

PARENT CORPORATION LIABILITY: AN EVALUATION OF THE CORPORATE VEIL PIERCING DOCTRINE AND ITS APPLICATION TO THE TOXIC TORT ARENA

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Pogo is not too far wrong when he says, "We have met the enemy and he is us." While this is disturbing, it is also optimistic: what man has done wrong man can set straight. Environmental law does not pretend to repeal the wind and the rain and the laws of ecology. It is aimed at man and seeks to control his activities.¹

I. INTRODUCTION

Chief Justice Marshall once described the corporation as "an artificial being, invisible, intangible and existing only in contemplation of law."² While this may be true, the corporate form is here to stay. The financial and economic advantages created by the existence of the corporate being are both enormous and

1. WILLIAM H. ROGERS, JR., ENVIRONMENTAL LAW § 1.1, at 1 (1977).

2. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

desirable.³

The principle of limited liability is one fundamental advantage provided by incorporation.⁴ Under this principle, "shareholders in a corporation are not liable for the obligations of the enterprise beyond the capital they contribute in exchange for their shares."⁵ Limited liability applies to both shareholders who are natural persons and to shareholders who are corporations or other artificial entities.⁶ The limited liability principle, like most rules (and privileges), is subject to exception. This exception, known as "piercing the corporate veil,"⁷ overrides the doctrine of limited liability by holding shareholders personally liable for the acts of the corporation.⁸ Once the corporate veil is pierced, the personal assets of shareholders are no longer shielded from legal actions brought by plaintiffs.⁹

This exception often arises where the corporation being sued or prosecuted is the wholly owned subsidiary of another corporation.¹⁰ Parts II and III of this comment, respectively, will discuss and evaluate parent corporation liability for subsidiary corporation actions in the United States under state and federal common law, and under federal environmental law, particularly under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹¹ Notions of parent corporation liability, especially with respect to federal common law, vary among jurisdictions and are presently in a state of flux.

Part IV of this comment will evaluate parent corporation liability in the toxic tort litigation context. Developments with

3. See, HARRY HENN, LAWS OF CORPORATIONS § 1, at 4 (2d ed. 1970).

4. Tax advantages also provide a strong incentive to incorporate for many business persons in the United States. But, these incentives for incorporation are outside the scope of this comment and therefore will not be discussed. For an overview of the tax advantages of incorporation, see LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY 114-27 (2d ed. 1988).

5. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1039 (1991).

6. SOLOMON, *supra* note 4, at 240. Corporations are viewed as separate entities, existing on their own.

7. *Id.* at 241.

8. *Id.*

9. *Id.*

10. *Id.*

11. 42 U.S.C. §§ 9601-9675 (1988 & Supp. I 1990), amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 101(35), 100 Stat. 1613 (codified in scattered sections of 42 U. S. C. §§ 9601-9675 (1988 & Supp. I 1990)).

respect to parent corporation liability in other areas of the law may affect or alter the standard utilized in toxic tort litigation. These alterations could potentially have an enormous impact on the ability of toxic tort victims to gain compensation for their injuries and could also further weaken the ability of parent corporations to limit their liability in the area of environmental law. For these reasons, this comment will also attempt to identify an appropriate standard for piercing the corporate veil in the toxic tort litigation arena.

II. STATE AND FEDERAL COMMON LAW STANDARDS FOR PIERCING THE CORPORATE VEIL

The circumstances under which the courts in the United States will pierce the corporate veil are confusing, unpredictable, and inconsistent. Application of the existing veil piercing standards vary from case to case, from state to state, and from circuit to circuit. In order to understand why this is so, it is necessary to discuss the following things: The policy and economic reasons for establishing limited liability, the standards for piercing the corporate veil under state law, and the standards for piercing the corporate veil under federal common law.

A. *The Function of Limited Liability*

The principle of limited liability exists in nearly every developed legal system.¹² The most basic effect of limited liability is that it "limits the potential loss of a shareholder to the amount invested in the enterprise."¹³ But what are the public purposes served by this principle and what are its effects?

One of the main effects of limited liability is to "shift a substantial portion of the risk of business failure to creditors and away from shareholders."¹⁴ The creditors, upon whom this additional risk is placed, include both voluntary creditors and involuntary creditors.¹⁵ Voluntary creditors consist of parties contracting with a corporation.¹⁶ Involuntary creditors mainly consist of tort victims.¹⁷ Limited liability can affect each type of

12. SOLOMON, *supra* note 4, at 241.

13. *Id.* at 240.

14. *Id.* at 242.

15. *Id.*

16. *Id.*

17. *Id.* Many times a court will pierce the corporate veil more readily if the action is based on a tort claim. However, Solomon and his co-authors caution: "This bifurcation is

creditor differently.

Two proponents of the limited liability principle, Frank H. Easterbrook and Daniel R. Fischel, argue that it is essential to the existence of publicly held corporations for

only in such an environment can the critical features of centralized management and investor willingness to bear risk exist. Limited liability makes investors willing to delegate management functions to a centralized corporate group and to undertake risky projects. Not only shareholders but voluntary creditors benefit from these rules. As to involuntary creditors, their loss from limitations on liability is mitigated by incentives to provide insurance which adequately substitutes for the personal liability of shareholders.¹⁸

Easterbrook and Fischel also argue that limited liability reduces monitoring costs with respect to an agent's performance, promotes efficient markets for stock, encourages diverse stock portfolios, and "encourages risk taking by corporations whenever a project indicates positive net present value."¹⁹

Robert B. Thompson agrees, for the most part, with Easterbrook and Fischel.²⁰ Thompson argues that "[l]imited liability permits parties to allocate the risk of an enterprise to a more efficient risk-bearer in particular circumstances."²¹ But Thompson also recognizes that limited liability places costs on parties who have not chosen to deal with the corporation. He explains:

Creditors who choose to deal with a limited liability enterprise accept this risk and can raise their prices to reflect this difference in risk or can seek security. . . . However, even if creditors are sometimes better risk-bearers, limited liability also shifts risks in other situations to claimants who had no choice in dealing with the enterprise. . . . To this extent, limited liability shifts some costs of doing business away from the corporation to other parts of society.²²

Thus, limited liability places involuntarily imposed costs upon innocent parties, who are not likely to be well-equipped risk-

somewhat oversimplified because the ability to bargain over terms is the main distinction between the categories. Yet the contract creditor who sells merchandise or services over the counter or over the telephone to a corporation has not engaged in any more bargaining than the tort victim." *Id.*

18. *Id.* (citing Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 93 (1985)).

19. *Id.*

20. Thompson, *supra* note 5, at 1070-73.

21. *Id.* at 1039.

22. *Id.* at 1039-40.

bearers. Many courts take into consideration whether the plaintiff was a voluntary or an involuntary creditor of the defendant corporation, when deciding whether or not to pierce the corporate veil.²³ Clearly, the justifications for limited liability are generally less persuasive when involuntary creditors are involved.

The arguments favoring limited liability are also less persuasive when applied to close corporations.²⁴ Many of the public benefits that are arguably promoted by limited liability with respect to public corporations, are not promoted by applying limited liability to close corporations. In fact, the main benefactors in any type of corporate limited liability situation are the shareholders. In the context of a close corporation, however, these shareholders are often the directors of the corporation. Accordingly, they are likely to reap larger personal gains from business profits. Indeed, limited liability may encourage close corporation shareholder-directors to engage in more risky activities because they stand to gain much more than do public corporation shareholders.²⁵

Thus, while strong arguments can be made favoring the limited liability principle, a line exists where the costs of limited liability outweigh the public benefits. The piercing the corporate veil exception to limited liability ensures that corporations do not abuse the privilege of limited liability. Though it is unclear exactly where the line is crossed from limited liability to some form of personal liability, every jurisdiction in the United States espouses a view that limited liability is not absolute.²⁶

B. State Common Law

Corporate formation in the United States is purely a matter of state law.²⁷ This does not mean that state law provides the

23. See *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 693 (5th Cir. 1985) (opining that in a contract case, unlike a tort case, the creditor has willingly transacted business with a subsidiary); *Bucyrus-Eric Co. v. General Products Corp.*, 643 F.2d 413, 419 (6th Cir. 1981) (noting that fraud is not an essential characteristic of piercing the corporate veil when its retention would produce injustice or inequitable results).

24. SOLOMON, *supra* note 4 at 242; see also Thompson, *supra* note 5, at 1047-48 ("Limited liability performs the additional function in larger corporations of facilitating the transferability of shares and making possible organized securities markets with the increased liquidity and diversification benefits that these markets make possible. The absence of these market-related benefits for close corporations explains, in part, why courts are more willing to pierce the veil of close corporations . . .").

25. SOLOMON, *supra* note 4, at 243.

26. See generally STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* (1991).

27. See SOLOMON, *supra* note 4, at 34. Though state laws regarding corporations are

only means of governing and controlling corporate behavior. Though state statutes provide the means for attaining limited liability via incorporation, federal law sometimes governs corporate veil piercing questions.²⁸ This subsection will set forth the common statutory means of limiting liability, discuss the standards for and the relevant factors involved in piercing the corporate veil under state law, and examine cases in which various courts, applying state law, pierced or refused to pierce the corporate veil.

The principle of limited liability is uniformly accepted as a fundamental rule of corporate law in all the states across the United States.²⁹ The Revised Model Business Corporation Act provides a clear example of this principle:

- (a) A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued or specified in the subscription agreement.
- (b) Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.³⁰

Other state corporation statutes utilize similar provisions limiting shareholder liability. Customarily, statutes require a corporation to explicitly state in its articles of incorporation that shareholder liability is generally limited to the extent of investment in the corporation.³¹

The limited liability principle is stringently upheld under state law.³² Harry T. Henn writes in his treatise on corporation

not the subject of this comment, a brief discussion of the veil piercing standards under state law will be helpful to the subsequent discussion of federal common law and federal statutory law parent corporation liability standards.

28. See *infra* note 75 and accompanying text for a discussion on when state law applies. The "internal affairs" doctrine is the basic means of determining whether state law or federal law applies. See Note, *Piercing The Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 855 (1982) [hereinafter *Piercing the Corporate Veil*].

29. See REVISED MODEL BUSINESS CORP. ACT § 6.22 (1991) [hereinafter RMBCA]; DEL. GEN. CORP. L. § 102(b)(7) (1991); N.Y. BUS. CORP. L. § 402(b) (1991).

30. RMBCA § 6.22 (citations omitted).

31. See N.Y. BUS. CORP. L. § 402(b).

32. *Piercing the Corporate Veil*, *supra* note 28, at 855 (stating that corporate law has generally been reluctant to hold an alleged alter ego liable).

law that "the prevailing rule is that where corporate formalities are substantially observed, initial financing reasonably adequate, and the corporation not formed to evade an existing obligation or statute or to cheat or to defraud, even a controlling shareholder enjoys limited liability."³³ The failure by either the corporation or by an individual shareholder to observe some or all of the elements of this rule may cause a court to disregard the general principle of limited liability.

State courts will pierce the corporate veil in similar situations³⁴ and a similar test will likewise be employed. However, a substantial grey area of corporate behavior exists within which a court's willingness to pierce the veil is unpredictable. Some commentators believe that "'Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled. There is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law."³⁵ The reasons for this unpredictability become more readily apparent after viewing the basic standards courts employ and the factors taken into account in such situations.

State courts generally employ a two-pronged test when deciding whether to pierce the corporate veil.³⁶ The first prong requires "such unity of interest and ownership that the separate personalities of the corporation and the [shareholder] no longer exist."³⁷ The second prong seeks to decide whether "the acts are treated as those of the corporation alone, [for then] an inequitable result will follow."³⁸ Some courts also require that retaining the corporate fiction will work an injustice on the injured party.³⁹ However, this third prong seems to be inherently answered under the second prong of the test and thus may be superfluous.

33. HARRY T. HENN, *LAWS OF CORPORATIONS* § 146, at 253 (2d ed. 1970).

34. See, e.g., PRESSER, *supra* note 26, §§ 2.01-2.52, at 2-1 to 2-523 (chapter on piercing the corporate veil under state law).

35. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985).

36. See *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 179 (5th Cir. 1981), *cert. denied* 456 U.S. 983 (1982); accord *Lowendahl v. Baltimore & O.R.R.*, 287 N.Y.S. 62, 72, *aff'd*, 6 N.E.2d 56 (1936). This test is equally applicable to piercing the corporate veil in the parent-subsidary context.

37. *Automotriz Del Golfo de Cal. S. A. v. Resnick*, 306 P.2d 1, 3 (1957); accord *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 421 (5th Cir. 1980).

38. *Automotriz*, 306 P.2d at 3.

39. See, e.g., *Saphir v. Neustad*, 413 A.2d 843, 853 (Conn. Super. 1979).

In *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*,⁴⁰ a classic corporate veil piercing case,⁴¹ an action was brought by a creditor seeking to hold the corporation's president individually liable.⁴² The United States Court of Appeals for the Fourth Circuit found in favor of the creditor and clearly laid out the determinative factors involved in the veil piercing analysis.⁴³ At the outset, the Fourth Circuit stated that South Carolina law employs a presumption that "the corporation and its stockholders are separate and distinct."⁴⁴ This presumption, however, is overcome under corporate veil piercing doctrine whenever: (1) "recognition of the corporate form would extend the principle of incorporation 'beyond its legitimate purposes,'" and (2) a failure to pierce the corporate veil would "produce injustices or inequitable consequences."⁴⁵ In such instances, stockholders will be held personally liable.⁴⁶

The court also recognized that the circumstances under which courts pierce the corporate veil lack clarity and uniformity,⁴⁷ launching the exception into a state of confusion. Further, the court insightfully acknowledged that the situations in which courts pierce the corporate veil are "rarely articulated with any clarity."⁴⁸ The court found this to be the case because corporate veil piercing is *sui generis* in nature.⁴⁹

40. 540 F.2d 681 (4th Cir. 1976). Although *DeWitt Truck Brokers* applies South Carolina law, it has been noted as a leading federal common law case. See, PRESSER, *supra* note 25, § 3.05, at 3-49.

41. Although *DeWitt Truck Brokers* does not involve piercing the corporate veil to hold a parent corporation liable, it is directly relevant to the parent corporation context because the standards utilized and factors analyzed are the same. The test for holding an individual personally liable for the action of the corporation is identical to the test employed when seeking to hold a parent corporation liable for the actions of its subsidiary. See *DeWitt Truck Brokers*, 540 F.2d at 683-87.

42. *Id.* at 683.

43. *Id.* at 683-87.

44. *Id.* at 683. The court noted that this presumption applies in the parent-subsidary context. *DeWitt Truck Brokers* also recognized that the presumption "is merely a legal theory, 'introduced for purposes of convenience and to subserve the ends of justice'"

45. *Id.* (citing *Krivo Industrial Supp. Co. v. National Distill. & Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973) *modified factually*, 490 F.2d 916 (5th Cir. 1974); *Sell v. United States*, 336 F.2d 467, 472 (10th Cir. 1964); *Stone v. Eacho*, 127 F.2d 284, 288-89 (4th Cir. 1942), *cert. denied*, 317 U.S. 635 (1942); *Jennings v. Automobile Sales Co.*, 93 S.E. 188, 188 (S.C. 1917)).

46. *Dewitt Truck Brokers*, 540 F.2d at 683. The court cautioned that personal liability should be imposed "reluctantly" and "cautiously."

47. *Id.* at 684.

48. *Id.* (citing *Swanson v. Levy*, 509 F.2d 859, 861-62 (9th Cir. 1975)).

49. *Id.*; see also BLACK'S LAW DICTIONARY 1286 (5th ed. 1979) (defining the term "sui generis" as: "Of its own kind or class; i.e., the only one of its own kind; peculiar").

DeWitt Truck Brokers, however, also expressed a liberal view of corporate veil piercing, stating that "[t]he theory of liability under the 'instrumentality' doctrine does not rest upon intent to defraud. It is an equitable doctrine that places the burden of the loss upon the party who should be responsible."⁵⁰ Many state courts would not go this far. The case enumerated eight factors that, when addressed, shed light on the propensity of a court in equity to pierce the corporate veil.⁵¹ These factors include:

- 1) whether the corporation was grossly undercapitalized for the purposes of the corporate undertaking;⁵²
- 2) failure to observe corporate formalities;
- 3) non-payment of dividends;
- 4) debtor corporation insolvency at the time;
- 5) dominant shareholder siphoning of corporate funds;
- 6) non-functioning of other officers or directors;
- 7) absence of corporate records; and
- 8) the fact that the corporation is merely a facade for the operations of the dominant shareholder or shareholders.⁵³

Although none of these factors, standing alone, is sufficient to pierce the corporate veil,⁵⁴ the undercapitalization factor is considered relatively important.⁵⁵ The Fourth Circuit found that the "obligation to provide adequate capital begins with incorporation and is a continuing obligation thereafter . . . during the corporation's operation."⁵⁶

In *Dewitt Truck Brokers*, the president of the defendant

50. *DeWitt Truck Brokers*, 540 F.2d at 684 (quoting *Krivo Industrial Supply Co. v. Nat'l. Distillers & Chemical Corp.*, 483 F.2d 1098, 1106-07 (5th Cir. 1973)).

51. *Id.* at 685-87.

52. *Id.* at 685-86 (citing *HENN*, *supra* note 3, at 257; *Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *Stone v. Eacho*, 127 F.2d 284, 288 (4th Cir. 1942); *Luckenbach S.S. Co. v. W. R. Grace & Co.*, 267 F. 676, 681 (4th Cir. 1920), *cert. denied*, 254 U.S. 644 (1920); *Francis O. Day Co. v. Shapiro*, 267 F.2d 669, 673 (D.C. Cir. 1959); *Arnold v. Phillips*, 117 F.2d 497, 502 (5th Cir. 1941), *cert. denied*, 313 U.S. 583 (1940); *Puamier v. Barge BT 1793*, 395 F. Supp. 1019, 1039 n.10 (E.D. Va. 1974); *Mull v. Colt Co.*, 31 F.R.D. 154, 163 (S.D.N.Y. 1962); *Kilpatrick Bros., Inc. v. Poytner*, 473 P.2d 33, 40 (Kan. 1970); *North Arlington Med. Bldg., Inc. v. Sanchez Const. Co.*, 471 P.2d 240, 244 (Nev. 1970); *Automorritz Del Golfo De Cal. v. Resnick*, 306 P.2d 1, 4 (Cal. 1957); *James R. Gillespie, The Thin Corporate Line: Loss of Limited Liability Protection*, 45 N.D. L. REV. 363, 377-78 (1969)).

53. *DeWitt Truck Brokers*, 540 F.2d at 686-87.

54. *Id.*

55. *Id.* at 685. A substantial amount of legal authorities consider undercapitalization to be an important factor in deciding whether to pierce the veil, "particularly so in the case of the one-man or closely held corporation."

56. *Id.* at 686.

corporation was found personally liable because there was a complete disregard of corporate formalities, the corporation operated only for the financial advantage of the president, the corporation was undercapitalized, the president had siphoned corporate funds which had been collected for plaintiff creditor, and the president had indicated to the plaintiff that he would take care of payments if the corporation failed to do so.⁵⁷

Though some states apply the corporate veil piercing analysis more strictly than others,⁵⁸ the willingness of a court to pierce the corporate veil, and the weight given to the above-mentioned factors, also depends, in part, on the type of claim before the court. *DeWitt Truck Brokers*, for example, represents a case where the court had very little trouble in justifying piercing the corporate veil. The cases which follow, *Edwards Co., Inc. v. Monogram Industries, Inc.*⁵⁹ and *Bucyrus-Erie Co. v. General Products Corp.*,⁶⁰ presented complex factual and legal issues and thus were more difficult to decide.

In *Edwards Co., Inc. v. Monogram Industries, Inc.*, the United States Court of Appeals for the Fifth Circuit, applying Texas law, expressly stated that the corporate veil piercing standard differs between tort claims and contract claims.⁶¹ *Edwards* was a breach of contract claim where the plaintiff attempted to pierce the corporate veil and hold the parent corporation liable for the contractual obligations of the subsidiary.⁶² Because the dispute was contractually based, the district court held the plaintiff to a higher burden of proof in establishing the elements necessary to pierce the corporate veil. Under this higher standard, the court concluded that, even though the defendant parent corporation "ultimately controlled" the subsidiary, the corporate veil should not be pierced because the record showed that the subsidiary was more than "just a piece of paper."⁶³

The appellate court, however, felt the plaintiff was justified in piercing the corporate veil to reach the parent corporation because: the parent corporation owned one hundred percent of

57. *Id.* at 688-89.

58. Compare *Edwards*, 730 F.2d 977, 982-83 with *Bucyrus-Erie*, 643 F.2d 413, 418-19.

59. *Edwards Co., Inc. v. Monogram Industries, Inc.*, 730 F.2d 977, 982 (5th Cir. 1984).

60. *Bucyrus-Erie Co. v. General Products Corp.*, 643 F.2d 413, 418 (6th Cir. 1981).

61. *Edwards*, 730 F.2d at 980-84.

62. *Id.* at 978.

63. *Id.* at 986.

the subsidiary stock; the parent corporation and subsidiary filed joint tax returns; the subsidiary failed to follow many corporate formalities; directors and officers of the parent corporation comprised all of the officers and directors of the subsidiary corporation; and the parent corporation often loaned money to the subsidiary.⁶⁴ The Fifth Circuit required a more stringent showing "that the subsidiary was used by the parent for fraud or injustice" before the corporate veil could be pierced.⁶⁵ Thus, the result in *Edwards* begs the question: what is "injustice" in the corporate veil piercing context? *Edwards* seems to represent a conservative approach to veil piercing in general, and especially when a parent corporation is involved.

Bucyrus-Erie Co. v. General Products Corp.,⁶⁶ another corporate veil piercing case arising out of a contract claim, articulated what seems to be a less stringent formula for piercing the veil than was applied in *Edwards*. The Sixth Circuit found that the corporate veil should be pierced when

- (1) domination and control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will, or existence of its own; (2) that domination and control was used to commit fraud or wrong or other dishonest or unjust acts; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.⁶⁷

Though *Bucyrus-Erie* establishes a three-pronged test, the second prong appears, intentionally or not, to broaden the scope of the wrongs that may cause a court to pierce the corporate veil. Further support for this contention may be found by the Sixth Circuit's recognition that fraud is not essential to corporate veil piercing. In *Bucyrus-Erie*, the court pierced the corporate veil and found the defendant corporation's president personally liable because the president failed to follow corporate formalities and because the corporation was undercapitalized.⁶⁸ The court stated that, absent fraud, courts "will disregard the corporate fiction when its retention would produce injustice or inequitable consequences."⁶⁹ Thus, the problem of determining when a court will find that injustice would be promoted or that inequita-

64. *Id.*

65. *Id.* at 983-84.

66. *Bucyrus-Erie Co. v. General Products Corp.*, 643 F.2d 413 (6th Cir. 1981).

67. *Id.* at 418.

68. *Id.*

69. *Id.* at 419 (citing *State v. Standard Oil Co.*, 30 N.E. 279, 279 (Ohio S. Ct. 1892); *Anderson v. Abbott*, 321 U.S. 349, 361 (1944); *National Marine Service v. Thibodeaux*, 501

ble consequences will result from refusal to pierce the corporate veil still remains.

DeWitt Truck Brokers, Edwards, and *Bucyrus-Erie* are generally representative of the current position of state corporate veil piercing law. Notwithstanding the applicable tests and relevant factors involved in piercing the corporate veil, perhaps the most important information and conclusions that can be drawn from these cases is that corporate veil piercing is sui generis in nature. Because courts more willingly pierce the veil in tort situations and because parent corporations will always exercise a greater degree of legitimate control over subsidiary corporations than will the average corporate shareholder, this conclusion makes corporate veil piercing in the parent-subsidiary context especially unpredictable with respect to torts.

The importance of the undercapitalization factor cannot be overemphasized either. It would seem especially difficult for a parent corporation to justify establishing an undercapitalized subsidiary - especially in an action sounding in tort. Nonetheless, the courts seem to hold uniformly that undercapitalization alone is not sufficient to justify piercing the corporate veil.

The difference in the willingness of various states to pierce the corporate veil has the undesirable effect of creating unpredictability for shareholders. Shareholders of corporations operating in several states are even less able to predict when the corporate veil will be pierced, because, as *Edwards* and *Bucyrus-Erie* demonstrate, some states apply the corporate veil piercing test more strictly than others. Though uniformity has its advantages, maybe, where state law applies, a requirement of more egregious conduct before piercing the corporate veil is not a bad idea, at least in a breach of contract case. This may not necessarily be true, however, under the context of federal corporate veil piercing law where it may be desirable to both create uniformity and promote the purposes of federal legislation and policy.

C. *Federal Common Law*

Much of the corporate veil piercing law suggests that the problems courts face are the same whether the cause of action

F.2d 940, 942 (5th Cir. 1974); *Krivo Industrial Supp. Co. v. National Distill. & Chem. Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973)).

arises under state law or federal law.⁷⁰ While this may be true for the most part, some authorities argue that a unique federal common law should be developed, especially in instances involving federal legislation.⁷¹ Since 1986, many federal courts have become more receptive to piercing the corporate veil.⁷² The ad hoc development of this trend may have thrown the federal law of corporate veil piercing into an even more unpredictable, confusing state of affairs than exists under state common law.⁷³ This subsection will examine when federal law applies and present some federal common law corporate veil piercing cases.⁷⁴

Federal law is not always applicable to cases in which there is a question of whether or not to pierce the corporate veil. As was mentioned above, sometimes state law applies. However, when federal interests are involved and state interests are not especially strong, the "internal affairs" doctrine of corporation law dictates that a federal court may be the proper forum.⁷⁵ To gain access to the looser corporate veil piercing standard employed in federal court, plaintiffs seeking to pierce the corporate veil may try to demonstrate that the issues surrounding their case involve primarily external corporate affairs.

One reason the corporate veil piercing standard is more uncertain under federal common law than under state common law is that the Supreme Court has not explicitly set a standard in this area. The Supreme Court first addressed the desirability of developing and implementing a looser federal common law standard for corporate veil piercing in *Anderson v. Abbott*.⁷⁶ In his

70. PRESSER, *supra* note 26, § 3.01, at 3-1.

71. *Id.*

72. *Id.* at 3-2 (noting that, after the publication of the seminal Harvard Law Review casenote entitled *Piercing The Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, *supra* note 28, many federal courts began to more liberally pierce the corporate veil).

73. *Id.*

74. The test laid out in *DeWitt Truck Brokers*, is often cited by federal courts and is generally representative of the federal standard. Therefore, because *DeWitt* is adequate, no federal standard will be enumerated herein. Further, though each federal circuit cannot be examined within the limits of this comment, the cases presented will be generally representative of the entire spectrum of federal corporate veil piercing law. For a more in depth discussion, see PRESSER, *supra* note 26, §§ 3.02-3.16.

75. See *Anderson v. Abbott*, 321 U.S. 349, 365 (1944); see also *Piercing the Corporate Veil*, *supra* note 28, at 862-63 ("according to the 'internal affairs' doctrine of corporate law, a corporation's internal affairs . . . should be regulated by the law of the state of incorporation, the external affairs may be governed by other law, such as that of the forum").

76. 321 U.S. 349 (1944).

opinion, Justice Douglas gave approval to such a standard when the goals and purposes of federal legislative policy would otherwise be avoided or undermined.⁷⁷ Douglas justified this looser standard arguing that "[i]f the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance."⁷⁸

The majority opinion in *Anderson* has been criticized, however, on two points. First, "the original justification for shareholder limited liability in America probably had as much to do with the protection of the concerns of the common man as it did with lofty financial mandarins."⁷⁹ Second, "the purpose of the limited liability 'scheme' in [*Anderson*] was not necessarily to frustrate federal policy, nor was that 'legislative policy . . . plain' in the manner Douglas suggested."⁸⁰

A second Supreme Court case, *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,⁸¹ represents a more cautious approach to piercing the corporate veil. In her opinion, Justice O'Connor used a standard comparable to the traditional state corporate veil piercing standard.⁸² O'Connor stated:

[W]here a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other. . . . In addition, our cases have long recognized 'the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.'⁸³

Because *First National City Bank* involves international law, and thus may be limited in its application, the federal common law standard for corporate veil piercing remains in limbo.⁸⁴ Though *First National City Bank*, decided thirty-nine years after *Anderson*, represents a more conservative approach to federal corporate veil piercing, *Anderson*, which promotes a loose federal corporate veil piercing standard is still alive. Accordingly, the

77. *Id.* at 362-63.

78. *Id.* at 366-67.

79. PRESSER, *supra* note 26, § 3.02, at 3-10.

80. *Id.*

81. 462 U.S. 611 (1983).

82. *Id.* at 629.

83. *Id.* at 629 (citing *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)).

84. PRESSER, *supra* note 26, § 3.02, at 3-17. Presser notes that "[i]t will be observed that even though [*First Nat'l City Bank*] cited a plethora of broad domestic veil piercing cases, it was really more concerned with issues of international economic and political realities. . . . Its holding is thus a very narrow one" *Id.*

- 9) The subsidiary receives no business except that given to it by the parent;
- 10) The parent uses the subsidiary's property as its own;
- 11) The daily operations of the two corporations are not kept separate; and
- 12) The subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.⁹⁷

The court also articulated two additional factors that may be considered: (1) "whether the directors and officers of [the subsidiary] act independently in the interest of that company, or whether they take their orders from the [parent] and act in the [parent's] interest;"⁹⁸ and (2) the "connection of [the] parent's employee, officer or director to [the] subsidiary's tort or contract giving rise to [the] suit."⁹⁹

The court in *Jon-T Chemicals* observed that the parent corporation had given the subsidiary millions of dollars in funds, the subsidiary was undercapitalized, the parent and the subsidiary funds were commingled, and the parent and subsidiary had used the subsidiary's property jointly.¹⁰⁰ Thus, the court pierced the corporate veil and held the parent corporation personally liable,¹⁰¹ even though the subsidiary had followed all the relevant corporate formalities.¹⁰² Agreeing with the Fourth Circuit's view, the Fifth Circuit noted that in deciding whether to pierce the corporate veil, "courts are concerned with reality and not form, with how the corporation operated and the individual defendant's relationship to that operation."¹⁰³ The court also added that observing corporate formalities was only one factor in a "multi-factor test."¹⁰⁴

The Fifth Circuit respects the need to develop a separate federal standard for piercing the corporate veil in cases involving

97. *Id.* at 691-92.

98. *Id.* at 692 (citing *Baker v. Raymond Int'l*, 656 F.2d 173, 180 (5th Cir. 1981), cert. denied 456 U.S. 983 (1982)).

99. *Id.* (citing *Miles v. A.T. & T.*, 703 F.2d 193, 196 (5th Cir. 1983)).

100. *Id.* at 694-95.

101. One commentator has remarked: "[W]hile *Jon-T Chemicals* did not expressly appear to have stressed . . . that there need to be, as well as domination and control by the shareholder, some fraud or wrong committed through the use of the corporate form, the court's focus on undercapitalization and the use of the subsidiary to commit a tort . . . surely reflect such a requirement." Thompson, *supra* note 5, at 78.

102. *Jon-T Chemicals*, 768 F.2d at 693.

103. *Id.* (citing *DeWitt Truck Brokers v. Ray Flemming Fruit Co.*, 540 F.2d at 681, 685 (4th Cir. 1976)).

104. *Id.* at 693-94.

"the rights of the United States arising under nationwide federal programs."¹⁰⁵ Nevertheless, *Jon-T Chemicals* may only apply a looser federal common law standard in cases sounding in tort. The court explained that recent holdings had required that, "in contract cases, fraud is an essential element of an alter ego finding. . . . However, we do not require a finding of fraud in tort cases, particularly where the subsidiary is undercapitalized"¹⁰⁶

It is unclear, however, whether the Fifth Circuit still requires fraud to pierce the corporate veil in contract cases involving parent companies and their subsidiaries: "[a]nother exception [to limited liability] arises where, as here, a parent company totally dominates and controls its subsidiary, operating the subsidiary as its business conduit or agent."¹⁰⁷ It thus appears that whether the claim sounds in tort or in contract fraud is not essential to hold a parent corporation liable for the acts of its subsidiary.

The Eighth Circuit's corporate veil piercing standard, is, perhaps, the broadest, most liberal standard among the federal circuits. *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Hroch*¹⁰⁸ is an exemplary decision. *Hroch* was an action by a union to recover delinquent payments to an employee trust. The plaintiff union sought to pierce the corporate veil and hold the defendant corporation's president liable for the delinquent payments.¹⁰⁹ At the outset, the Eighth Circuit stated that because the case arose under federal legislation, namely the Labor Management Relations Act, federal common law applied.¹¹⁰ The court enumerated the same three-pronged test used by the Fourth Circuit to decide whether to pierce the corporate veil. The elements of the test included:

105. *Id.* at 693 (citing *United States v. Kimbell Foods Inc.*, 440 U.S. 715, 726 (1979)).

106. *Id.* at 692-93 (citations omitted). The court went on to say: "The reason for this distinction is clear. In a contract case, the creditor has willingly transacted business with the subsidiary. If the creditor wants to be able to hold the parent liable for the subsidiary's debts, it can contract for this. . . . In a tort case, by contrast, the creditor has not voluntarily chosen to deal with the subsidiary; instead, the creditor relationship is forced upon it. Thus, the question of whether the creditor relied on misrepresentation by the subsidiary is irrelevant." *Id.* at 693.

107. *Id.* at 691.

108. 757 F.2d 184 (8th Cir. 1985).

109. *Id.* at 190.

110. *Id.* at 190 (citing *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1109 (9th Cir. 1979)).

- 1) The amount of respect given to the separate entity of the corporation by its shareholders;
- 2) The degree of injustice visited on the litigants by recognition of the corporate entity; and
- 3) The fraudulent intent of the incorporators.¹¹¹

After revealing the corporate veil piercing test and the relevant factors considered in applying that test,¹¹² the Eighth Circuit stated that, "the courts will disregard the corporate form 'when-ever necessary to prevent fraud or to achieve equity.'"¹¹³

In reviewing the facts before it, the *Hroch* court noted that: (1) the corporation had been dissolved for failure to pay occupational tax, (2) the corporate record keeping was inadequate, and (3) the corporation had failed to observe various "necessary" formalities.¹¹⁴ However, the court did not pierce the corporate veil for these reasons alone. According to the court, the testimony of the defendant corporation's president "strongly suggest[ed] that he had used the corporate form in an inequitable fashion to avoid its obligations and that unless judgment is entered against him individually, the contributions to the Trusts will never be made, resulting in a fraud on the Trusts."¹¹⁵ The Eighth Circuit admitted that under state corporate veil piercing standards, it probably would have refused to pierce the corporate veil.¹¹⁶ The court, however, emphasized its duty under the federal standard to consider congressional policy, in deciding whether to pierce the corporate veil or not,¹¹⁷ and accordingly, held the defendant president personally liable.

Hroch, *Jon-T Chemicals*, and *Valley Cabinet* all indicate that the federal law regarding corporate veil piercing is in a state of flux, varying from jurisdiction to jurisdiction. *Valley Cabinet* represents a conservative standard following the traditional corporate veil piercing test. This approach is undesirable due to its failure to address the additional necessity of designing a uniform federal law and the necessity of taking into account federal poli-

111. *Id.* (citing *Seymour v. Hull & Moreland Eng'g*, 605 F.2d at 1105); see also *Board of Trustees v. Valley Cabinet* 877 F.2d 769, 772 (9th Cir. 1984).

112. *Contractors, Laborers, Teamsters, & Eng'rs Health & Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985).

113. *Thompson*, *supra* note 5, at 96-97 (citing *Hroch*, 757 F.2d at 190).

114. *Hroch*, 757 F.2d at 190-91.

115. *Id.* at 191.

116. *Id.*

117. *Id.*

cies and legislation when addressing corporate veil piercing questions.

Jon-T Chemicals resembles the traditional state approach, but appears to apply a more lenient federal standard in the tort context. As tort victims are involuntary creditors with respect to defendant corporations, a more lenient test is surely justified. *Jon-T Chemicals* may also represent a greater willingness in courts to pierce the corporate veil, while at the same time holding on to the old standards for fear of jeopardizing the rule of limited liability. At the very least, *Jon-T Chemicals* is useful for its laundry list of factors relevant to analyzing parent corporation liability.

Hroch represents a liberal federal corporate veil piercing standard that may vary from case to case. The *Hroch* court approach, however, indicates that certain cases require corporate veil piercing even when the traditional test for piercing cannot be satisfied.

All of these cases are valuable because they indicate the need for a uniform federal common law standard for piercing the corporate veil in order to promote federal policies and legislation. Arguably, the promotion of federal policies and legislation cannot be achieved until a uniform standard has been established. As the next section of this comment will demonstrate, the cases determining parent corporation liability under CERCLA represent one means of moving towards a uniform federal standard under cases involving federal statutory law.

III. PIERCING THE CORPORATE VEIL UNDER CERCLA

The development of environmental law has given rise to a new line of cases determining parent corporation liability for the acts of a subsidiary. The federal common law regarding corporate veil piercing has branched off into a new area in cases involving violations of environmental statutes. In the environmental context, the corporate veil piercing doctrine's effect on parent corporation liability can be clearly examined in cases involving claims under the Comprehensive Environmental Response, Compensation, and Liability Act.¹¹⁸ The reasons for this development can be easily understood by discussing the purpose of CERCLA, the statutory bases of liability, and the recent

118. 42 U.S.C. §§ 9601-9675.

developments in the jurisprudence concerning CERCLA and parent corporation liability.

A. *The Purpose of CERCLA*

Congress enacted CERCLA to combat the growing problem of improper hazardous waste disposal.¹¹⁹ Congress sought to achieve this goal by allowing the federal government to clean up hazardous waste and subsequently recover the costs from the responsible parties.¹²⁰

The Environmental Protection Agency (EPA) is the primary authority designated to enforce the goals of CERCLA.¹²¹ EPA clean-up activities, called response actions, are financed by the "Hazardous Substance Superfund", also known as the Superfund.¹²² CERCLA authorizes the government to recover the cleanup costs from responsible parties,¹²³ and imposes heavy per-day penalties for failure to comply with its provisions.¹²⁴

B. *Liability Under CERCLA*

*United States v. Maryland Bank and Trust Co.*¹²⁵ concisely enumerates the elements necessary to recover response costs. The government must establish that:

- 1) the site is a "facility";
- 2) a "release" or "threatened release" of any "hazardous substance" from the site has occurred;
- 3) the release or threatened release has caused the United States to incur "response costs"; and
- 4) the defendant is one of the persons designated as a liable party liable for costs.¹²⁶

Thus, in order to incur liability, a parent corporation must first be designated as a liable party.

The court in *United States v. Fleet Factors*,¹²⁷ a lender liability case under CERCLA which interpreted section 9607(a), enumerated four types of parties liable for cleanup costs:

119. H.R. REP. NO. 96-106, 848, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.A.N. 6119.

120. *Id.*

121. 42 U.S.C. § 9615(b)(1) (1988).

122. 26 U.S.C. § 9507(a) (1988 & Supp. II 1990).

123. 42 U.S.C. § 9607.

124. *Id.* § 9608.

125. 632 F. Supp. 573 (D. Md. 1986).

126. *Id.* at 576.

127. 901 F.2d 1550 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

- 1) the present owners and operators of a facility where hazardous wastes were released or are in danger of being released;
- 2) the owners or operators of a facility at the time the hazardous wastes were disposed;
- 3) the person or entity that arranged for the treatment or disposal of substances at the facility; and
- 4) the person or entity that transported the substances to the facility.¹²⁸

In general, parent corporation liability depends upon the defendant's designation as an owner or operator.

C. CERCLA Parent Corporation Liability: Developments in the Case Law

Initially, the case law under CERCLA developed two methods of holding parent corporations liable for violations by subsidiaries. The first method is to find the subsidiary directly liable as an "owner" under 42 U.S.C. § 9607(a), and then utilize the traditional corporate veil piercing doctrine to hold the parent corporation indirectly liable.¹²⁹ The second method involves interpreting the definition of "operator" under 42 U.S.C. § 9607(a) broadly enough to include parent corporations.¹³⁰ This method holds parent corporations directly liable for CERCLA violations.¹³¹ The courts appear to have abandoned the corporate veil piercing approach in the CERCLA context "except in fairly extreme and rare circumstances."¹³² Examination of the following two cases will demonstrate the unwillingness of courts to pierce the corporate veil in the CERCLA context¹³³ and the development and application of direct parent corporation liability under CERCLA.¹³⁴

In *Joslyn Manufacturing Co. v. T.L. James & Co.* the court

128. *Id.* at 1553-54.

129. See, e.g., *Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

130. See, e.g., *United States v. Kayser-Roth*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

131. Allen Kezsbom et al., "Successor" And "Parent" Liability For Superfund Cleanup Costs: *The Evolving State Of The Law*, 10 VA. ENV'TL. L.J. 45, 60 (1990) (noting that "[o]perator liability holds a parent liable for its own conduct in relation to the operation of the facility through the subsidiary, not for the subsidiary's conduct").

132. 1 ENVIRONMENTAL DISPUTE HANDBOOK: LIABILITY AND CLAIMS 239 (David A. Carpenter et al. eds., 1991) [hereinafter ENVIRONMENTAL DISPUTE HANDBOOK].

133. See, e.g., *Joslyn Mfg. Co.*, 893 F.2d at 80.

134. See, e.g., *Kayser-Roth, Inc.*, 910 F.2d at 26-27.

used a strict corporate veil piercing test.¹³⁵ The Fifth Circuit rejected the looser corporate veil piercing control test espoused by some courts,¹³⁶ finding that Congress had not expressed an intent to hold parent corporations liable and therefore, common law principles of corporate law governed the court's analysis.¹³⁷ The court held that "[v]eil piercing should be limited to situations in which the corporate entity is used as a *sham* to perpetrate fraud or avoid personal liability."¹³⁸

To justify applying a strict state law approach to corporate veil piercing under CERCLA, the Fifth Circuit stated that "[w]ithout an express Congressional directive to the contrary, common law principles of corporation law, such as limited liability govern our court's analysis."¹³⁹ The court then interpreted the legislative history of the statute in such a way as to justify using a strict veil piercing standard:

Significantly, CERCLA does not define "owners" or "operators" as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain . . . the sole function of the courts is to enforce it according to its terms. . . . The 'normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.' "¹⁴⁰

Thus, according to the Fifth Circuit, a looser federal corporate veil piercing standard was not appropriate in the CERCLA context.

Joslyn involved an order to clean up a wood treating operation found to be in violation of CERCLA.¹⁴¹ The court declined to pierce the corporate veil because three of the five directors on the subsidiary corporate board had no ties to the parent corporation, and the subsidiary "owned its own property and equip-

135. *Joslyn Mfg. Co. v. T. L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991).

136. *Id.* at 82. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1984) as an example where the court has extended liability to parent corporations under a looser standard.

137. *Id.* at 83.

138. *Id.* (citations omitted).

139. *Id.*

140. *Id.* at 82-83 (citations omitted).

141. *Id.* at 81.

ment, and maintained its own employees, payrolls, insurance, pension system, workman's compensation program" and filed its own tax returns.¹⁴² Based on these facts, the Fifth Circuit appears justified in declining to pierce the corporate veil. However, by enunciating such a rigid corporate veil piercing standard under CERCLA, *Joslyn* sent the corporate veil piercing standard under federal common law back into the dark ages. CERCLA is a statute with a clear legislative goal: environmental disasters should be cleaned up at the expense of responsible parties.¹⁴³ This explicit statutory purpose, coupled with the environmental crisis faced by the United States today, more than justifies application of a looser federal veil piercing standard. Such a looser standard could provide significant deterrence to polluters and perhaps reduce future environmental problems. In light of these factors, *Joslyn* could have easily justified its result under a looser standard.

The First Circuit Court of Appeals took a different approach to parent corporation liability under CERCLA in *United States v. Kayser-Roth*.¹⁴⁴ In employing the direct parent corporation liability approach mentioned above, the court first looked to the purpose of CERCLA, then looked to the definition of "operator" under 42 U.S.C. § 9607(a), and finally considered whether the defendant parent corporation fell within the definition of a responsible party as an operator.¹⁴⁵

The First Circuit found CERCLA to be primarily remedial in nature.¹⁴⁶ For this reason, the court stated that it would "construe [CERCLA's] provisions liberally to avoid frustration of the beneficial legislative purpose. With this in mind, [the court] join[ed] the Second Circuit in proclaiming that 'we will not interpret § 9607(a) in any way that apparently frustrates the statute's goals.'"¹⁴⁷

The question next to be determined was whether the term "operator" includes parent corporations.¹⁴⁸ The court first noted that parent corporations are "surely" included under the

142. *Id.* at 81-82.

143. S. REP. NO. 848, 96th Cong., 2d Sess. 2 (1980), reprinted in 42 U.S.C.C.A.N. 6119, 6120.

144. 910 F.2d 24 (1st Cir. 1990), cert. denied, 111 S. Ct. 957 (1991).

145. *Id.* at 26-27.

146. *Id.* at 26.

147. *Id.*

148. *Id.*

definition of "person."¹⁴⁹ Afterwards, the First Circuit stated, "'Operator' is defined circularly in the statute as any person operating a facility."¹⁵⁰ The court, therefore, concluded that parent corporations fit within the definition of operator.¹⁵¹ More importantly, perhaps, the court found that "Congress, by including a liability category in addition to owner ('operator') connected by the conjunction 'or,' implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership."¹⁵² This interpretation legitimates applying a looser standard for determining parent corporation "operator" liability than for "owner" liability.

The test for determining operator liability was clearly stated by the district court in *Kayser-Roth*:

To be held directly liable as an operator, courts have considered a number of factors including: whether the person or corporation had the capacity to discover in a timely fashion the release or threat of release of hazardous substances; whether the person or corporation had the power to direct the mechanisms causing the release; and whether the person or corporation had the capacity to prevent and abate damages.¹⁵³

This test calls for a different, more specific inquiry by courts in determining parent corporation liability than the federal corporate veil piercing approach. Perhaps, this standard offers more certainty to parent corporations.

The *Kayser-Roth* approach, however, does not reduce the limited liability rule to an exception. The court recognized that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary."¹⁵⁴ Even under this limitation, the court found that the defendant corporation "exerted practical total influence and control" over the subsidiary's operations.¹⁵⁵ It thus appears that the court could have utilized a corporate veil piercing approach just as easily to find

149. *Id.* at 26 n.5 (citing 42 U.S.C. § 9601 (21)).

150. *Id.* at 26 (citing 42 U.S.C. § 9601 (20)(A)(ii)).

151. *Id.*

152. *Id.*

153. *United States v. Kayser-Roth*, 724 F. Supp. 15, 21 (D. R.I. 1989) *aff'd*, 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991).

154. 910 F.2d at 27.

155. *Id.*

the parent corporation liable.¹⁵⁶

The district court in *Kayser-Roth*, however, did pierce the corporate veil, finding the defendant parent corporation liable.¹⁵⁷ The district court's decision was based on the following facts: the two corporations shared common officers, nominated and appointed by the parent; the parent exerted "practical total influence and control" over the subsidiary's operations; the parent required the subsidiary to gain approval for almost all purchases or expenditures; the parent completely controlled fiscal operations, including accounting, accounts payable, and payroll; and the parent made the ultimate decision to acquire the drycleaning process that caused the environmental damage.¹⁵⁸

The First Circuit's decision not to employ a veil piercing analysis may, thus, indicate a desire by the courts to design a uniform standard for determining parent corporation liability under CERCLA and avoid the unpredictability surrounding the corporate veil piercing doctrine. The *Joslyn* court's approach is contrary to the notion discussed in *Jon-T Chemicals*,¹⁵⁹ that a unique federal common law should be developed to promote federal policies and legislation. However, this notion was espoused by another Fifth Circuit opinion discussed earlier. The strong federal policies involved in CERCLA litigation and the necessity to hold responsible parties liable for environmental disaster cleanup make the approaches taken by the *Kayser-Roth* district court and the appellate court more appropriate and desirable.

IV. PARENT CORPORATION LIABILITY IN THE TOXIC TORT CONTEXT

Stated concisely, toxic torts is

a subcategory of personal injury tort litigation consist[ing] generally of a civil action alleging injury from an exposure, or a series of exposures, to an identifiable hazardous material, such as a water pollutant from a plant discharge, or an airborne particle of asbestos from the insulation of a building.¹⁶⁰

In attempting to deal with today's environmental crisis, the growing concerns present in statutory environmental law are no

156. See *Kayser-Roth*, 724 F. Supp. at 15 (district court pierced the corporate veil).

157. *Kayser-Roth*, 910 F.2d at 27-28.

158. *Id.* at 27.

159. See *United States v. Jon-T Chemicals*, 768 F.2d 689, 693 (5th Cir. 1985); see also *supra* notes 99-110 and accompanying text.

160. K. TOUHY ET AL., *THE ENVIRONMENTAL LITIGATION DESKBOOK* 7 (1989).

less present in the toxic tort context.¹⁶¹ Though some practitioners argue that the growth of environmental litigation, in general, will also make parent corporations likely targets for the toxic tort liability of their subsidiaries,¹⁶² the ability of toxic tort victims to recover for their injuries is still substantially impaired by the application of stringent state law standards for piercing the corporate veil.¹⁶³ Given the nature of the relationship between the toxic tort victim and the responsible insolvent or immune subsidiary corporation, traditional state law analysis for piercing the corporate veil seems highly inappropriate. After examining a typical application in the toxic tort context and the policy reasons behind limiting or not limiting parent corporation liability for toxic torts, it becomes readily apparent that a looser standard for piercing the corporate veil is essential to achieve equity and justice under our legal system.

Craig v. Lake Asbestos of Quebec, Ltd. represents the general approach used for corporate veil piercing in toxic tort litigation.¹⁶⁴ In *Craig*, the plaintiff brought a personal injury action to recover for injuries caused by asbestos exposure.¹⁶⁵ One defendant, Charter Consolidated (Charter), was impleaded as the alleged "alter ego" of its subsidiary, Cape Industries (Cape), an asbestos supplier who was also a defendant.¹⁶⁶ In reversing the trial court's decision to pierce the corporate veil and hold Charter liable, the Third Circuit applied a strict, traditional state law corporate veil piercing analysis.¹⁶⁷

The Third Circuit explained "that the corporate veil may be pierced only where (1) 'the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent' and (2) 'the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law.'"¹⁶⁸ The court admitted that the second prong of the test, a finding of "fraud or injustice," was satisfied because Cape had clearly and intention-

161. See ENVIRONMENTAL DISPUTE HANDBOOK, *supra* note 132, at 249.

162. *Id.*

163. See 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43.10, at 759 (perm. ed. 1990).

164. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149 (3d Cir. 1988).

165. *Id.* at 146.

166. *Id.* at 146-47.

167. *Id.* at 146, 149.

168. *Id.* at 149 (citing *State Dept. of Env't'l Protection v. Ventron*, 469 A. 2d 150, 164 (N.J. 1983)).

ally taken measures to avoid liability for asbestos injuries in the United States.¹⁶⁹ The court noted, however, "that evasion of tort liability has never, in itself, been sufficient basis to disregard corporate separateness."¹⁷⁰ Accordingly, the Third Circuit considered to discuss whether Charter exercised the necessary control over Cape to satisfy the first prong of the corporate veil piercing test.¹⁷¹ The Third Circuit noted that the control element is only satisfied where "complete domination, not only of finances but of policy and business practice in respect to the transaction attacked [is found] so that the corporate entity . . . had . . . no separate mind, will or existence of its own."¹⁷² With this in mind, the court of appeals refused to pierce Charter's corporate veil.¹⁷³

The district court, on the other hand, had found the requisite degree of control necessary to pierce the corporate veil because: Charter owned sixty-two percent of Cape's common stock and one hundred percent of its preferred stock,¹⁷⁴ Charter had "widespread involvement in Cape's financial and management decisions,"¹⁷⁵ three Charter directors served on the Cape board of directors,¹⁷⁶ Charter was "omnipresen[t] in the minds of the Cape board members,"¹⁷⁷ and "Cape recognized the reality of its position: that it was an operating division of Charter with a semblance of independence."¹⁷⁸ However, these factors weren't sufficient to establish control under the appellate court's analysis.¹⁷⁹ Further, the appellate court failed to even consider whether a more lenient test should be applied in the tort context or whether equity and justice required a different result.¹⁸⁰ Thus, the result in *Craig* provides a classic example of the need

169. *Id.* Several default judgments had been entered against Cape in asbestos injury litigation. However, because Cape was a British Corporation, plaintiffs were unable to collect such judgments against Cape. *Id.* at 150; see also *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1399 (D.C. Pa. 1985) (discussing Cape's scheme to avoid liability for asbestos injuries).

170. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d at 150.

171. *Id.*

172. *Id.* at 150 (citing 1 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43, at 490 (rev. perm. ed. 1983)).

173. *Id.* at 152.

174. *Craig v. John Mansville Corp.*, 1987 WL 10191, *13 (E.D. Pa. 1987).

175. *Id.* at *14.

176. *Id.* at *16.

177. *Id.* at *17.

178. *Id.*

179. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d at 152.

180. See *id.* at 150.

to rethink corporate veil piercing analysis in the toxic tort litigation context.

Obviously, the direct liability approach applied in *Kayser-Roth*¹⁸¹ is not relevant to the toxic tort arena, because parent liability as an operator is based on statutory definitions and terms set forth in CERCLA. The concerns that led to the enactment of CERCLA, however, are certainly relevant to the toxic tort context and they may provide persuasive policy arguments for parent corporation liability. CERCLA is a remedial statute designed to clean up existing environmental calamities, at the expense of responsible parties and to prevent avoidable future ones.¹⁸² Similarly, the policy behind toxic tort law is to provide an equitable and just resolution to environmental disasters involving personal injuries.¹⁸³

George W. Dent, Jr. argues that "[t]he social importance and immense costs of pollution make environmental law an ideal arena for reconsidering theories of limited liability for tort."¹⁸⁴ Dent enumerates several well-founded reasons for holding shareholders, and thus parent corporations, liable for a corporation's torts.¹⁸⁵ He explains:

First, liability deters negligence. Those who are not liable for injuries they cause have no economic incentive to be prudent and may inflict serious avoidable injuries. If liable for the injuries they inflict, rational people exercise reasonable care to avoid causing harm. Similarly, imposing liability for injuries one causes promotes allocative efficiency. If such liability is not imposed, activities do not bear their costs and will be overutilized. Second, broad liability is preferred in order to spread the risks of loss. Many people each paying a little can more easily bear the cost of injuries than the few who are injured. Similarly, liability should fall on the party best able to insure because insurance broadly spreads the risk of loss. Limited liability undermines these principles.¹⁸⁶

The theory continues, concluding that majority shareholders, officers and directors should not enjoy limited liability for the

181. See *United States v. Kayser-Roth*, 910 F.2d 24, 26-27 (1st Cir. 1990).

182. H.R. REP. NO. 96-106, 96th Cong., 2d Sess. pt. 1, at 1 (1980), reprinted in 1980 U.S.C.A.N. 6119.

183. TOUHY, *supra* note 160, at 7.

184. George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151, 151 (1991).

185. *Id.* at 165.

186. *Id.* at 165-66.

corporation's torts.¹⁸⁷ He reasons that "the goals of loss-spreading and deterring torts, including toxic spills, argue for liability of all those who share in the corporation's income and can influence its activities."¹⁸⁸ Thus, under this analysis, the standard for piercing the corporate veil in the toxic tort context should not require a strict showing of fraud and total dominance, but some looser standard consistent with the promotion of these goals. Perhaps such a standard would impose liability where there is the capacity to control the corporation's tortious activities and equity and justice so require.

V. CONCLUSION

The status of corporate veil piercing law is unpredictable, especially at the federal level. This unpredictability restricts the ability of courts to fashion equitable results and to create uniform standards with respect to piercing the corporate veil. Furthermore, this doctrine is changing dramatically in the area of environmental law, where courts are now promoting the use of statutory terms to find parent corporations liable for the acts of subsidiaries.

The more liberal standards applied at the federal level by some courts are especially appropriate to the area of torts, including toxic torts. However, an even looser standard may be called for, such as that espoused by Dent. The victims in toxic tort cases are involuntary creditors of corporations and the responsible parties, rather than society at large, should be made to pay for the injuries they cause. Perhaps the test and factors enumerated in this comment will promote the proper balance between limited liability and piercing the corporate veil to hold parent corporations liable for the conduct of their subsidiaries.

PETER FRENCH

187. *Id.* at 168.

188. *Id.*