: (1) explicitly define the extent to which it preempts state law; (2) despite the absence of express preemptive language, Congress may indicate an intent to occupy an entire field of regulation; or (3) despite the absence of congressional intent to occupy a field, Congress may preempt state law to the extent that the state law actually conflicts

¹⁰⁹ See *infra* notes 228-31 and accompanying text.

¹¹⁰ Another commentator has tackled the problem of the liability of a dissolved corporation under CERCLA from a preemption perspective. See Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131 (1989). The author concludes that CERCLA's plain meaning and legislative intent do not provide a conclusive answer on whether Congress intended to preempt state corporate law. *Id.* at 148. By way of analogy to CERCLA's preemption of state substantive hazardous waste law, state government tort immunity statutes, and federal common law for hazardous waste releases, the author argues that CERCLA preempts state corporate law on the question of dissolution as well. *Id.* at 149.

The author ignores, however, the question of whether CERCLA also overrides the Federal Rules of Civil Procedure, in particular Rule 17(b), and the availability of equitable defenses under CERCLA. The author also makes no mention of other federal statutes that courts have held inapplicable due to corporate dissolution. See *supra* note 82 and accompanying text. Under traditional preemption analysis, application of Rule 17(b) and state corporate law would always frustrate the purpose of Congress whenever a corporate defendant escapes liability due to dissolution. See *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987), discussed *infra* notes 181-97 and accompanying text.

¹¹¹ *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. and Bargaining Bd.*, 467 U.S. 461, 467 (1984).

with federal law.¹¹² Regarding the third test, the Court has determined that such a conflict arises when compliance with both state and federal law is impossible¹¹³ or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹¹⁴

The Court has also established, however, that preemption is not a preferred conclusion. The Court has stated both that "[t]he exercise of federal supremacy is not lightly to be presumed"¹¹⁵ and that powers of the states were not to be superseded unless that was the "clear and manifest purpose of Congress."¹¹⁶ The Court has also stated that preemption may be found when the federal interest is "so dominant" that the federal system precludes enforcement of state laws on the same subject.¹¹⁷

Not surprisingly, federal courts have found that federal pollution control laws that establish standards for releases preempt less stringent state standards.¹¹⁸ The Supreme Court also has addressed whether CERCLA preempts state law in the area of tax collection for hazardous waste spills. In *Exxon Corp. v. Hunt*,¹¹⁹ the Supreme Court ruled that CERCLA section 114(c),¹²⁰ which authorized the collection of an excise tax on the petrochemical industry to support CERCLA's trust fund, preempted part of a New Jersey law which also required the petrochemical industry to pay a hazardous waste clean-up fund tax.¹²¹ Because the statutes conflicted on their face, the Court applied the first test¹²² and held that section 114(c) prevented collection of hazardous waste taxes at the state level.¹²³ The Supreme Court has not yet addressed whether CERCLA preempts

¹¹² *Id.*

¹¹³ *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)).

¹¹⁴ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹¹⁵ *Schwartz v. Texas*, 344 U.S. 199, 203 (1952).

¹¹⁶ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹¹⁷ *Id.*

¹¹⁸ See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1983); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Chevron, USA v. Hammond*, 726 F.2d 483 (9th Cir. 1984). For a comprehensive discussion of federal pollution control statutes and preemption, see Glicksman, *Federal Pre-Emption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121 (1985-86) (arguing that federal pollution statutes should not preempt state law remedies).

¹¹⁹ 475 U.S. 355 (1986). For another discussion of CERCLA preemption in *Exxon*, see Note, *supra* note 110, at 135-37.

¹²⁰ 42 U.S.C. § 9614(c) (1982) (deleted by SARA, Pub. L. No. 99-499, § 114(a) (1986)).

¹²¹ New Jersey Spill Compensation and Control Act, N.J. STAT. ANN. § 58:10-23.11-11z (West 1982 & Supp. 1985).

¹²² *Exxon*, 475 U.S. at 362.

¹²³ *Id.* at 376-77.

other state or federal laws that stand as an obstacle to the accomplishment of its goals.

Because state dissolution law, in both federal and state courts, is the body of law determining a dissolved corporation's capacity to be sued, an examination of state dissolution laws highlights ways in which state law can operate to frustrate the accomplishment of CERCLA's objectives.

B. State Dissolution Laws

A corporation's ability to end its existence through dissolution has a long legal tradition. At common law before the American Revolution, death generally ended any causes of action against an individual.¹²⁴ The Supreme Court, in *Oklahoma Natural Gas Co. v. Oklahoma*,¹²⁵ drew a parallel between the dissolution of a corporation and the death of an individual, and held that only statutory authority could prolong the life of a corporation past its dissolution.¹²⁶ Because causes of action abated upon dissolution at common law, states reacted by passing statutes extending the life of a corporation beyond dissolution.¹²⁷ These statutes, commonly called survival statutes, typically provide a corporation with a period of time to wind up its affairs. During this period, a corporation can sue and be sued.¹²⁸ All states now acknowledge, to some degree, the interests of creditors and other claimants not recognized at common law.

Beyond this fundamental similarity, state corporate law governing dissolution varies widely. The length of time for the survival of remedies varies from two to five years, and some states extend this period indefinitely.¹²⁹ Some states apply these statutes to corporations that have dissolved voluntarily, but allow indefinite post-dis-

¹²⁴ Marcus, *Suability of Dissolved Corporations—A Study in Interstate and Federal-State Relationships*, 58 HARV. L. REV. 675, 676 (1945). Generally, contract actions survived, but, with a few exceptions, tort actions did not. *Id.* at 677. See also 16 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8113, at 358 (1988). "[I]n the absence of statutory provisions to the contrary, the effect of dissolution is to put an end to the corporation's existence for all purposes whatsoever." *Id.*

¹²⁵ *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257 (1927).

¹²⁶ *Id.* at 259.

¹²⁷ W. FLETCHER, *supra* note 124, § 8143 at 443 (1988). For a survey of state dissolution procedures, see REVISED MODEL BUSINESS CORP. ACT § 14.05 statutory comparison at 1482-84 (Supp. 1986) [hereinafter MODEL ACT].

¹²⁸ W. FLETCHER, *supra* note 124, § 8143.

¹²⁹ MODEL ACT, *supra* note 127, § 14.07 statutory comparison at 1505. Fifteen states, including California, Michigan, and New Jersey, place no express time limit on the survival of remedies. *Id.*

solution suits for corporations that have been dissolved for delinquency.¹³⁰ Other differences include court supervision of the dissolution process,¹³¹ transferee liability,¹³² and involuntary dissolution for failure to pay taxes or to file annual reports with the state.¹³³ In some states, corporations may appoint liquidating trustees to wind up their affairs.¹³⁴

At common law, despite the abatement of claims against a dissolved corporation, an equitable trust fund theory sometimes was applied to allow creditors to recover from the undistributed assets or from the shareholders.¹³⁵ Many courts have held, however, that survival statutes replace the trust fund theory, precluding recovery from shareholders at the end of the winding-up period as well as from the undistributed assets of the corporation.¹³⁶

1. Pre- vs. Post-Dissolution Claims

State laws also differ in their treatment of pre- and post-dissolution claims. Most survival statutes state explicitly that pre-dissolution claims must be brought within the statutory period.¹³⁷ Some

¹³⁰ Marcus, *supra* note 124, at 683-90; W. FLETCHER, *supra* note 124, § 8168, at 543-44.

¹³¹ For instance, Massachusetts and New Hampshire allow for the distribution of assets under voluntary dissolution to be undertaken with court supervision. MASS. GEN. L. ch. 156B, § 103 (1970); N.H. REV. STAT. ANN. § 293-A:88 (1987).

¹³² See *Products Liability—Liability of Transferees for Defective Products Manufactured by Transferor*, 30 VAND. L. REV. 238, 248 (1977) (discussing two cases in which dissolved corporation's assets were purchased by transferees).

¹³³ W. FLETCHER, *supra* note 124, § 7997, at 66-67; see also, e.g., N.Y. BUS. CORP. LAW § 1103 (McKinney 1986) (Attorney General may bring action for dissolution for violation of law resulting in forfeiture of charter).

¹³⁴ See, e.g., DEL. CODE ANN. tit. 8, § 279 (1983 & Supp. 1988).

¹³⁵ For a comprehensive examination of the trust fund doctrine, and the effect of survival statutes on it, see Friedlander & Lannie, *Post-Dissolution Liabilities of Shareholders and Directors for Claims Against Dissolved Corporations*, 31 VAND. L. REV. 1363 (1978); Henn & Alexander, *Effect of Corporate Dissolution on Products Liability Claims*, 56 CORNELL L. REV. 865, 880-82 (1971); Schoone, *Shareholder Liability Upon Voluntary Dissolution of Corporation*, 44 MARQ. L. REV. 415 (1961). See also W. FLETCHER, *supra* note 124, § 8161, at 518.

¹³⁶ See, e.g., *Reconstruction Fin. Corp. v. Teter*, 117 F.2d 716, 726-27 (7th Cir.), cert. denied, 314 U.S. 620 (1941); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 550-51 (Tex. 1981); *Blankenship v. Demmler Mfg. Co.*, 89 Ill. App. 3d 569, 572-74, 411 N.E.2d 1153, 1155-57 (1980); see also *Gonzales v. Progressive Tool & Die Co.*, 455 F. Supp. 363, 367-69 (E.D.N.Y. 1978). But see *Green v. Oilwell, Div. of U.S. Steel Corp.*, 767 P.2d 1348, 1353-54 (Okla. 1989) (Oklahoma Supreme Court allowed equitable trust fund theory to allow plaintiff to recover from shareholders for post-dissolution claim).

¹³⁷ A majority of states follow the approach of section 105 of the 1969 Model Business Corporation Act, which limited claims to those arising pre-dissolution. See, e.g., ME. REV. STAT. ANN. tit. 13A, § 1122 (1964); PA. STAT. ANN. tit. 15, § 2111 (Purdon 1967).

courts have interpreted this language to mean that *only* pre-dissolution claims can be brought after dissolution, thus barring post-dissolution claims altogether.¹³⁸ Because CERCLA applies retroactively,¹³⁹ its cause of action applies to corporate activities that may have occurred prior to both passage of the statute and dissolution. In states where this interpretation has been adopted by the courts, corporations that dissolved prior to CERCLA's passage may be able to claim successfully that a CERCLA claim, although based on pre-dissolution activities, arose post-dissolution and is therefore barred.¹⁴⁰

2. Dissolution Under the 1985 Model Business Corporation Act

An examination of the treatment of claims against dissolved corporations under the Revised Model Business Corporation Act (Model Act)¹⁴¹ illustrates how some drafters have sought to balance the competing interests of claimants and dissolved corporations.¹⁴² Under the Model Act, dissolution takes place in a two-step process. It begins upon the filing of a notice of intent to dissolve with the state of incorporation.¹⁴³ Thereafter, the corporation must stop conducting business as usual, but may defend and bring suits, as well as sell and distribute the assets of the corporation.¹⁴⁴ The corporation is required to notify known claimants of its dissolution.¹⁴⁵ All claims against the corporation, whether known or unknown, must be brought within five years of the commencement of the winding-up period.¹⁴⁶ The Model Act provides that claims may be enforced

¹³⁸ Friedlander & Lannie, *supra* note 135, at 1375. At least one court, however, has interpreted the statute to mean that only pre-dissolution claims *must* be brought within the time period, thereby allowing post-dissolution claims indefinitely by shareholders. *See id.* at 1371-75 (discussing *Levy v. Liebling*, 238 F.2d 505 (7th Cir. 1956), *cert. denied*, 353 U.S. 936 (1957)). Under this interpretation, CERCLA claims could be brought at any time after dissolution.

¹³⁹ *See supra* note 29 and accompanying text.

¹⁴⁰ This argument was made successfully by the defendant in *Levin Metals v. Parr Richmond Terminal Corp.*, 817 F.2d 1448 (9th Cir. 1987), discussed *infra* notes 181-97 and accompanying text.

¹⁴¹ MODEL ACT, *supra* note 127, §§ 14.03, 14.05-14.07.

¹⁴² For another discussion of the policies underlying the 1985 Revised Model Business Corporation Act's dissolution provisions in light of CERCLA, see Note, *supra* note 110, at 155-56. The author concludes that the Model Act's five-year limitation on claims is insufficient for CERCLA claims. *Id.*

¹⁴³ MODEL ACT, *supra* note 127, § 14.03, at 1467-68.

¹⁴⁴ *Id.* § 14.05, at 1478-79.

¹⁴⁵ *Id.* § 14.06, at 1491.

¹⁴⁶ *Id.* § 14.07, at 1499.

against the dissolved corporation's undistributed assets¹⁴⁷ or against the shareholders' distributions.¹⁴⁸

The Official Comment to the Model Act sheds light on the policy underlying these provisions. The Comment acknowledges that earlier versions of the Model Act, which contained a two-year winding-up period, did not recognize the serious problem created by barring claims brought after the end of the winding-up period.¹⁴⁹ On the one hand, preventing an otherwise valid claim based on a mechanical two-year limitation period results in obvious injustice to the barred plaintiff.¹⁵⁰ On the other hand, permitting these suits indefinitely makes it impossible for the corporation to end completely. Such an indefinite ending leaves other creditors and shareholders either without their share of the assets or without certainty about the assets they will receive. The drafters of the Model Act thus chose a five-year winding-up period believing that most claims would be brought within that time period.¹⁵¹ They thereby struck what they determined to be a reasonable balance between competing interests.¹⁵²

The measure of what is a reasonable balance will vary from legislature to legislature, but states that provide only a two-year winding-up period¹⁵³ unreasonably prevent some claims from being brought against dissolved corporations. Products liability cases pose particularly difficult policy questions because injury from a defective product may not become evident until years after the survival period has expired.¹⁵⁴ Governmental entities, with bureaucratic impediments to bringing suits swiftly, also may find it difficult to bring suit

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* These claims may be made against shareholders' distributions according to their prorata share of the claim or the amount they receive in distribution, whichever is smaller. *Id.* at 1500. The purpose of this scheme is to encourage plaintiffs to sue as many shareholders as possible, rather than suing only those shareholders who received large shares in the distribution. *Id.* at 1503.

¹⁴⁹ *Id.* § 14.07, at 1500 official comment.

¹⁵⁰ *Id.* at 1501.

¹⁵¹ *Id.*

¹⁵² *Id.* Some commentators have identified the state's interest as "certainty and definiteness." See, e.g., Friedlander & Lannie, *supra* note 135, at 1401. Others have cited practical difficulties in tracing former employees, records, and other pertinent information. See Henn & Alexander, *supra* note 135, at 913.

¹⁵³ Twenty-five jurisdictions provide a two-year survival period. MODEL ACT, *supra* note 127, § 14.07, at 1505 statutory comparison.

¹⁵⁴ This problem has received a great deal of attention from commentators in recent years. See generally Note, *Recognizing Product Liability Claims at Dissolution: The Compatibility of Corporate and Tort Law Principles*, 87 COLUM. L. REV. 1048 (1987); see also Henn & Alexander, *supra* note 135.

within a short period of time.¹⁵⁵ CERCLA actions, brought for corporate behavior that may have occurred many years prior to suit, pose additional administrative burdens. Location of records and personnel, in addition to an initial problem of discovering hazardous waste, may make a two-year period for the government to bring a CERCLA action unreasonable.¹⁵⁶

An approach one commentator has suggested is to compare the length of the statute of limitations for a particular cause of action against the length of the winding-up period.¹⁵⁷ If a statute provides a long statute of limitations, a shorter winding-up period cuts off the plaintiff's ability to bring an action before the legislature intended under the substantive statute. While there is some theoretical support for linking a corporation's capacity to be sued with the particular substantive law at issue, neither the legislatures nor the courts have adopted this approach.

Although all states have recognized the need to protect claimants from the harshness of complete abatement at dissolution, they differ widely on where the balance should be struck between the countervailing interests of claimants and dissolved corporations. The Model Act's approach, with a five-year winding-up period, provides more favorable conditions for governmental plaintiffs under CERCLA actions than the two-year period that most states have adopted. Because of variations in state winding-up periods, dissolved corporations in some states may remain liable under CERCLA while those in states with shorter winding-up periods or with a bar on post-dissolution claims may escape liability, based on factors unrelated to their culpability under the statute. These variations in liability clearly undercut the intent of CERCLA: to impose a nationwide, uniform scheme of liability in order to discourage corporations from locating in those states with more lenient liability laws.¹⁵⁸

An uncritical application of Rule 17(b) and state dissolution law will lead, therefore, to conflicts between CERCLA's primary goals and many state dissolution laws. In general, three possibilities for the courts exist: (1) to follow Rule 17(b) and look to state law to find capacity; (2) to follow Rule 17(b) and look to state law, but fail to

¹⁵⁵ Friedlander & Lannie, *supra* note 135, at 1407.

¹⁵⁶ CERCLA has been amended to include a six-year statute of limitations for the initiation of suits, but the six-year period begins from the date of the initiation of on-site remedial construction, not from the date of release of the waste into the environment. 42 U.S.C.A. § 9613(g)(2)(A) (West Supp. 1986).

¹⁵⁷ *Id.* at 1410.

¹⁵⁸ See *supra* notes 24-28 and accompanying text.

find capacity; or (3) to reject Rule 17(b) altogether and impose liability regardless of dissolution by finding preemption. Courts in six CERCLA cases have faced this problem, and have resolved the conflict resulting in three of the potential outcomes. An examination of these cases reveals both the ways that courts have applied state dissolution law in CERCLA actions and the courts' alternatives when finding no capacity to be sued under state law.

VI. CERCLA AND RULE 17(b): SIX CASES

A. Defendants' Capacity Found Under State Law

In *United States v. Northeastern Pharmaceutical and Chemical Co.*,¹⁵⁹ the United States District Court for the Western District of Missouri followed Rule 17(b) and looked to state law to determine whether the defendant, NEPACCO, retained sufficient capacity to be sued for response costs under CERCLA.¹⁶⁰ NEPACCO, incorporated in Delaware, had ceased to do business in 1972, had liquidated its assets in 1974, and in 1976 had forfeited its charter for failing to name an agent to receive service of process.¹⁶¹ The government brought its action against NEPACCO in 1980,¹⁶² outside the three-year winding-up period provided for by Delaware law.¹⁶³ Nevertheless, both the district court and the Court of Appeals for the Eighth Circuit held that NEPACCO was not dead but "in a state of coma,"¹⁶⁴ because the corporation had failed to file a certificate of voluntary dissolution with the state.¹⁶⁵

Similarly, the United States District Court in Massachusetts, in *In Re Acushnet River & New Bedford Harbor Proceedings*,¹⁶⁶ found sufficient basis under Massachusetts corporate law to revive a dissolved corporation for purposes of a CERCLA suit. Defendant Belleville Industries, a PCB manufacturer, was revived under Massachu-

¹⁵⁹ *United States v. Northeastern Pharm. and Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

¹⁶⁰ *Id.* at 827 n.1.

¹⁶¹ 810 F.2d at 746.

¹⁶² *Id.*

¹⁶³ DEL. CODE ANN. tit. 8, § 278 (1983 & Supp. 1988).

¹⁶⁴ 810 F.2d at 746.

¹⁶⁵ *Id.*

¹⁶⁶ 675 F. Supp. 22 (D. Mass. 1987).

setts law¹⁶⁷ to resolve a dispute over the sale of its assets, one month short of the expiration of Massachusetts' three-year winding-up period.¹⁶⁸ As a revived corporation, Belleville continued to exist while this dispute was being resolved.¹⁶⁹ The federal government brought suit against Belleville under CERCLA while Belleville was revived.¹⁷⁰ Belleville sought to dismiss this suit, arguing that the three-year winding-up period had expired, and therefore that the CERCLA suit should be barred.¹⁷¹ The district court rejected this argument, finding that Massachusetts' revival statute and survival statute operate independently.¹⁷² Under Massachusetts law, therefore, either the Secretary of State or the court¹⁷³ retains the power to prolong corporate existence beyond the three-year winding-up period for purposes of suit under CERCLA.

Two other courts that have addressed CERCLA liability of dissolved corporations also have followed Rule 17(b) and applied state law. NEPACCO was again a CERCLA defendant in *Missouri v. Bliss*.¹⁷⁴ In ruling on a motion to quash service, the United States District Court for the Eastern District of Missouri rejected the claims of NEPACCO, which had incorporated in Delaware, that the applicable law was that of Missouri.¹⁷⁵ The court also held that, under Delaware law, NEPACCO retained the capacity to be sued.¹⁷⁶

In the most recent case to address this question, *United States v. Moore*,¹⁷⁷ the United States District Court for the Eastern District of Virginia likewise found corporate capacity under Virginia corporate law.¹⁷⁸ The defendant, Moor-Fite Corporation, dissolved in 1985.

¹⁶⁷ *Id.* at 38. The Massachusetts revival statute allows the State Secretary to revive a dissolved corporation subject to such terms and conditions "as the public interest may require." MASS. GEN. LAWS ANN. ch. 156B § 108 (West 1970). Section 104 of Chapter 156B also allows the court to appoint receivers with the power to prosecute and defend suits. These powers and "the existence of the corporation may be continued as long as the court finds necessary." *Id.* § 104.

¹⁶⁸ MASS. GEN. LAWS ANN. ch. 156B, § 102 (West Supp. 1986).

¹⁶⁹ See 675 F. Supp. at 38.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 40. This court concluded that the survival statute did not impose a limitation upon the power of the state to revive a dissolved corporation under the survival statute.

¹⁷³ See *supra* note 167.

¹⁷⁴ 23 Env't Rep. Cas. (BNA) 1978 (E.D. Mo. 1985).

¹⁷⁵ *Id.* at 1982. For a discussion of door-closing statutes, see *supra* note 83.

¹⁷⁶ *Bliss*, 23 Env't Rep. Cas. (BNA) at 1982.

¹⁷⁷ 27 Env't Rep. Cas. (BNA) 1796 (E.D. Va. 1988).

¹⁷⁸ *Id.* at 1799.

Virginia law provided for unending liability for pre-dissolution claims.¹⁷⁹ Because the government brought suit for CERCLA violations that allegedly occurred in 1983, the motion to quash service was denied.¹⁸⁰

Thus, in four CERCLA cases, courts have found that the applicable state law continued corporate capacity and liability, thereby avoiding the question of whether CERCLA overrides Rule 17(b) or preempts state corporate law on dissolution. In two other CERCLA cases, in which the application of state law precluded a finding of capacity, the courts were forced to resolve the conflict, and they came to opposite conclusions on both Rule 17(b) and preemption.

B. Levin Metals v. Parr Richmond Terminal Corp.

In *Levin Metals v. Parr Richmond Terminal Corp.*,¹⁸¹ the Court of Appeals for the Ninth Circuit applied Rule 17(b), looked to California corporate law, and held that a CERCLA action was barred against a dissolved corporation. From 1947 to 1981, Parr Industrial, and later Parr Richmond Terminal Corporation, had manufactured, stored, and distributed fertilizers, herbicides, pesticides, and scrap metals on property in Richmond, California.¹⁸² These operations resulted in the release of hazardous substances that contaminated the property.¹⁸³

Parr Industrial voluntarily dissolved in 1971 and sold the property to Parr Richmond Terminal Corporation.¹⁸⁴ Levin Metals Corporation purchased the property in 1981 from Parr Richmond Terminal Corporation.¹⁸⁵ Soon thereafter, hazardous wastes were discovered on the property. In 1984, Levin Metals brought a state claim of fraud against the defunct Parr Industrial, through its two major shareholders and its successor, Parr Richmond Terminal Corporation.¹⁸⁶ In 1985, Levin Metals, which was being sued by the federal government for response costs under CERCLA as the owner of the contaminated property, also brought an action for damages and declaratory relief under CERCLA against both defendants.¹⁸⁷

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 817 F.2d 1448 (9th Cir. 1987).

¹⁸² *Id.* at 1449.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 608 F. Supp. 1272, 1274 (N.D. Cal. 1985) (related case).

¹⁸⁶ *Id.*

¹⁸⁷ 817 F.2d at 1449.

Parr Industrial sought to have the suit dismissed, claiming that, under California law, a dissolved corporation could not be sued for a cause of action arising after its dissolution.¹⁸⁸ The district court agreed, holding that Parr Industrial could not be sued because CERCLA was not passed until 1980, nine years after Parr Industrial had dissolved, and because no cause of action arose until Levin Metals actually incurred clean-up costs.¹⁸⁹

The Ninth Circuit Court of Appeals affirmed this decision, holding that, under Rule 17(b), California corporate law governed whether Parr Industrial had the capacity to be sued under CERCLA.¹⁹⁰ The court adopted the district court's reasoning, finding that, although CERCLA imposed liability for pre-dissolution activities, CERCLA's cause of action did not arise until after the statute was passed, and therefore did not arise until after Parr Industrial had dissolved.¹⁹¹ Because it held that Parr Industrial could not be sued, the court did not reach the issue of whether Levin Metals had to incur clean-up costs before its cause of action arose.¹⁹²

In response to the defendant's arguments, Levin Metals contended that Rule 17(b) effectively allowed California law to defeat assertion of an important federal right and thus CERCLA should trump both Rule 17(b) and state corporate law.¹⁹³ Levin Metals argued that, if Rule 17(b) were followed, application of California law would impede and obstruct the basic purposes of CERCLA.¹⁹⁴ Therefore, it concluded, California law should be preempted.¹⁹⁵

The Ninth Circuit Court rejected these arguments, stating that there was no previous authority for superseding 17(b) in CERCLA actions and, more pointedly, that capacity to be sued and liability were two distinct legal concepts.¹⁹⁶ According to the court, although CERCLA might preempt state liability statutes, California corporate law defines capacity, not liability, and therefore state law was not preempted. The court stated that Levin Metals' preemption argument would serve to override Rule 17(b) any time a federal

¹⁸⁸ *Id.*

¹⁸⁹ 631 F. Supp. 303, 303-04 (N.D. Cal. 1986).

¹⁹⁰ 817 F.2d at 1451.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1449-50.

¹⁹⁶ *Id.* The court implied that, while CERCLA addressed standards of liability, it did not address more general legal issues regarding the ability of a party to maintain or defend an action in federal court.

claim was presented.¹⁹⁷ The Ninth Circuit thus recognized capacity to be sued as a fundamental concept of state corporate law. CERCLA's policy objectives, although broad, did not support an abrogation of Rule 17(b), absent explicit congressional direction.

C. United States v. Sharon Steel Corp.

The United States District Court for the Central District of Utah explicitly rejected the Ninth Circuit Court's *Levin Metals* holding. In *United States v. Sharon Steel Corp.*,¹⁹⁸ the court, ruling on a motion to dismiss,¹⁹⁹ found that Congress intended CERCLA to supersede Rule 17(b), and thus, that state law governing dissolved corporations did not bar a CERCLA action.²⁰⁰

In 1986, the federal government brought a CERCLA action against Sharon Steel Corporation, UV Industries, Inc. (UV), and UV Industries Liquidating Trust (the Trust) to clean up a hazardous waste site. The property, located in Midvale, Utah, contained wastes left from the storage of milling and smelting tailings.²⁰¹ In November, 1979, UV, the owner of the site, liquidated and sold its assets and properties to Sharon Steel Corporation for over \$517 million.²⁰² Four months later, UV filed articles of dissolution in Maine, its state of incorporation.²⁰³ It then placed the proceeds from the sale of its assets in a trust for distribution to stockholders.²⁰⁴ Maine's survival statute dictated that a corporation is subject to suit for pre-dissolution claims for up to two years after dissolution.²⁰⁵ The federal government brought its suit against the defendants in October, 1986, five and a half years after UV dissolved and three and a half years after the winding-up period had expired.²⁰⁶

¹⁹⁷ *Id.*

¹⁹⁸ 681 F. Supp. 1492 (D. Utah 1987).

¹⁹⁹ The district court has not reached a final decision in this case. Defendant UV Liquidating Trust's motion for immediate Appeals Court review has been denied. As this Comment went to print, District Court Judge Jenkins was reviewing the Trust's Motion for Summary Judgment.

²⁰⁰ *Sharon Steel*, 681 F. Supp. at 1498.

²⁰¹ *Id.* at 1493.

²⁰² Plaintiff's Memorandum in Opposition to Motion of Defendant UV Industries, Inc. Liquidating Trust to Dismiss the Complaint at 5, 681 F. Supp. 1492 (D. Utah 1987) (No. 86-C-924J).

²⁰³ *Sharon Steel*, 681 F. Supp. at 1493.

²⁰⁴ *Id.* at 1494.

²⁰⁵ *Id.* (quoting Maine's survival statute).

²⁰⁶ *Id.* at 1493.

None of the parties argued that CERCLA superseded Rule 17(b) or preempted state corporate law. On behalf of the dissolved corporation, the Trust argued that under Rule 17(b) it was only subject to Maine law.²⁰⁷ The federal government argued that UV Industries was subject to Utah law, which provided that a corporation doing business within its borders was subject to suit even after dissolution, as long as its assets had not yet been distributed.²⁰⁸ The government also argued that even under Maine law UV Industries was liable because Maine courts would not enforce Maine's survival statute in light of the overriding public policy expressed in CERCLA.²⁰⁹ Defendant Sharon Steel argued that UV Industries was subject to suit because a state survival statute, like a statute of limitations, could not operate to bar a claim brought by the United States.²¹⁰

In ruling for the government, the district court did not adopt the government's arguments but instead devised its own reasons for rejecting the Trust's motion. Relying on *Gustin-Bacon*, the court found clear congressional intent in CERCLA's "notwithstanding" provision to supersede a Federal Rule of Civil Procedure.²¹¹ The court also found that CERCLA preempted state law because the operation of state dissolution laws would stand as an obstacle to the accomplishment and execution of the full purposes of the statute.²¹²

The court also expressly disagreed with the Ninth Circuit Court's distinction in *Levin Metals* between liability and capacity. Calling it a "distinction without a difference,"²¹³ the court reasoned instead that, by merging the concepts of capacity and liability, a state could simply reduce or eliminate corporate liability by limiting its capacity to be sued.²¹⁴ Whether direct or indirect, state corporate law would prevent CERCLA defendants from being held liable for the cost of a cleanup, a result that would frustrate the purpose of the statute. The court also dismissed the Ninth Circuit Court's fear that merging liability and capacity would result in an override of Rule 17(b) every time a federal right was asserted.²¹⁵ The *Sharon Steel* court reasoned that preemption would occur only when Congress expressed the

²⁰⁷ The Trust has stipulated to its own capacity, but has argued that it has not assumed the liability of UV Industries, and is not independently liable under CERCLA. *Id.* at 1494.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1495.

²¹⁰ *Id.*

²¹¹ *Id.* at 1495-98.

²¹² *Id.* at 1498.

²¹³ *Id.* at 1497.

²¹⁴ *Id.*

²¹⁵ *Levin Metals*, 817 F.2d 1448, 1451 (9th Cir. 1987).

clear intent to supersede state capacity provisions required under *Gustin-Bacon*,²¹⁶ as the court found in CERCLA.²¹⁷

VII. RESOLVING THE CONFLICT BETWEEN *LEVIN METALS* AND *SHARON STEEL*

Levin Metals and *Sharon Steel* stand in sharp contrast to one another on both congressional intent to supersede Rule 17(b) in enacting CERCLA's "notwithstanding" language and CERCLA's preemption of state corporate law. Although the *Sharon Steel* holding is desirable from an environmental perspective—that assets gained at the expense of the environment be used to rectify the damage—on both of these issues, the weight of the legal authority supports *Levin Metals* and not *Sharon Steel*.

A. Congressional Intent to Supersede Rule 17(b)

Regarding Rule 17(b), the *Sharon Steel* court assumed that Congress has plenary power to supersede any of the federal rules, relying on *Gustin-Bacon*.²¹⁸ When applied to a conflict between CERCLA and Rule 17(b), however, *Gustin-Bacon*'s requirement of "clear intent, express or otherwise"²¹⁹ is not met. Although the statute provides liability "notwithstanding any other provision or rule of law," CERCLA is silent on the applicability of the federal rules as a whole, and on 17(b) in particular. Congress expressed no clear intent regarding corporate capacity to be sued in the statute itself.

The legislative history of CERCLA is also silent on the issue of corporate capacity to be sued. Moreover, the legislative history regarding the "notwithstanding" language indicates that Congress intended to preclude defenses based on due care, not all procedural and equitable defenses.²²⁰ In light of the long-standing deference to state law on the capacity of a dissolved corporation, and congressional intent to let "traditional and evolving principles of common law"²²¹ govern CERCLA liability, Congress did not address the conflict between the statute and the rule sufficiently to indicate its clear intent. Furthermore, under traditional rules of statutory construction, Congress is presumed to know the state of the law, in-

²¹⁶ See *supra* notes 91–103 and accompanying text.

²¹⁷ *Sharon Steel*, 681 F. Supp. at 1498.

²¹⁸ *Id.* at 1495.

²¹⁹ See *supra* notes 91–103 and accompanying text.

²²⁰ See *supra* notes 14–22 and accompanying text.

²²¹ 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph).

cluding the Federal Rules of Civil Procedure, when it drafted CERCLA. Had Congress intended to supersede Rule 17(b) on corporate capacity—an unprecedented move—one can also presume that it would have done so with more specific language than “notwithstanding any other provision or rule of law.”²²²

Judicial interpretations of CERCLA’s liability provisions in light of other procedural or equitable defenses also undercut the argument that Congress intended to supersede Rule 17(b). The majority of courts facing these defenses have held that, despite the seemingly conclusive language of section 107, defendants may still raise equitable defenses.²²³ Although some courts have rejected equitable defenses, these holdings may be limited to particular defenses raised: attempts to enlarge the statutory defenses enumerated in section 107(b) or to apply procedural requirements found in other sections of CERCLA.²²⁴ Similarly, the courts that have addressed procedural defenses based on the federal rules have not found clear intent in the “notwithstanding” language to override the rules.²²⁵

Finally, the Ninth Circuit Court’s reasoning in *Levin Metals* is persuasive.²²⁶ Carried to its logical extreme, reading clear intent to supersede all non-statutory defenses into CERCLA’s broad language and legislative history leads one to conclude that Congress intended to supersede all of the rules of civil procedure or judicial doctrines of res judicata or accord and satisfaction, whenever they frustrate the imposition of liability under CERCLA.²²⁷

Courts’ policy-balancing approach in cases concerning a prisoner’s capacity to sue²²⁸ provides some support for the finding that CERCLA supersedes Rule 17(b). On one hand, Congress clearly expressed its intent that those responsible for contributing hazardous waste be responsible for its cleanup, and therefore the government has a strong interest in being able to reach the assets of corporate violators. Whether undistributed or in the hands of shareholders, a dissolved corporation’s assets should still be available to pay for the cost of a CERCLA cleanup. A state’s traditional power to create,

²²² The *Sharon Steel* court opined that if Congress had intended CERCLA to reach only existing corporations, it could have done so expressly, reversing the traditional statutory construction presumption of congressional knowledge. 681 F. Supp. at 1496 n.8.

²²³ See *supra* notes 40–47 and accompanying text.

²²⁴ See *supra* notes 49–59 and accompanying text.

²²⁵ See *supra* notes 31–39 and accompanying text.

²²⁶ *Levin Metals*, 817 F.2d at 1451.

²²⁷ See *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1057–59 (D. Ariz. 1984).

²²⁸ See *supra* notes 104–06 and accompanying text.

regulate, and dissolve corporations, while long-held, may not be sufficient to thwart a federal statute designed to protect public health and the environment from hazardous waste. From a policy perspective, therefore, the balancing approach supports the argument that CERCLA supersedes Rule 17(b).

Unfortunately, from a legal perspective, the analogy between a prisoner's right to sue for civil rights claims and the government's right to sue under CERCLA is not strong enough to firmly establish CERCLA liability for dissolved corporations. This type of non-constitutional policy-balancing is more appropriate for Congress than the courts. Further, even when presented with constitutional claims, not all federal courts have adopted the balancing approach, and thus state law on individual capacity to sue has prevented a prisoner from raising constitutional claims.²²⁹ Because some courts have found that the protection of constitutional rights does not override Rule 17(b),²³⁰ it is less likely that courts will find that CERCLA's policy objectives override the state's interests.

Should a court adopt the balancing approach, it may hold that CERCLA's strong policy objectives still do not weigh as heavily as the protection of constitutional rights. On the other side of the balance, a state's interest in determining the terms of corporate existence may be found more compelling than its interest in preventing prisoners from suing, in light of the traditional and extensive role that state law has played in regulating corporate behavior.²³¹ Contrary to the court's view in *Sharon Steel*, therefore, Congress did not express the clear intent required under the *Gustin-Bacon* test to supersede Rule 17(b). The policy-balancing test, not part of the *Sharon Steel* analysis, also fails as a basis for finding an override of 17(b), due to its limited application.

B. CERCLA Preemption of State Law

The *Sharon Steel* and *Levin Metals* courts also disagreed on whether CERCLA preempted state law, although neither opinion sets out a rigorous analysis of the problem under the three preemption tests. The *Sharon Steel* court simply concluded that state dissolution law stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," because a state could always limit a corporation's liability by eliminating its

²²⁹ See *Lombardi v. Peace*, 259 F. Supp. 222, 226 (S.D.N.Y. 1966).

²³⁰ See *id.*

²³¹ See *supra* notes 76-81 and notes 124-26 and accompanying text.

capacity to be sued.²³² The *Levin Metals* court stated that CERCLA did not preempt state law because state law governed capacity to be sued, not liability.²³³

The *Levin Metals* court correctly rejected an application of the third preemption "obstacle" analysis. As the court noted, under an "obstacle" preemption analysis, Rule 17(b) would be inoperative in any case involving a federal question because a dissolved corporation's lack of capacity to be sued would always stand as an obstacle to the enforcement of federal law.²³⁴ The *Sharon Steel* court implicitly acknowledged this analytical flaw when it stated that preemption would only be found where Congress "clearly expresses" its intention to supersede state law; in short, a reexpression of the *Gustin-Bacon* test.²³⁵

The distinction between the *Gustin-Bacon* test and the preemption "obstacle" test is subtle but important. The preemption analysis establishes that state law may be preempted despite a lack of clear congressional intent. Although this is an appropriate standard when evaluating clashes between federal and state statutes, it is inappropriate when resolving a clash between a federal statute and other federal statutes, including the Federal Rules of Civil Procedure, that are expressions of congressional intent as well.

Moreover, Rule 17(b) reflects a long tradition of state control over corporate dissolution and capacity to be sued. *Oklahoma Natural Gas*,²³⁶ *Chicago Title*,²³⁷ and their progeny²³⁸ clearly establish that corporations are creatures of state law. Under Rule 17(b), corporations' expectations about certainty and definiteness based on state law have been settled over a long period of time.²³⁹ Other than *Sharon Steel*, courts consistently have viewed Rule 17(b) as operative in federal question cases.²⁴⁰ Any radical alteration of this doctrine requires a clear expression of congressional intent.

Despite its correct legal analysis, the *Levin Metals* holding, and the lack of clear congressional intent in CERCLA itself, result in poor environmental policy. Application of state law encourages cor-

²³² 681 F. Supp. 1492, 1497 (D. Utah 1987) (quoting *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984)).

²³³ *Levin Metals*, 817 F.2d at 1451.

²³⁴ *Id.*

²³⁵ *Sharon Steel*, 681 F. Supp. at 1498.

²³⁶ *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257 (1927).

²³⁷ *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937).

²³⁸ See cases cited at *supra* note 82.

²³⁹ See *supra* notes 124-27 and accompanying text.

²⁴⁰ See cases cited at *supra* note 82.

porations with CERCLA liability, in states with short winding-up periods, to dissolve with the hope that the federal government will not bring suit within the state survival period. A corporation, faced with the prospect of CERCLA liability, may very well commit corporate suicide rather than pay the extensive costs of CERCLA cleanups.

Because of the paramount interest in environmental safety and public health, Congress should therefore amend CERCLA to provide for continued capacity of a dissolved corporation to be sued. Another commentator on the question of CERCLA liability of dissolved corporations has argued that CERCLA preempts state dissolution law but also has proposed a legislative amendment that would impose liability on corporations that dissolved prior to CERCLA's enactment in 1980.²⁴¹ The commentator also argues that CERCLA liability should be extended to shareholders once corporate assets have been distributed to the amount received in distribution.²⁴² Although this author disagrees with the conclusion that preemption is the appropriate method of analysis, the proposed legislative solution strikes an appropriate balance between CERCLA's goals and corporate and shareholder expectations. Corporations that dissolved after CERCLA was enacted in 1980 were on sufficient notice of potential liability to justify an extension of liability.

Additionally, Congress should limit dissolved corporation liability to claims brought by the federal government. The federal government's interest in the CERCLA trust fund²⁴³ underlies the justification for an unprecedented intrusion into a traditional area of state control. Because non-government plaintiffs seek restitution for their own costs, not for the expenditure of trust funds, Congress should tailor this extension of corporate capacity to governmental claims. In addition, the amendment should expressly limit the corporate "resuscitation" to defending only CERCLA claims. Non-CERCLA claims by other plaintiffs should be barred, although the corporation has been revived, to reduce the impact on the corporation's interests of certainty and definiteness.

VIII. CONCLUSION

Federal Rule of Civil Procedure 17(b) directs a federal court to apply state corporate law to determine whether a dissolved corpo-

²⁴¹ Note, *supra* note 110, at 163-64.

²⁴² *Id.* at 167.

²⁴³ See *supra* notes 9 and 27.

ration has the capacity to be sued. Because many state dissolution laws allow a corporation to end its existence, and its capacity to be sued, within two years after dissolution, some plaintiffs with otherwise-valid claims against dissolved corporations cannot be compensated.

In CERCLA actions, this plaintiff is the federal government. One of CERCLA's primary policy objectives, to make those responsible for hazardous waste problems pay for their cleanup, is therefore thwarted by the application of Rule 17(b). As it presently stands, however, CERCLA does not contain the requisite clear congressional intent to override Rule 17(b). CERCLA's liability language, though broad, was aimed primarily at eliminating defenses based on due care. An examination of the statute and its legislative history reveal no congressional consideration of potential CERCLA conflicts with the Federal Rules of Civil Procedure. Moreover, a majority of federal courts have continued to allow CERCLA defendants to raise procedural and equitable defenses despite the statute's broad language.

Congress, therefore, should amend CERCLA to extend a dissolved corporation's capacity to be sued for CERCLA violations. The overriding interest in the protection of public health and safety expressed in CERCLA justify a limited abrogation of this tradition.